

The Sedona Conference Commentary on Protection of Privileged ESI

The Sedona Conference

Focus specifically on **pages 154–167** of the *Commentary*, beginning with Section IV (Principle 4) and ending at Subsection IV.A. (Use of Search and Retrieval Technologies Generally).

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THE SEDONA CONFERENCE COMMENTARY ON PROTECTION OF PRIVILEGED ESI*

*A Project of The Sedona Conference Working Group on Electronic
Document Retention & Production (WG1)*

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PREFACE

Welcome to the final, December 2015, version of The Sedona Conference *Commentary on Protection of Privileged ESI*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). The Sedona Conference is a 501(c)(3) research and educational institute that exists to allow leading jurists, lawyers, experts, academics, and others, at the cutting edge of issues in the areas of antitrust law, complex litigation, and intellectual property rights, to come together in conferences and mini-think tanks called Working Groups to engage in true dialogue, not debate, in an effort to move the law forward in a reasoned and just way.

The public comment version of The Sedona Conference *Commentary on Protection of Privileged ESI* was published in November 2014 after more than two years of dialogue, review, and revision, including discussion at two of our Working Group 1 meetings. After nearly a four month public comment period, during which The Sedona Conference sponsored a public webinar on the Commentary, the editors have fully considered and incorporated into this final version as appropriate the extensive comments received. I thank all those who submitted comments as well as the drafting team members for their dedication and contribution to this project. Special acknowledgement goes to Denise E. Backhouse, Kevin F. Brady, Arthur C. Fahlbusch, Adrian Fontecilla, Daniel K. Gelb, Goutam U. Jois, Colleen M. Kenney, Jessica Ross, Matthew M. Saxon, Christopher J. Spizzirri, Ariana J. Tadler, and Pamela Williams. I also thank the following Judicial Observers for their participation and assistance in creating this Commentary: Hon. Joy Flowers Conti, Hon. John M. Facciola, Hon. Audrey G. Fleissig, Hon. James C. Francis, Hon. Frank Maas, Hon. Andrew J. Peck, Hon. Lee Rosenthal, Hon. Thomas J. Shields, and Hon. Karla R. Spaulding. Finally, I especially want to recognize David M. Greenwald and Patrick

L. Oot for serving as the Team Leaders and John J. Rosenthal for serving as the Editor-in-Chief and Steering Committee Liaison.

We hope our efforts will be of immediate and practical assistance to judges, parties in litigation and their lawyers, and database management professionals. We continue to welcome comments for consideration in future updates. If you wish to submit feedback, please email us at comments@sedonaconference.org. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be.

Craig Weinlein
Executive Director
The Sedona Conference
November 2015

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THE SEDONA PRINCIPLES ON PROTECTION OF PRIVILEGED ESI

Principle 1: Parties and their counsel should undertake to understand the law of privilege and its appropriate application in the context of electronically stored information.

Principle 2: Parties, counsel, and courts should make use of Federal Rule of Evidence 502(d) and its state analogues.

Principle 3: Parties and their counsel should follow reasonable procedures to avoid the inadvertent production of privileged information.

Principle 4: Parties and their counsel should make use of protocols, processes, tools, and technologies to reduce the costs and burdens associated with the identification, logging, and dispute resolution relating to the assertion of privilege.

INTRODUCTION

Since the discovery of electronically stored information (“ESI”) has become common practice after the adoption of the 2006 Amendments to the Federal Rules of Civil Procedure (Fed. R. Civ. P.), we have witnessed the explosion of the sheer volume of information now subject to discovery. The ever-expanding volume of ESI complicates producing parties’, especially large organizations’, ability to identify, exclude from the production, and log documents subject to a claim of attorney-client privilege or work-product protection.¹ The resulting reality is that it is difficult if not impossible, even with the best processes and technology, to prevent the unintentional production of privileged materials in a large ESI production.²

Privilege logs “have emerged as a staple of discovery” in litigation, presumably per the requirements of Rule 26(b)(5).³ Despite the flexibility provided by the Fed. R. Civ. P., and the admonition in the 1993 Advisory Committee Notes to Rule

1. See Hearing of the Advisory Comm. on Evidence Rules 86–88 (Jan. 29, 2007); <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-evidence-may-2007> (testimony of Patrick Oot, Director of Electronic Discovery & Senior Counsel, Verizon, stating that total contract and outside counsel privilege review costs in a regulatory investigation exceeding \$7 million could have been avoided using Rule 502 and culling strategies to cull out and prioritize privilege review).

2. See *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008) (“Where discovery is extensive, mistakes are inevitable . . .”); *MVB Mortg. Corp. v. F.D.I.C.*, No. 2:08-cv-771, 2010 WL 582641, at *4 (S.D. Ohio Feb. 11, 2010) (“In the context of the exchange of information during discovery, it is inevitable that errors will be made and privileged documents will sometimes be produced inadvertently. The recent amendments to Fed. R. Evid. 502 reflect this reality.”).

3. Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 22 (2009).

26(b)(5) that document-by-document logs may be unduly burdensome when numerous documents are withheld, parties often prepare document-by-document privilege logs.⁴ In complex litigation, preparation of these logs can consume hundreds of thousands of dollars or more, and rarely “enable other parties to assess the claim” as contemplated by Rule 26(b)(5). Nor do the logs achieve the other goal of the rule—to “reduce the need for *in camera* examination of the documents.”⁵ Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production. In short, the procedure and process for protecting privileged ESI from production is broken.

On September 19, 2008, the President signed into law a solution to this problem—Federal Rule of Evidence (Fed. R. Evid.) 502 (“Rule 502”).⁶ Rule 502 was intended to address waiver of privilege claims and reduce the cost of civil discovery. Rule 502 accomplishes this in three principal ways. *First*, Rule 502(a) limits subject matter waiver to voluntary disclosures and eliminates subject matter waiver for inadvertent disclosures. *Second*, Rule 502(b) precludes waiver for inadvertent disclosures when the privilege holder took reasonable steps to prevent the disclosure and took prompt steps to rectify the error. *Third*, Rule

4. See DAVID M. GREENWALD, ROBERT R. STAUFFER, & ERIN R. SCHRANTZ, TESTIMONIAL PRIVILEGES, VOLUME 2 § 1:69 n.8 (Thomson Reuters 2012) [hereinafter TESTIMONIAL PRIVILEGES].

5. 1993 Advisory Committee Notes to FED. R. CIV. P. 26(b)(5).

6. See *infra* Appendix B for a discussion of the Rulemaking and Legislative History of Rule 502 citing Patrick L. Oot, *The Protective Order Toolkit: Protective Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 (2009).

502(d) enables federal courts to “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.” Under this third prong, federal courts may enter orders, such as non-waiver provisions in protective orders and confidentiality orders, that will avoid any questions about whether the waiver was inadvertent or whether the holder of the privilege took reasonable steps, and the order will be binding in the case in which the order was entered and also control waiver issues in other federal and state proceedings regarding a disclosure covered by the order.⁷

Notably, Rule 502(d) permits courts to enter orders that provide that a disclosure does not constitute a waiver—regardless of the actions taken by the producing party. In sum, courts may enter orders that provide greater protection than is provided in subsections (a) and (b) of Rule 502. By reducing the risk of waiver, such an order provides parties and their counsel with a blank canvas to design and implement creative mechanisms to limit the risk of waiver for the disclosure of privileged information and reduce the tremendous cost of identifying and logging privileged documents. Thus, a federal court could enter a Rule 502(d) order to prevent waiver without regard to the reasonableness of the procedures used to identify privileged documents. Rule 502(d) also permits the parties to agree that there will be no waiver even if there is no privilege review, thereby permitting the parties to agree to use a “quick peek” or “make available production” without waiving privilege or protection.

Given the potential to eliminate the possibility of waiver and reduce the cost of privilege review, some commentators

7. Several states have adopted analogues to Fed. R. Evid. 502 (Rule 502), which to varying degrees enable litigants to minimize the cost of discovery in state court proceedings. *See infra* Appendix F.

have stated that the failure to at least ask for the entry of a Rule 502(d) order is tantamount to malpractice.⁸ Despite such statements, the bench and the bar have been largely ignorant of the rule and have failed to take advantage of its protections. As Judge Paul Grimm has noted with respect to Rule 502: “to date it has not lived up to its promise . . . because parties have overlooked it and courts have not construed it consistently with its purpose”⁹

This Commentary is an attempt by The Sedona Conference to breathe some needed life into the understanding and use of Rule 502 by: (i) reminding counsel of the basics of the law on privilege in the context of modern document productions; (ii) encouraging parties, lawyers, and the courts to consider employing Rule 502(d)-type orders in every complex civil matter;

8. See, e.g., Monica Bay, *On Stage*, LAW TECH. NEWS (April 1, 2013) (quoting U.S. Magistrate Judge Andrew J. Peck) (“I’ll give you a fairly straight takeaway on 502(d). In my opinion it is malpractice to not seek a 502(d) order from the court before you seek documents.”).

9. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up To Its Potential?*, XVII RICH. J.L. & TECH. 8 (2011); see also *Smith v. Allstate Ins. Co.*, 912 F. Supp. 2d 242, 247–48 (W.D. Pa. 2012) (“Curiously, neither [defendant] in its motion nor Plaintiff in her response reference Fed. R. Evid. 502(b) or discuss its factors as they relate to the instant case [involving inadvertent production]. Accordingly, some information that would be helpful in resolving this issue is not before the Court.”); *Swift Spindrift, LTD v. Alvada Insurance, Inc.*, No. 09 Civ. 9342(AJN)(FM), 2013 WL 3815970, at *4 (S.D.N.Y. July 24, 2013) (“Perhaps this omission [to mention Rule 502] should not be a surprise since remarkably few lawyers seem to be aware of the Rule’s existence despite its enactment nearly five years ago.”); Hon. L. Rosenthal, *The Phillip D. Reed Lecture Series, Evidence Rules Committee Symposium on Rule 502, Panel Discussion, Reinvigorating Rule 502* (Oct. 5, 2012) (“Rule 502 is underutilized”); Richard Marcus, *The Rulemakers’ Laments*, 81 FORDHAM L. REV. 1639, 1644 (2013) (“The reality is that not very many lawyers have used these very flexible tools.”); *id.* at 1645 (“The much larger problem, however, is that lawyers simply have not noticed the rule”).

(iii) articulating a “safe harbor” presumption that protects parties from claims of waiver in connection with the inadvertent production of privileged materials, provided that there is adherence to certain basic best practices in the context of ESI privilege review; (iv) encouraging cooperation among litigants to lower the cost and burden of identifying privileged information; and (v) identifying protocols, processes, tools, and techniques that can be used to limit the costs associated with identifying and logging privileged material, and avoiding or resolving disputes relating to the assertion of privileges.

PRINCIPLES AND COMMENTARIES

I. Principle 1. Parties and their counsel should undertake to understand the law of privilege and its appropriate application in the context of electronically stored information.

Commentary

Comment: Attorneys have a professional obligation to understand the law of privilege in the context of electronically stored information. That ethical duty arises from several provisions in the professional rules, including the following:

- **Duty of Confidentiality:** “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [certain specific exceptions, e.g., to prevent death or substantial bodily harm].” ABA Model Rules of Prof’l Conduct R. 1.6(a) Confidentiality of Information (2009). “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.” ABA Model Rules of Prof’l Conduct R. 1.6(c) Confidentiality of Information (2009). Virtually all states have the same or similar rules regarding a lawyer’s duty of confidentiality.
- **Duty of Competence:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ABA Model Rules of Prof’l Conduct R. 1.1 Competence

(2009). “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing legal study and education and comply with all continuing legal education requirements to which the lawyer is subject.” ABA Model Rules of Prof’l Conduct R. 1.1, cmt. 8 (2012) (emphasis added).

- **Duty of Supervision:** ABA Model Rules of Prof’l Conduct R. 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers (2009) requires those with managerial authority to make reasonable efforts to ensure that the firm and its lawyers follow the Rules of Professional Conduct. *See also* Rule 5.3(a) Responsibilities Regarding Non-Lawyer Assistants: “A lawyer has a duty to supervise a law firm or department’s junior members, paralegals, support staff, and any third-parties for whose work the lawyer is responsible.”

Many judges who have conducted *in camera* reviews of documents withheld from production under claims of privilege come to the conclusion that many litigants and their counsel have little understanding of the law of privilege or how to apply that law in the context of the production of ESI. A detailed discussion of the attorney-client privilege is beyond the scope of this Commentary. There are lengthy treatises devoted to the law of privilege. In addition, the law varies by jurisdiction, and applying the law to specific situations requires a thorough understanding of the factual nuances of each unique situation. However, practical guidance about identifying and protecting privileged ESI cannot start without a basic review of the law of privilege and, in particular, what may legitimately be deemed

privileged and how to avoid waiving the privilege. Only with this basic understanding can parties avoid the common practices of claiming privilege for ESI that is not privileged and waiving privilege of ESI.

A. Attorney-Client Privilege

Fed. R. Evid. 501 provides for the application of federal common law of privilege when jurisdiction is based on a federal question.¹⁰ In most cases brought under the federal courts' diversity jurisdiction, and in other federal proceedings "with respect to an element of a claim or defense as to which state law supplies the rule of decision," state law of privilege applies.¹¹ State law regarding privilege issues, of course, also applies in state court proceedings. Each jurisdiction has its own articulation of the privilege, and there are considerable differences among jurisdictions regarding the scope and application of the privilege.

However, there are generally four common elements across jurisdictions: (1) a communication, (2) made between privileged persons, (3) in confidence (and kept in confidence),

10. Fed. R. Evid. 501 provides in pertinent part:

[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

See also TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:3.

11. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:3.

and (4) for the purpose of obtaining or providing legal assistance for the client.¹² The privilege protects communications, but it does not permit a party to resist disclosure of the facts underlying the communications.¹³ Key aspects of these elements are discussed below.

Persons. Communications between “privileged persons” may include those between employees, in-house counsel or outside counsel, and any of the company’s subsidiaries or affiliates, and any combination of them. These could be communications: (i) from employees to counsel; (ii) from counsel to employees; (iii) between counsel; (iv) between employees or their functional equivalents;¹⁴ or (v) with qualified agents of counsel or the client (e.g., employees or counsel of an agent, confidential litigation consultant, or informal consulting expert).¹⁵ It is important to note that the nature and scope of the privilege varies jurisdiction-by-jurisdiction, and certain jurisdictions limit the extent and/or existence of any claim of privilege, for example, between non-lawyer employees, or with functional equivalents and/or affiliated entities.

Scope of the Privilege. The attorney-client privilege, once established, is absolute unless waived. In order to qualify for the attorney-client privilege, a communication must have been made for the primary purpose of facilitating the rendering of legal advice.¹⁶ If not, it will not be privileged, even if made by a

12. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000); *see also* TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:5.

13. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:13.

14. *Id.* at § 1:31 (*In re Bieter* doctrine is often limited to small corporate entities).

15. *Id.* at §§ 1:28–1:32 (agents of counsel), and at § 1:36 (representatives and agents of the client).

16. *In Re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 798 (E.D. La. 2007).

lawyer or in confidence. Thus, for example, a document authored by a company in-house attorney and sent to an employee would not be privileged if the communication related to business or personal matters, and not legal advice. The inquiry is whether a lawyer is being asked to render (or is rendering) some sort of legal, rather than business, advice. Such questions are often more easily answered in the affirmative when dealing with confidential communications between a client and outside legal counsel. As to communications between in-house legal counsel and company employees (or their functional equivalents), the standards for determining which company representatives may seek or obtain legal advice on behalf of a corporation vary among jurisdictions. The majority of courts today employ a “functionality” or “subject-matter” test which extends the attorney-client privilege to include a company lawyer’s communications with any corporate employee so long as the communication relates to the subject matter for which the company is seeking legal representation.¹⁷ Because in-house counsel may play multiple roles in a corporation, *some* courts apply additional scrutiny to assertions of privilege involving communications with in-house counsel, requiring in-house counsel to make

17. See, e.g., *id.* at 796. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73 (2000); see also TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:26 n.5. Note: Some states continue to employ the more restrictive “control group” test, which designates only upper-level management as clients of the corporate counsel. See, e.g., Alaska (see *Manumitted Cos. v. Tesoro Alaska Co.*, 2006 U.S. Dist. LEXIS 57658, at *7 (D. Alaska Aug. 16, 2006)); Illinois (see *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982); *Sterling Fin. Mgmt., L.P. v. UBS PaineWebber, Inc.*, 336 Ill. App. 3d 442, 449 (2002)); Hawaii (HAW. REV. STAT. § 626-1); Maine (ME. R. EVID. 502(a)(2)). Many other states have yet to specifically decide which test to apply. See Brian E. Hamilton, *Conflict, Disparity, and Indecision: The Unsettled Corporate Attorney-Client Privilege*, 1997 ANN. SURV. AM. L. 629, 630 (1997). The control group test has been explicitly rejected for use by federal courts. See *Upjohn Co. v. United States*, 449 U.S. 383, 390–92, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981).

a “clear showing” that communications were made for a legal, rather than a business purpose.¹⁸

Confidential. In order to be privileged, a communication must be made and maintained in confidence. Communications contained in public documents, such as final press releases and corporate annual reports, are not privileged. Also, as a general rule, if an attorney-client communication is disclosed to independent third parties (not including qualified agents of privileged persons), the communication is no longer confidential for purposes of applying the privilege.

The party asserting a privilege or protection has the burden of establishing that withheld information qualifies for protection.¹⁹ It is, therefore, necessary for lawyers to understand the elements of privilege and to be able to articulate how each element of the privilege is satisfied for withheld information.

B. Work-Product Protection Generally

The work-product protection was originally predicated on common law, but the doctrine was codified in Rule 26(b)(3). Similar protections are found in state common law or state analogues to Rule 26(b)(3).²⁰ Whereas the attorney-client privilege provides an absolute privilege from discovery if established and maintained, the work-product protection provides *qualified* protection against compelled disclosure “for tangible material (or

18. See, e.g., *Vioxx*, 501 F. Supp. 2d at 799. (“While this expanded role of legal counsel within corporations has increased the difficulty for judges in ruling on privilege claims, it has concurrently increased the burden that must be borne by the proponent of corporate privilege claims relative to in-house counsel.”).

19. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:62 n.5 (attorney-client privilege), and at § 2:8 n.2 (work-product protection).

20. State court analogues to Fed. R. Civ. P. 26(b)(3) are not all as broad as the federal rule. See, e.g., ILL. SUP. CT. R. 201 (protecting only opinion work product).

its intangible equivalent) prepared in anticipation of litigation or for trial.”²¹ In order to invoke such protection under Rule 26(b)(3), the materials must constitute: (i) a document (or tangible thing that would be otherwise discoverable); (ii) prepared by or for a party (or a party’s representative); and (iii) in anticipation of litigation²² or for trial. To establish that a document was prepared in anticipation of litigation, a party must demonstrate that the threat of litigation was “reasonably anticipated.” Opinion work product, which includes the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative, is entitled to near-absolute protection.²³ Fact work product may be discovered only upon a “show[ing of] substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”²⁴ When fact work product and opinion work product are mixed, a court may order that opinions or mental impressions be redacted where production of fact work product is required.²⁵

Scope of Protection. Work-product protection is “distinct from and broader than the attorney-client privilege.”²⁶ Provided

21. FED. R. EVID. 502(g)(2).

22. The term “litigation” as used herein and in the work-product context extends to adversarial proceedings in which the parties have the right to either: (1) cross-examine witnesses, or (2) present evidence or information to counter an opposing party’s presentation. “Litigation,” therefore, is defined broadly to include criminal and civil trials as well as other adversarial proceedings such as administrative hearings, arbitration, and grand jury proceedings. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 2:14 n.9.

23. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 2:22 nn.5–6.

24. FED. R. CIV. P. 26(b)(3)(ii).

25. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 2:7 n.2, and at § 2:34 n.10.

26. *United States v. Nobles*, 422 U.S. 225, 238 n.11, 95 S. Ct. 2160, 2170, 45 L. Ed. 2d 141, 153 (1975).

the materials were prepared in anticipation of litigation or for trial, work-product protection will extend not only to those materials prepared by attorneys, but also to materials prepared by a party or by others at that party's or an attorney's direction. For example, materials prepared by a consultant hired by the lawyer to assist in trial preparation are generally covered by work-product protection (unless that consultant has been retained to testify at trial).²⁷ In addition, materials prepared by a party, without the involvement of an attorney, may be protected work product so long as the materials were prepared in anticipation of litigation or for trial.²⁸

Confidentiality. Whereas the attorney-client privilege is generally waived whenever a privileged communication is disclosed outside the privileged circle of client and attorney, work product is only waived when disclosed to an adversary or to someone who substantially increases the opportunities for potential adversaries to obtain the information (a "conduit").²⁹ Disclosure to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of work-product protection.³⁰

27. *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 664–65 (3d Cir. 2003).

28. *See, e.g., Angel Learning, Inc. v. Houghton Mifflin Harcourt Pub. Co.*, No. 1:08-cv-01259-LJM-JMS, 2010 WL 1579666, at *1 (S.D. Ind. April 19, 2010) (work-product doctrine applies to documents prepared by a party in anticipation of litigation, even where counsel is not directly involved in preparing the documents; "counsel's lack of involvement in preparing the documents has absolutely no bearing on the work-product inquiry; a party can create work product just like its counsel can, so long as the materials are prepared for litigation purposes.").

29. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 2:28 nn.1–2.

30. *See, e.g., In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3rd Cir. 1991); *Chase v. City of Portsmouth*, 236 F.R.D. 263, 269 (E.D.

C. Common Law Waiver Prior to Rule 502

Even if a document satisfies all the requirements for the attorney-client privilege or work-product protection, that privilege/protection may nevertheless be lost through waiver. Typically, a party's disclosure of a privileged document to third parties who do not share a confidential relationship with the disclosing party (i.e., the third parties are not agents or representatives of the disclosing party or its legal counsel) constitutes waiver. Similarly, disclosure of work product to an adversary or to another party in a manner that materially increases the likelihood of disclosure to an adversary typically results in loss of the work-product protection. Furthermore, under the common law, disclosure of a privileged communication to a third party may waive the privilege with respect to the communication itself, and also with respect to other privileged communications on the same subject matter which fairness requires must be revealed ("subject matter waiver").³¹

Va. 2006); 8 CHARLES ALAN WRIGHT, ATHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEIMAN, *FEDERAL PRACTICE & PROCEDURE* § 2024 (3d ed. 2015).

31. See *GFI, Inc. v. Franklin Corp.*, 265 F.3d 1268, 1272–73 (Fed. Cir. 2001) (under Fifth Circuit law, voluntary waiver of attorney-client privilege extends to all communications pertaining to the same subject matter); *U.S. v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998) ("The waiver covers any information directly related to that which was actually disclosed."); *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982) (voluntary disclosures to a third party waive the privilege not only for the specific communication disclosed but also for all communications relating to the same subject matter); *In re Omnicron Grp. Securities Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005) (although internal investigation materials were otherwise privileged, production to a litigation adversary of a PowerPoint presentation summarizing the investigation, which had been presented to the Board of Directors, broadly waived the privilege over underlying documents created as of the time of the presentation).

Prior to the adoption of Rule 502, courts generally followed one of three distinct approaches to waiver based on inadvertent disclosures: (1) the strict approach, (2) the “middle” approach, or (3) the lenient approach.³² Under the strict approach, adopted by the court in *In re Sealed Case*,³³ any document produced, either intentionally or otherwise, lost its privileged status.³⁴ Under the lenient approach, a party had to knowingly waive privilege; a determination of inadvertence ended the inquiry.³⁵

The majority of courts applied the “middle” approach, using a case-by-case analysis to determine the reasonableness of the precautions taken to protect against disclosure and the actions taken to recover the inadvertently disclosed material. The Restatement (Third) of the Law Governing Lawyers (“the Restatement”) at § 79 lists several of the factors frequently used by courts to analyze inadvertent waiver pursuant to the middle approach:

- (1) the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures);
- (2) the efficacy of precautions taken and of additional precautions that might have been taken;
- (3) externally imposed pressures regarding the timing or the volume of required disclosure, if any;
- (4) whether the disclosure was by act of the client or lawyer or by a third person; and

32. *Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996).

33. 877 F.2d 976 (D.C. Cir. 1989).

34. *Gray*, 86 F.3d at 1483; *see also In re Grand Jury*, 475 F.3d 1299 (D.C. Cir. 2007) (reaffirming the approach taken in *In re Sealed Case*).

35. *Gray*, 86 F.3d at 1483.

- (5) the degree of disclosure to non-privileged persons.³⁶

Judge Paul Grimm, a thought leader in this area, authored a number of very important ESI-related decisions, two of which are “must reads” in understanding the problems associated with protecting waiver of privilege in the digital information era. In *Hopson v. Mayor of Baltimore*,³⁷ Judge Grimm was the first jurist to address in detail the issue of whether anything less than a full document-by-document privilege review was reasonable given the volume of ESI and the time necessary to complete such a review. In what became the precursor to Rule 502, Judge Grimm discussed the need for a court to enter an order regarding the scope and process of privilege. In addition, Judge Grimm noted, in pre-Rule 502 decisions, that the issuance of such an order was essential to protecting against subject matter waiver of attorney-client privilege or work-product immunity because compliance with that order would not result in the waiver of any privilege or work-product claim for inadvertently produced privileged material.

Three years later, Judge Grimm penned *Victor Stanley, Inc., v. Creative Pipe, Inc., et al.*,³⁸ the seminal decision on the use of search methodology for conducting privilege review. In emphasizing the need for a uniform approach to the law of waiver and an order implementing a non-waiver agreement, Judge Grimm focused on the methodology employed by the producing party to identify privileged documents. In *Victor Stanley*, Judge Grimm found that because the defendants had used a poorly designed search protocol with no test to ascertain the validity of the protocol, the privilege was waived. In particular,

36. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. h (2000).

37. 232 F.R.D. 228 (D. Md. 2005).

38. 250 F.R.D. 251 (D. Md. 2008).

Judge Grimm noted that the defendants were at fault for “having failed to take reasonable precautions to prevent the disclosure of privileged information, including the voluntary abandonment of a non-waiver agreement that the Plaintiff was willing to sign.” Four months after Judge Grimm issued the *Victor Stanley* decision, in September 2008, Rule 502 was enacted. Rule 502 provides significant protections against waivers of privilege. But Rule 502 was preceded by clawback agreements, and the Fed. R. Civ. P. codification of those agreements, as discussed next.

D. Federal Rule of Civil Procedure 26—Codification of the Clawback Procedure

The 2006 Amendments to Rule 26(b)(5) addressed the inherent cost and burden associated with identifying and logging privileged materials, including those arising from the increasing volumes of ESI by codifying the practice of many litigants to include in standard confidentiality agreements and protective orders a clawback procedure, whereby parties could seek the return of inadvertently produced privileged documents.

Specifically, Rule 26(b)(5) codified a procedure through which a party who has inadvertently produced privileged or work-product information may nonetheless assert a protective claim to that material. The rule provides that once the party seeking to establish the privilege or work-product claim notifies the receiving parties of the claim and the grounds for it, the receiving parties must return, sequester, or destroy the specified information. Fed. R. Civ. P. 26(b)(5) provides in relevant part:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(B) Information Produced. 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.

Since the rule is a procedural one, it did not and could not address whether and under what circumstances inadvertent production would constitute a waiver of the privilege. In this regard, the Committee Note clearly states that the rule does not address whether the privilege or protection was waived by the production, but simply prohibits the receiving party from using or disclosing the information, and requires the producing party to preserve the information, until the claim is resolved.³⁹

The 2006 Amendments also added a provision to Rule 26(f) requiring the parties to discuss the issue of privilege as part of developing a discovery plan. Rule 16(b) was also amended to allow the court to enter an order regarding any agreements the parties reached regarding issues of privilege or trial-preparation material protection.⁴⁰ While Rule 26(b)(5) was a tremendous step forward in the Rules process, it did not provide a substantive change in waiver law or provide a mechanism for parties to obtain protection from possible waiver rulings. The resolution

39. FED. R. CIV. P. 26(b)(6) Advisory Committee Notes to the 2006 Amendments.

40. *See* FED. R. CIV. P. 16(b).

of this problem would have to wait two years until the amendment of the Federal Rules of Evidence.

E. Federal Rule of Evidence 502

Federal Rule of Evidence 502 was signed into law on September 19, 2008, and is a substantial departure from the traditional approach to waiver of the attorney-client privilege and the work-product protection. The rule applies with respect to disclosures, both voluntary and inadvertent, in federal proceedings, and to federal offices and agencies. The rule itself limits the scope of waiver, and Rule 502(d) gives a federal court the power to bind parties and the courts in all other state and federal proceedings with respect to disclosures made in the federal proceeding in which the order was entered.⁴¹

Thus, Rule 502 reflects an effort by Congress to enable litigants to minimize the extraordinary cost of civil litigation in federal proceedings, particularly the cost of e-discovery, without risking broad waiver of privilege in either federal or state proceedings. Rule 502 provides:

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver: When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communica-

41. A number of states have enacted Rule 502 analogues, although there are differences among the state rules. *See infra* Appendix F for a discussion of state law analogues to Rule 502.

tions or information concern the same subject matter; and (3) they ought in fairness to be considered together.

(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).

(c) Disclosure Made in a State Proceeding: When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred.

(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.

(f) Controlling Effect of This Rule: Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions: In this rule: (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

1. Limiting the Scope of Waiver for Voluntary Disclosures

Rule 502(a) significantly limits the scope of waiver with respect to undisclosed privileged communications or information in the context of a federal proceeding or disclosure to a federal office or agency. Specifically, Rule 502(a) eliminates subject matter waiver for inadvertent disclosures and minimizes the likelihood of subject matter waiver for intentional disclosures: "It follows that an inadvertent disclosure of protected information can *never* result in a subject matter waiver." Explanatory Note to Rule 502(a) (emphasis added). The Rules Committee explained that subject matter waiver is "reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."

The Advisory Committee explained the very narrow circumstances in which waiver beyond the disclosed information is appropriate:

[Rule 502(a)] provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communications or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary Thus, subject matter waiver is limited to situations in which party intentionally puts protected information into the litigation in a selective, misleading and unfair manner The language concerning subject matter waiver—"ought in fairness"—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

Rule 502 was intended to limit instances of subject matter waiver. There have not been many decisions that have addressed the circumstances in which subject matter waiver is appropriate under Rule 502(a). Influenced in part by Rule 502(a)'s requirement that there be a fairness balancing analysis before there can be a finding of subject matter waiver with respect to disclosures made during litigation, the Federal Circuit remanded a case and directed the trial court to conduct a fairness analysis before determining whether a pre-litigation disclosure resulted in subject matter waiver.⁴²

42. *Wi-Lan, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1369 (Fed. Cir. 2012) ("If a party who expressly waives privilege during

The Advisory Committee Notes⁴³ are clear that in order for there to be subject matter waiver, disclosure must be voluntary and fairness must require subject matter waiver.⁴⁴ The legislative history supports the position that there should be no subject matter waiver unless a disclosure is voluntary and “a party’s strategic use” of the disclosed privileged or protected information in litigation “obliges that party to waive the privilege regarding other information concerning the same subject matter so that the information being used can be fairly considered in context.”⁴⁵

litigation receives the protection of a fairness balancing test, as per Rule 502(a), should the same protection be made available to a person whose waiver occurred pre-litigation? . . . We conclude that the Ninth Circuit would find fairness balancing to be required.”).

43. According to the Advisory Committee Notes, Rule 502 was submitted “directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege.” The Advisory Committee Note also explains that the Note “may be incorporated as all or part of the legislative history of the rule.”

44. In *Bear Republic Brewing Co. v. Central City Brewing Co.*, 275 F.R.D. 43, 50 (D. Mass. 2011), the court, while acknowledging the clear intention of both the Advisory Committee Notes and the legislative history to require a fairness analysis before finding subject matter waiver, nevertheless held that Rule 502(a)’s language requires a finding of subject matter waiver whenever there has been an intentional disclosure of privileged information. According to the court, a fairness analysis is relevant only with respect to the scope of the subject matter waiver. The *Bear Republic* decision demonstrates a minority view. More prevalent is the view that the purpose of Rule 502(a) is to limit subject matter waiver to rare circumstances, not to maintain the common law approach that subject waiver occurs whenever privileged information is disclosed to third parties.

45. 154 CONG. REC. H7818-7819 (September 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence), 2008 WL 4133109; 23 WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5438, 849–51 (Supp. 2011). See also *Lott v. Tradesmen Int’l, Inc.*, No. 5:09-CV-183-KKC, 2013 WL 308853 (E.D. Ky. Jan. 25, 2013) (fairness does not require finding of subject matter waiver where disclosed privileged

If courts properly construe Rule 502(a), parties and their lawyers may now conduct a cost-benefit analysis regarding the resources that they will spend to screen for privilege, and whether to produce arguably privileged but otherwise insignificant documents rather than spend significant time and money fighting the issue in response to motions to compel. As discussed with respect to Rule 502(d) below, parties can further decrease the risk of uncertainty regarding waiver by having the court enter an order pursuant to Rule 502(d) that not only addresses the “clawback” process for inadvertently produced material, but is tailored to the needs of a specific case.

2. Voluntary Disclosures to Federal Offices and Agencies

Rule 502(a) applies not just to disclosures in a federal proceeding, but also to disclosures to federal offices and agencies whether or not there is a pending federal proceeding. Therefore, Rule 502(a) limits the scope of waiver for disclosures that parties choose to make pursuant to a voluntary disclosure of potential wrongdoing, or in response to an informal investigation by the federal government.

It is imperative, in this context, that counsel be familiar with the history of Rule 502. At one point, the Department of Justice took the position that it could insist that parties subject to its investigations or prosecutions forfeit their attorney-client or work-product privileges in order to secure favorable treatment. This led to the proposal that this policy be prohibited and the Rule 502, then being considered, create a new common law privilege which would permit a party to make a complete disclosure of all of its privileged information to the government

emails would not be admitted into evidence and would not be considered by the court).

without any fear that the information would be available to anyone else (“selective waiver”).⁴⁶

A rule codifying the selective waiver doctrine was necessary, because the vast majority of circuits that had considered the question had concluded that there could be no such thing as a “selective” waiver of the privilege. In the absence of the ability to selectively disclose privileged information to the government, disclosure to the government meant waiver as to all third party litigants.⁴⁷

The effort to create this new privilege failed and, as a result, the prohibition against a selective waiver remains in most jurisdictions. Indeed, the Advisory Committee acknowledges as much in its notes to Rule 502.⁴⁸

Production of documents to the government outside of litigation raises a procedural quandary for the producing party: while Rule 502(a) limits the scope of waiver with respect to disclosures to federal offices or agencies, the certainty of Rule 502(d) likely will not be available, because no federal court can bind other state and federal proceedings unless the disclosures were made in connection with litigation before the court. As a result, if several cases are later filed relating to the subject matter

46. For an excellent analysis of this history, see Appendix A, Martin R. Lueck & Patrick M. Arenz, *The DOJ's Evolving Position on Requests for Waiver of the Attorney-Client Privilege & Work Products Materials during Corporate Investigations* (2009).

47. See *id.* at 7–8; see, e.g., *In re Qwest Commc'ns Int'l Inc. Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006) (declining to adopt selective waiver privilege and holding production to government waived privilege as to third-party civil litigants).

48. “The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.” FED. R. EVID. 502 Advisory Committee Note.

of the disclosures, each of those courts may have an opportunity to rule on waiver, creating a significant risk of inconsistent and unpredictable outcomes.

What if the parties obtain a Rule 502(d) order that applies to disclosure of all privileged documents—allowing a party to clawback privileged documents at any time without risk of waiver? Does this essentially create a selective waiver doctrine, and would that Rule 502(d) order be valid?

There are several arguments against this strategy, at least with respect to an order that effectively allows selective waiver by not limiting the order to inadvertently produced documents. Another party, who wants the privileged information given to the government, can argue that the party that made the disclosure has done indirectly what it could not do directly—get the very exemption from the no selective waiver rule that the drafting committee rejected. Additionally, it could be argued that the conferral of jurisdiction was collusive and constituted a fraud upon the court if it were unaware of the agreement the parties had made. If that argument were accepted by another court, then the court that issued the order lacked jurisdiction over the subject matter since the dispute was not a true case or controversy and jurisdiction was procured by a fraud upon the court.⁴⁹

In the absence of dispositive authority, counsel may nevertheless conclude that having such an understanding with the government may be worth running the risk that the Rule 502(d) order that the parties secure by their understanding will ultimately be set aside. For example, the risk of subsequent litigation may be so slim that counsel can conscientiously advise her client that weighing that risk against what could be the prohibitive costs of review still renders this kind of agreement a legitimate strategy. It should be recalled that the privilege belongs

49. FED. R. CIV. P. 60(b)(4).

to the client and a fully advised client can waive it and run whatever risk that client sees fit to run.

3. “Use” vs. “Disclosure”

There is a significant limitation to Rule 502(a). It applies to “disclosures,” but it does not purport to apply to “use” of privileged information by a producing party. “Use” includes not just the affirmative use of a produced privileged document as an exhibit in support of summary judgment or at trial, but also when a party puts “at issue” privileged information.⁵⁰ Although disclosure of a privileged document may not result in subject matter waiver, a producing party’s use of that document may force the application of Rule 502(a) compelling the production of otherwise privileged information that “ought in fairness to be considered” with the document that party used.⁵¹

This issue is particularly important as parties consider whether to produce privileged information to the government. Although Rule 502(a) specifically applies to disclosures to federal offices and agencies, some may assert that such disclosures are “use” of privileged information to the extent that a party makes the production to obtain cooperation credit or otherwise obtain leniency from the government.

50. TESTIMONIAL PRIVILEGES, *supra* note 4, at § 1:88.

51. See *Shinogi Pharma, Inc. v. Mylan Pharmaceuticals, Inc.*, No. 10-1077, 2011 WL 6651274 (D. Del. Dec. 21, 2011) (the doctrine that reliance on the advice of counsel waives the attorney-client privilege remains unaffected by Rule 502); see also *Graff v. Haverhill North Coke Co.*, No. 1:09-cv-670, 2012 WL 5495514 (S.D. Ohio Nov. 13, 2012) (voluntary disclosure of the final version of an investigation report that concluded that the producing party was in compliance with the law, and the assertion of an affirmative defense that it was compliant, put the report “at issue” in the litigation. Defendant, therefore, was required to produce draft versions of the report and any email communications with counsel regarding the report).

If the courts were to find that most voluntary disclosures to government agencies constituted “use,” it would effectively read the protections out of Rule 502(a). As the United States Supreme Court has emphasized, in order to be effective, the scope of the attorney-client privilege must be predictable.⁵² Uncertainty regarding whether disclosure—of some otherwise privileged or protected information developed during a corporate internal investigation—will lead to wholesale loss of the privilege for the entirety of the investigation makes it less likely that a company will risk disclosing what may be helpful information for the government’s investigation.

In order to give Rule 502(a) its intended reach, the best approach is to reserve the waiver required by that rule for only those situations in which it is clear that a party disclosing privileged information to the government is attempting to “cherry pick” in an effort to mislead the government. The act of disclosure itself, without evidence that the disclosing party has “intentionally” provided the privileged or protected information in a “selective, misleading and unfair manner,” should not constitute “use” of the information, and should not result in waiver of anything other than the limited waiver in Rule 502(a). A finding of such a waiver following disclosure to the government should be an unusual exception, not the norm.

52. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (“But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application.”).

II. Principle 2. Parties, counsel, and courts should make use of Federal Rule of Evidence 502(d) and its state analogues.

Commentary

Comment 2(a): Rule 502(d) provides parties with a vehicle to ensure that the production of ESI does not result in waiver regardless of the circumstances of its production.

Rule 502(d) provides: “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.” An agreement among the parties on the effect of disclosure in a federal proceeding, however, binds only the parties to the agreement, unless it is incorporated into a court order.⁵³

Rule 502(d) gives a federal court broad power to enter an order ruling that the parties’ conduct in a proceeding before the court does not result in waiver. A Rule 502(d) order may address not only inadvertent waiver, but also instances in which intentional disclosure will not result in waiver. Thus, a Rule 502(d) order can be crafted to expedite discovery and save costs by obviating the risk that disclosure will result in waiver. Moreover, once a court has entered a Rule 502(d) order establishing the rules that will govern the production of privileged documents, the order eliminates the need to refer to Rule 502(b), or to establish the elements set forth in that rule.⁵⁴

53. FED. R. EVID. 502(e). It is important to recognize that a Rule 502(d) is “available not only to litigants, but also to third-parties” who are producing information, for instance, pursuant to a subpoena. Thomas C. Gricks, *The Effective Use of Rule 502(d) in E-Discovery Cases*, THE LEGAL INTELLIGENCER (Oct. 25, 2011).

54. See *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2013 WL 50200 (D. Kan. Jan. 3, 2013) (Rule 502(d) order is designed to allow the parties and the court to defeat the default operation of Rule 502(b) in order to reduce costs and expedite discovery); *Brookfield Asset Mgmt., Inc. v. AIG*

To date, Rule 502(d) has mostly been used to establish under what circumstances, if any, the production of privileged information can constitute or not constitute grounds for waiver.⁵⁵ The parties could agree that the unintentional or inadvertent production of privileged information cannot result in a waiver regardless of whether the producing party undertook the reasonable efforts to preclude its production. Similarly, the parties could also agree that the intentional production of privileged information does not result in a waiver. For example, one party might agree to produce certain “privileged” documents such as legal opinions explaining the basis of its actions. Under a 502(d) agreement, the parties might agree that the production of those documents would not constitute a broader waiver of any claim to privilege over similar documents or similar communications.⁵⁶

Fin. Prods. Corp., No. 09 Civ. 8285(PGG)(FM), 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013) (Maas, J.) (holding that party that, due to vendor error, produced privileged material contained in the metadata of redacted documents had “the right to claw back the [documents], no matter what the circumstances giving rise to their production were” because “the parties at [the Court’s] urging had entered into a Rule 502(d) [order]”); *see also* United States v. Daugerdas, No. S3 09 CR 581(WHP), 2012 WL 92293 (S.D.N.Y. Jan. 11, 2012) (denying defendant’s motion to unseal privileged document produced by defendant’s employer pursuant to Rule 502(d) order in criminal case, explaining that allowing the document to be unsealed for use in a private arbitration proceeding between defendant and employer regarding legal fees incurred in connection with the criminal case would defeat the purpose of the 502(d) order).

55. *S.E.C. v. Bank of Am. Corp.*, 2009 WL 3297493 (S.D.N.Y. Oct. 14, 2009) (entering order pursuant to Rule 502(d) to limit waiver to documents actually disclosed to government and adopting parties’ definition of subject matter of the disclosed documents).

56. *Shinogi Pharma, Inc. v. Mylan Pharmaceuticals, Inc.*, No. 10-1077, 2011 WL 6651274 (D. Del. Dec. 21, 2011) (the Rule 502(d) order provided that, if the producing party elected not to rely on the disclosed opinions, the receiving party was required to return or destroy all copies of the opinions and,

Once entered by the court, the Rule 502(d) order provides the producing party with protection from a claim of waiver by the opposing party. Most importantly, Rule 502(d) provides that such an order is enforceable in all other federal and state proceedings.⁵⁷ Prior to the adoption of Rule 502, these arrangements were enforceable as to the parties to a specific federal proceeding,⁵⁸ but there was no certainty that a confidentiality agreement, protective order, or even a ruling by the court that there had been no waiver would be followed by other courts involving different parties.⁵⁹ By incorporating such agreements in a court order pursuant to Rule 502(d), the parties can be certain that such a non-waiver order will control waiver issues regarding that disclosure in other matters.

Comment 2(b): Absent good cause shown by one of the parties, courts should enter Rule 502(d) clawback/non-waiver orders as a matter of course when parties fail to appropriately consider and agree upon the entry of such orders.

pursuant to Rule 502, “the production of the opinions would not result in a waiver of the attorney-client privilege or work-product protection in this or any other subsequent litigation.”).

57. *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, 4:08-CV-684-Y, 2009 WL 464989 (N.D. Tex. Feb. 23, 2009) (issuing Rule 502(d) order to protect disclosure in suit over attorney’s fees from waiving privilege in ongoing state court proceedings).

58. *Rainer v. Union Carbide Corp.*, 402 F.3d 608, 625 (6th Cir. 2005), *amended on reh’g* (Mar. 25, 2005) (enforcing an “Agreed Protective Order” signed by all of the parties and finding no waiver); *Employers Ins. Co. of Wausau v. Skinner*, No. CV 07-735(JS)(AKT), 2008 WL 4283346, at *7 (E.D.N.Y. Sept. 17, 2008) (parties’ confidentiality agreement prevented waiver of privilege); *Minebca Co. v. Pabst*, 370 F. Supp. 2d 297, 300 (D.D.C. 2005) (“Simply put, the language of the Protective Order trumps the case law.”).

59. *See Hopson v. Mayor and City Counsel of Balt.*, 232 F.R.D. 228 (D. Md. 2005).

A Rule 502(d) order is designed to allow the parties and the court to defeat the default operation of Rule 502(b) in order to reduce costs and expedite discovery.⁶⁰

Parties should take it upon themselves to carefully craft and submit for approval to the court a Rule 502(d) order setting forth under what circumstances, if any, the production of a privileged document would constitute waiver.⁶¹ There is no requirement that the parties agree to have a Rule 502(d) order entered. The court has the power to enter a Rule 502(d) order where parties are unable or unwilling to suggest or agree to the entry of such an order. The Advisory Committee Notes state “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.”

By way of example, in *Rajala v. McGuire Woods*, the court had the “authority to enter a clawback provision [even when] not all the parties agreed to one.”⁶² The Court recognized that “an order containing a clawback provision is not dependent on

60. Several courts and pilot projects have created and published sample Rule 502(d) Orders. See, e.g., *infra* Appendix E, Peck, M.J., Model Rule 502(d) Order (S.D.N.Y.).

61. See *infra* Appendix D, Sample Model Order. The parties’ initiative is especially important in light of the fact that “few districts have emphasized Rule 502 in local rules, guidelines, or amended forms.” Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets with (E-Discovery) Road*, 19 RICH. J. L. & TECH. 8, 38 (2013); but see Local Rules W.D. Wash. CR 26(f)(1)(H) (requiring counsel to discuss “procedures for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Rule 502(d) or (e) of the Federal Rules of Evidence”).

62. No. 08-2638-CM-DJW, 2010 WL 2949582, at *4–5 (D. Kan. July 22, 2010) (Waxse, M.J.).

the agreement of the parties.”⁶³ The Court referenced the Statement of Congressional Intent regarding Rule 502, which explains that a court may enter such an order on its own motion.

The Court found that such an agreement was appropriate given that plaintiff sought broad discovery, including voluminous ESI, from defendant. The Court observed that the order could reduce the resources and time spent on discovery disputes.⁶⁴ Finally, the Court noted if the producing party abused the 502(d) order by engaging in a “document dump,” the plaintiff could still seek appropriate relief.⁶⁵

Comment 2(c): Regulatory agencies should enter into Rule 502(d)-type agreements to facilitate the production of information in the regulatory setting.

The protections of Rule 502(d) orders are not available with respect to the production of information to federal and state agencies in regulatory proceedings because those proceedings are outside of formal litigation proceedings. However, WG1 of the Sedona Conference encourages federal and state agencies to enter into agreements with parties producing information to regulatory agencies that would set forth whether and under what circumstances the government may have the ability to later claim the production of privileged information constitutes a waiver. By doing so, the agencies provide a mechanism that will allow parties to potentially expedite a production to the agency without the fear that the unintentional production of a privileged document would result in a later claim of privilege waiver. Indeed, some federal agencies have already recognized

63. *Id.* at *4.

64. *Id.* at *6.

65. *Id.* at *7.

the potential benefits of such a rule.⁶⁶ Parties availing themselves of such agreements, however, must do so knowing that these agreements cannot preclude a third-party in another action from arguing that the production of the privileged information to the government agency—intentionally or unintentionally—constituted a waiver of the privilege.

Comment 2(d): Rule 502(d) orders should be considered to facilitate *consensual* “quick peek” and “make available” productions in order to promote judicial economy without fear of any later claim of waiver.

With the agreement of the producing party, Rule 502(d) can also be used creatively by the parties to facilitate the production of information without any privilege review, subject to an assurance that privileged documents produced through such a production will be returned without a later claim of waiver. This practice is often referred to as a “quick peek” or “make available production.” Such productions may be particularly appropriate with respect to categories of documents that are unlikely to have any privileged information. In a commercial contract dispute, for example, where thousands of form contracts are required to be produced that are unlikely to have any privileged information, a Rule 502(d) order could be crafted to allow for the production of such information without the fear of waiver.

Parties have, on occasion, used such “quick peek” or “make available” productions on a wholesale basis for their entire production. Such productions should only be undertaken with a producing party’s clear understanding of the risks and

66. See, e.g., Int’l. Trade Comm. Proposed Rule, 19 C.F.R. § 210.27(e), 77 Fed. Reg. at 60, 952–56 (proposing procedure to address inadvertent disclosures); Fed. Trade Comm. Rule 16 C.F.R. § 2.11(d) (allowing for retrieval of inadvertently disclosed privileged material).

informed consent. In particular, even though a Rule 502(d) order can require the return of such privileged documents and ensure there is no waiver, once it is produced, the opposing party knows its contents. In addition, parties and the courts should be cognizant that a Rule 502(d) order should not be used as a cost-shifting tool allowing the producing party to make a “data dump” and requiring the requesting party to identify privileged documents. Courts have also rejected proposed Rule 502(d) orders that attempt to improperly shift the burden for asserting privilege.⁶⁷

Courts and litigants can creatively use Rule 502(d) orders in instances where the producing party bears a larger burden—taking into account the volume of ESI to be reviewed and produced, and where the producing party agrees to the production without a privilege review. For example, in *Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of N.M.*,⁶⁸ the court entered a Rule 502(d) order over the objection of the plaintiff because the defendant was amenable to producing all of the voluminous ESI in response to the plaintiff’s requests, provided that the court entered a Rule 502(d) order. The court recognized that, “by ordering the College to turn over the CSF ESI unreviewed, the court is in effect forcing Radian Asset to bear the cost of that review if it wants certain data,” but the court rejected the plaintiff’s objection about the Rule 502(d) order being an impermissible cost-shifting order because “[s]uch a protective order is not, however, a traditional cost-shifting order.” Moreover, the court clarified that it was only relying on Rule 502(d) to protect

67. See *Chevron Corp. v. Weinberg Group*, No. 11-409 (D.D.C. Oct. 26, 2012) (Facciola, M.J.) (rejecting an order that would have required receiving party to indicate its intention to use a document, then seek a ruling from the court that the document may be used; instead, finding that it was producing party’s burden to assert and establish privilege).

68. No. CIV 09-0885JB/DJS, 2010 WL 4928866 (D.N.M. Oct. 22, 2010).

the defendant's privilege and not as its authority to order the production of documents. The court also agreed with plaintiff that Rule 502 is a "not a cost shifting tool." Ultimately, the court struck a balance by ordering the plaintiff to undertake some review of hard drives to identify the one that belonged to a particular custodian but ordering that the defendant produce that hard drive and large volumes of other ESI subject to the Rule 502(d) order. Therefore, *Radian Asset* provides support for defending the entry of a Rule 502(d) order over any objection.

Comment 2(e): Rule 502(d) does not authorize a court to require parties to engage in "quick peek" and "make available" productions and should not be used directly or indirectly to do so.

Although Rule 502(d) provides broad powers to a federal court, it does not give the court the power to order parties to produce privileged information where there has been no finding of waiver. For example, although a court may enter a Rule 502(d) order *allowing* the parties to engage in a "quick peek" process, the court cannot *order* a "quick peek" process over the objection of the producing party.⁶⁹

It is well-established that a court may not compel disclosure of privileged attorney-client communications absent

69. See Martin R. Lueck & Patrick M. Arenz, *Rule 502(d) & Compelled Quick-Peek Productions*, 10 SEDONA CONF. J. 229 (2009).

waiver or an applicable exception.⁷⁰ Indeed, due process is implicated when privileged communications are required to be disclosed, even for *in camera* review.⁷¹

Notably, courts have acknowledged limits to their authority to order an *in camera* review. For example, in *United States v. Zolin*, the United States Supreme Court held that a court cannot compel a party to disclose privileged communications for *in camera* inspection without the requesting party making a showing of a factual basis adequate to support a good-faith belief that a reasonable person would conclude a review of the privileged communications may reveal evidence of a crime or fraud.⁷² The court recognized that a blanket rule allowing *in camera* review “would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue

70. See, e.g., *In re Dow Corning Corp.*, 261 F.3d 280, 284 (2d Cir. 2001) (“compelled disclosure of privileged attorney-client communications, absent waiver or an applicable exception, is contrary to well established precedent” and “we have found no authority . . . that holds that imposition of a protective order . . . permits a court to order disclosure of privileged attorney-client communications.”); *In re General Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998) (“the district court may not compel disclosure of allegedly privileged communications to the party opposing the privilege” unless crime/fraud exception applies); see also *Chase Manhattan Bank, NA v. Turner & Newhall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992) (issuing writ vacating discovery order that required party to produce documents subject to a claim of attorney-client privilege prior to a ruling on the merits of the objection).

71. See, e.g., *U.S. v. Zolin*, 491 U.S. 554, 571 (1989) (“There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings.”); *In re Grand Jury Proceedings (Doe)*, No. 91-56139, 1993 WL 6598, at *3 (9th Cir. Jan. 15, 1993) (“although the attorney-client privilege is not itself a constitutional right, this and other courts have found the Due Process Clause implicated in cases [pertaining to *in camera* review]”) (internal citations omitted).

72. 491 U.S. 554, 572 (1989).

risk.”⁷³ The court in *Zolin* also noted that its test would be even more stringent if a party sought outright disclosure of the privileged communication, and not just *in camera* review.⁷⁴

Rule 502 contains no provision that grants the court the authority to compel a “quick peek” production or other disclosure of privileged information absent a finding of waiver. Indeed, Rule 502 was designed to protect producing parties, not to be used as a weapon impeding a producing parties’ right to protect privileged material. Compelled disclosure of privileged information, even with a right to later clawback the information, forces a producing party to ring a bell that cannot be un-rung. As one court recognized, “regardless of how painstaking the precautions, there is no order . . . which erases from defendant’s counsel’s knowledge what has been disclosed. There is no remedy which can remedy what has occurred, regardless of whether or not the precautions were sufficient.”⁷⁵

The court’s analysis is directly on point here. There are many ways in which a producing party may be prejudiced by compelled disclosure of privileged information. For instance, after viewing privileged material, a party may submit a request for admission to elicit the material or tailor a deposition question to do the same. Or a party may adjust its settlement position in light of its review of the privileged information. These concerns would inevitably erode the goal of the attorney-client privilege, which is “to encourage full and frank communication between attorneys and their clients and thereby promote

73. *Id.* at 571.

74. *Id.* at 572.

75. *International Digital Systems Corp. v. Digital Equip.*, 120 F.R.D. 445, 449 (D. Mass. 1988).

broader public interests in the observance of law and administration of justice.”⁷⁶

Courts also should not employ Rule 502(d) indirectly to compel a result that is not permitted directly under the rule. For example, some courts have separately entered 502(d) orders protecting parties from claims of waiver by the production of privileged documents as well as Rule 16(b) scheduling orders with aggressive document production deadlines that do not provide the parties with a reasonable period of time to review the documents for privilege. In these instances, the courts caution the parties that there will be dire consequences for missing the deadline and they, therefore, should consider all means available to achieve a timely document production, including the use of a “quick peek” or “make available” production. In essence, the courts are attempting to indirectly compel a result that it is not directly permitted under Rule 502(d)—a result that was never intended by the rule.

III. Principle 3. Parties and their counsel should follow reasonable procedures to avoid the inadvertent production of privileged information.

Commentary

Comment 3(a): Rule 502(b) provides a uniform statutory approach to the issue of inadvertent production and waiver, eliminating the three common-law approaches in determining whether there has been an inadvertent waiver.

76. *Upjohn Co. v. U.S.*, 449 U.S. 383, 393 (1981) (“if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).

Rejecting the common-law approach to waiver, Rule 502(b) adopts a three-part test to determine whether the disclosure results in an inadvertent waiver:

(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).

Rule 502 overrules approaches previously applied in federal courts that are inconsistent with the plain language of the rule.⁷⁷

Comment 3(b): Rule 502(b) applies only to the unintentional production of privileged ESI that is not otherwise addressed in a Rule 502(d) order.

Rule 502(b) requires that a disclosure be “inadvertent.”⁷⁸ Although courts often combine the analysis of inadvertence with whether reasonable steps were taken to avoid disclosure—because the effort taken to prevent disclosure is evidence that a party did not intend to disclose privileged material—a finding of inadvertence is an independent threshold question. Where a party intentionally discloses a privileged document but later re-

77. See, e.g., *Amobi v. D.C. Dep’t of Corr.*, 262 F.R.D. 45, 52 (D.D.C. 2009) (noting that Rule 502 “overrides the long-standing strict construction of waiver” in the D.C. Circuit).

78. *Amobi*, 262 F.R.D. 45 (D.D.C. 2009).

thinks the wisdom of the disclosure, the initial disclosure is not inadvertent. Inadvertence means “mistaken.”⁷⁹

Comment 3(c): Prior to litigation, corporations should take reasonable steps to protect their privileged information by ensuring that: (i) employees are trained on what communications and activities can be protected under a claim of privilege; (ii) privileged communications are identified; and (iii) tools are utilized to ensure the appropriate management of privileged information.

The ability to identify and segregate privileged information is greatly facilitated by the identification, labelling, and management of that information prior to litigation. The following are examples of best practices regarding the identification and handling of privileged information prior to litigation that may facilitate the identification and segregation of privileged information during the collection, review, and logging process:

- **Train Employees on the Scope of Privilege and Waiver.** Most non-lawyers and many lawyers do not understand the nature and the scope of the attorney-client privilege or work-product protection. Training those individuals, espe-

79. *Id.*; see *Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705 (W.D. Va. 2010) (production of notes after careful analysis, partial redaction, and designation as confidential was not inadvertent despite producing party's subsequent discovery that the notes reflected communications with the party's general counsel); *Silverstein v. Fed. Bur. Of Prisons*, No. 07-cv-02471, 2009 WL 4949959 (D. Colo. Dec. 14, 2009) (rejecting government's assertion that production of privileged memorandum was inadvertent and finding that government had intentionally produced privileged memorandum to obtain litigation advantage and, only on the eve of a Rule 30(b)(6) deposition, sought to retrieve the memorandum and deny plaintiff discovery regarding the document). See also *Amobi*, 262 F.R.D. at 53 (adopting simple test for inadvertence: was the disclosure unintended?).

cially those who interact with the legal department or whose roles involve privileged communications or work-product activity, will facilitate the identification and designation of privileged information.

- **Use legal titles.** Attorneys who are acting as such, even those who work in departments outside the legal department, should use legal titles, such as “counsel,” “associate general counsel,” “senior litigation counsel,” etc. The company’s organizational chart should reflect these legal titles and, when appropriate, indicate direct or dotted line reporting to the legal department.
- **Identify when acting as an attorney.** Written communications should state that: (i) in-house counsel has been asked to provide legal advice and (ii) the communication is for the purpose of obtaining information to enable the attorney to provide legal advice.
- **Educate clients to request legal advice and to maintain confidentiality.** The assertion of the attorney-client privilege is bolstered when the corporate client specifies a request for legal advice in an initial communication. In order to avoid waiver, clients should be instructed to maintain privileged materials in confidence and not distribute them without approval from counsel.
- **Educate employees about the risk of commingling legal and business advice.** There is a risk that commingling legal and business advice will waive otherwise applicable privileges. A court may determine that a document reflecting both

business and legal advice is not “predominantly” or “primarily” legal in nature.⁸⁰ The risk of waiver is increased where a document is prepared for simultaneous review by both legal and non-legal personnel.⁸¹

- **Limit distribution of privileged materials to those employees who need to know the information for legal purposes.** Waiver may occur within an organization when otherwise privileged materials are circulated to persons not assisting in furnishing information to the lawyer

80. See, e.g., *Phillips v. C.R. Barc, Inc.*, 290 F.R.D. 615, 629 (D. Nev. 2013) (in order to determine whether the primary purpose is to provide legal advice, courts will look at a number of factors, including “whether the legal purpose so permeates any non-legal purpose ‘that the two purposes cannot be discretely separated from the factual nexus as a whole’”); *Visa U.S.A., Inc. v. First Data Corp.*, 2004 WL 1878209 (N.D. Cal. 2004) (documents prepared for a dual purpose will not be privileged if the documents had a “clear, readily separable business purpose.”).

81. “The attorney-client privilege does not attach . . . to documents which were prepared for simultaneous review by both legal and non-legal personnel within the corporation. This rule applies to the document as a whole because each communication within that document was provided to non-legal personnel for their review. Thus, those communications cannot be said to have been made for the primary purpose of seeking legal advice.” *United States v. Chevron Corp.*, No. C 94-1885 SBA, 1996 U.S. Dist. LEXIS 8646, at *6, 1996 WL 444597 (N.D. Cal. May 30, 1996) (internal citations omitted); see also *In Re: Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 809 (E.D. La. 2007) (“We accepted the possibility that addressing communications to both lawyers and non-lawyers could reflect the seeking of legal advice from the lawyers and that the non-lawyers were simply being notified about the nature of the legal services sought. Facially, however, it appeared far more probable that the non-lawyers were being seen [sic] the communications for separate business reasons.”).

or acting upon legal advice received from the lawyer.⁸²

- **Label privileged and work-product protected documents.** Apply the appropriate privilege legend to every privileged record. Privileged communications should, at a minimum, be labeled as “Privileged & Confidential.” Privileged records that are protected under the work-product doctrine may also contain a “Work Product” label. In addition to demonstrating the intention to keep the document confidential, proper labeling of privileged and protected ESI will make it easier and less expensive to identify these documents with technology-assisted review in the event of discovery. Note: Such labels should not be used indiscriminately where documents are not legitimately privileged or protected.

Comment 3(d): Parties and counsel should identify and implement “reasonable” steps to prevent disclosure of privileged ESI during the collection, identification, and review process.

The central issue under Rule 502(b) is whether the disclosing party took reasonable steps to prevent disclosure. As

82. TESTIMONIAL PRIVILEGES, *supra* note 4, at §1:83; *see* Upjohn Co. v. United States, 449 U.S. 383, 390–92, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981) (holding that attorney-client privilege could protect communications between company’s lawyer and company employee, where lawyer needed employee’s information to adequately advise the company); *Vioxx*, 501 F. Supp. 2d at 796 (the privilege protects communications between those employees and corporate legal counsel on matters within scope of their corporate responsibilities, as well as communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities).

Judge Grimm pointed out: “The analytical methods are reasonable, even though operators cannot guarantee the methods will identify and withhold from production every privileged or protected document. Reviewing courts must remember that the bellwether test under Rule 502(b)(2) is *reasonableness*, not *perfection*.”⁸³

The rule itself does not set forth criteria for what is reasonable, opting instead for a “flexible” approach, according to the Rule’s Advisory Committee Note: “[Rule 502] does not explicitly codify [the multi-factor] test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors.”⁸⁴

Here, Judge Grimm’s opinion in *Victor Stanley* is again applicable. Judge Grimm recognized the importance of employing proper methods when searching for privileged documents.⁸⁵ Moreover, the opinion questioned whether simply running a keyword search would be sufficient. Judge Grimm strongly indicated that a qualified expert should be involved in determining the proper search methodology, observing that “[w]hile keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection

83. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up To Its Potential?*, XVII RICH. J.L. & TECH. 8 (2011).

84. FED. R. EVID. 502(b) Advisory Committee Notes.

85. *Victor Stanley, Inc., v. Creative Pipe, Inc., et al.*, 250 F.R.D. 251, 262 (D. Md. 2008) (“Use of search . . . retrieval methodology, for the purpose of . . . withholding privileged or work-product protected information from production, requires the utmost care in selecting methodology . . .”).

and implementation obviously involves technical, if not scientific knowledge.”⁸⁶ Judge Grimm also noted that courts most likely will require some reliable source (such as a qualified expert or learned treatise) if asked to resolve an issue related to the appropriateness of a search methodology.⁸⁷ Thus, before employing a particular search methodology, parties should consider consulting a qualified expert in the field, so that they are prepared to adequately defend their methodology if challenged.⁸⁸ While this is an important step in the process, it also adds to the overall cost and time associated with searching for privileged information.

In light of the uncertainty surrounding the “reasonableness” standard,⁸⁹ Judge Grimm suggested following best practices as described by The Sedona Conference.⁹⁰

To avoid a potential waiver of privilege, and to avoid the damage that can be caused by an inadvertent production whether or not the production results in a waiver, the parties and their counsel should design and implement a reasonable and auditable procedure for the identification and logging of

86. *Id.* at 260.

87. *Id.* at 261 n.10.

88. *See id.* (“opinions regarding specialized, scientific or technical matters are not ‘helpful’ unless provided by someone with proper qualifications.”).

89. Adding to the uncertainty, some courts have indicated that taking some reasonable steps is not sufficient to preserve privilege; rather a party must take *all* reasonable steps. *See ReliOn, Inc. v. Hydra Fuel Cell Corp.*, No. 06-607-HU, 2008 WL 5122828, at *2 (D. Or. Dec. 4, 2008) (“the court deems the privilege waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter”).

90. *Victor Stanley*, 250 F.R.D. at 262 (“[C]ompliance with [t]he Sedona Conference Best Practices for use of search and information retrieval will go a long way towards convincing the court that the method chosen was reasonable and reliable.”).

privileged documents. Consideration should be given to the factors outlined below.

- **Collection Process to Include Steps to Identify Privileged ESI.** Simply asking record owners if they worked with counsel on the issues relevant to the claims and defenses of the case can help identify ESI that may be privileged. Similarly, discussions with in-house counsel may help build the list of search terms, including names of attorneys, that would make the privilege review more efficient and accurate.
- **Written Document Review Protocol to be Used for Managing Privileged Records.** Design and implement a written document review protocol that includes a detailed discussion of the law of privilege for the jurisdiction(s) at issue. An experienced senior attorney on the review team should be charged with oversight responsibilities in the creation and implementation of this protocol.
- **Education and Training of the Review Team.** Education and training of the review team is a critical step with respect to the appropriate application of the attorney-client and work-product privileges. The training should include a detailed discussion on basic privilege law. It might also include using sample documents from the production to assist the review team in the identification of privileged materials.
- **Escalation Process for Privilege Calls.** The review procedure should also have an escalation process whereby questions regarding the scope and application of privilege calls to specific documents can be directed to an experienced senior

attorney with the oversight responsibilities mentioned above.

- **Segregation of Privileged Information.** Information that is under review for privilege (or already determined to be privileged) should be segregated from the document review collection to avoid any unnecessary comingling with the remainder of the production.
- **Quality Control and Sampling Process.** A quality control and sampling process under the direction of an experienced senior attorney should be designed and implemented to ensure that privileged documents have been appropriately identified. Such a process is likely to reflect whether the review team is over-designating or under-designating documents for privilege. Quality control and sampling may also identify the need for retraining the review team regarding the nature and extent of privileged documents found within the document population. This quality control and sampling process should be conducted throughout the privilege review process. Prior to the production of the non-privileged documents, additional quality control and sampling of the production should be undertaken to ensure that privileged documents have not been inadvertently included in the production set.
- **Advanced Analytical Software Applications and Linguistic Tools in Screening for Privilege and Work Product.** The Advisory Committee Notes expressly stated that whether a party used analytical software applications and linguistic tools in screening for privilege and work

product is a factor to consider in determining whether “reasonable steps” were undertaken to prevent inadvertent disclosure.⁹¹ At a minimum, best practices would dictate the proper selection and good faith implementation of search terms to identify and potentially screen out for further review potentially privileged documents. In addition, the producing party should consider the feasibility of using more advanced analytical tools to help identify privileged documents, including near duplicate, threading, clustering, concerting, and technology-assisted review software/engines.

- **Contemporaneous Documentation of the Privilege Review Processes.** In order to defend the methodology used to search for privileged information before a court, even in *in camera* review, a party should be prepared to demonstrate that the procedures and processes that were undertaken to identify and log privileged documents were contemporaneously documented.
- **Transparency of Process.** As part of the meet and confer process, a party should consider disclosing to the opposing party the methodology that it will use to implement the privilege review process.

Comment 3(e): A party that claims that it inadvertently produced privileged documents should be entitled to a rebuttable presumption that it took “reasonable steps” to prevent the disclosure where: (i) it disclosed the reasonable steps as part of the Rule 26(f) meet and confer process; (ii) the opposing party

91. FED. R. EVID. 502(b) Advisory Committee Notes.

did not timely object to the procedure with specificity to the extent that it could; and (iii) the producing party in good faith adhered to the disclosed reasonable steps in the review of privileged ESI.

In the event that the parties are unable to agree to the terms of a Rule 502(d) order as part of the Rule 26(f) process, the parties should at least discuss and attempt to agree upon the procedure that each side will employ to prevent the inadvertent disclosure of privileged information. Absent such agreement, it is incumbent upon each party to at least articulate any objection it may have to the opposing party's proposed procedure that will be used to prevent the inadvertent disclosure of privileged information.

In order to facilitate cooperation, a producing party should be entitled to a rebuttable presumption that it took "reasonable" steps to prevent the disclosure of privileged information pursuant to Rule 502(b)(2) provided it can show that: (i) the disclosure of the methodology was part of the Rule 26(f) meet and confer process; (ii) the producing party implemented the disclosed methodology in good faith; and (iii) the opposing party failed to timely object to the extent that it could (i.e., at a minimum before the day that the production is required either by agreement or court order). The producing party would still be required to demonstrate the other two elements of Rule 502(b). The non-producing party has the ability to rebut the presumption with evidence demonstrating that the procedure used could not have been "reasonable" given the facts surrounding the production of the inadvertently produced privileged information.

Comment 3(f): Parties should undertake to notify one another immediately upon the discovery of inadvertently produced privileged ESI.

The clock for “promptness” does not start ticking until the producing party knows or should have known about the inadvertent disclosure. A court’s interpretation of the word “prompt” may depend on whether the inadvertently produced material is discovered at a deposition or in another setting. Several courts have adopted a strict interpretation of “prompt.” Therefore, if an inadvertently produced privileged document is used by the receiving party at a deposition and its disclosure adversely affects the producing party’s case or would lead to the disclosure of other privileged documents, counsel for the producing party should object immediately to the use of the document and instruct the deponent not to answer questions about the document. An “immediate” objection and instruction prevents the witness from testifying about the document and unquestionably satisfies Rule 502(b)(3)’s requirement for promptness. While an immediate objection will undoubtedly meet the standard for “promptness,” courts differ in their response when an objection is not immediate.

A court’s interpretation of “prompt” may vary when counsel discovers the inadvertent disclosure outside the deposition setting. For instance, in *Heriot v. Byrne*,⁹² the court found no waiver where the producing party discovered the inadvertent disclosure before a deposition and notified the receiving party of the vendor’s error within twenty-four hours of discovery of the error.⁹³

Comment 3(g): It is the obligation of the producing party to rectify the error promptly, including seeking the return privileged documents.

92. 257 F.R.D. 645 (N.D. Ill. 2009).

93. See, e.g., *In re Actos (Pioglitazone) Products Liability Litigation*, MDL Docket No. 6:11-MD-2299 (W.D. La. July 10, 2012) (Doherty, J.) (Case Management Order) (requiring that the producing party notify the receiving party of the inadvertent production within *ten* days).

The Advisory Committee Notes provide that Rule 502(b) “does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.” Instead, the rule requires the producing party “to follow up on any obvious indications that a protected communication or information has been produced inadvertently.”

When a privileged document surfaces in litigation, the producing party should use the procedures outlined in Rule 26(b)(5)(B)⁹⁴ as a starting point.⁹⁵ If the receiving party does not return or sequester the privileged communication, then further action is required by the producing party. Specifically, the producing party should promptly follow up with the receiving party or seek court intervention.⁹⁶ These steps should be taken

94. The procedures set out in Fed. R. Civ. P. 26(b)(5)(B) are as follows: 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.

95. Neither Fed. R. Evid. 502(b) nor Fed. R. Civ. P. 26(b)(5)(B) provides guidance on how quickly the receiving party must return privileged documents to the producing party. Thus, the parties themselves should consider entering into an agreement dictating the procedures and timing governing the return of privileged documents. If a Rule 502(d) order has been entered then these procedures should be included in that order. Thomas C. Gricks, *The Effective Use of Rule 502(d) in E-Discovery Cases*, THE LEGAL INTELLIGENCER (Oct. 25, 2011).

96. *Luna Gaming–San Diego, LLC v. Dorsey & Whitney, LLP*, No. 06-cv-2804, 2010 WL 275083, at *6 (S.D. Cal. Jan. 13, 2010) (“Failing to take affirmative steps to retrieve the document, beyond merely asking for it at depositions, also waives the privilege”).

without delay.⁹⁷ For larger productions, courts may be more forgiving when determining promptness of the actions taken.⁹⁸

IV. Principle 4. Parties and their counsel should make use of protocols, processes, tools, and technologies to reduce the costs and burdens associated with identification, logging, and dispute resolution relating to the assertion of privilege.

Commentary

In 1993, Rule 26 was amended to add subdivision (b)(5), requiring a producing party to “notify other parties if it is withholding material otherwise subject to disclosure under the rule or pursuant to a discovery request because it was asserting a claim of privilege or work product protection.”⁹⁹ The Advisory Committee Notes added that the failure to notify the other party could result in either sanctions under Rule 37(b)(2) or waiver of the privilege.¹⁰⁰ The stated purpose of the amendment was to provide an opposing party with information to “evaluate the applicability of the claim [of privilege].”¹⁰¹ The rule did not attempt to define the information that should be provided but the Advisory Committee Notes stated: “Details concerning time,

97. *Kmart Corp. v. Footstar, Inc.*, No. 09-C-3607, 2010 WL 4512337, at *2 (N.D. Ill. Nov. 02, 2010) (“Liberty Mutual did not file this motion until twelve days after the deposition. . . . a reasonable step would be to file a motion within a matter of days.”).

98. *See, e.g., United States v. Sensient Colors, Inc.*, No. 07-1275, 2009 WL 2905474 (D. N.J. Sept. 9, 2009) (In a production consisting of 45,000 documents, the court stated “only eight work days [after the inadvertent disclosure], plaintiff confirmed its error and notified defendant that Rule 26(b)(5)(B) should be followed. The Court finds that these actions were timely and reasonable”).

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

100. FED. R. CIV. P. 26(b)(5) Advisory Committee Note to the 1993 amendments.

101. *Id.*

persons, general subject matter, etc. may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden. In rare circumstances, some of the pertinent information affecting applicability of the claim, such as the identity of the client, may itself be privileged; the rule provides that such information need not be disclosed.”¹⁰² The amendment to this rule resulted in the rise of the modern privilege log.

With this said, the current method used by most parties for identifying privileged documents and for creating privilege logs appears to be a broken process.¹⁰³ Privilege logging is arguably the most burdensome and time consuming task a litigant faces during the document production process. Further, the deluge of information and rapid response times required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs “raise[] the term ‘boilerplate’ to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.”¹⁰⁴

102. *Id.*

103. Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, June 23, 2012, at 73 (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.”).

104. *Chevron Corp. v. Weinberg Group*, No. 11-406, 2012 WL 4480697 (D.D.C. Sept. 26, 2012) (Facciola, M.J.). In *Chevron*, the Court noted the trend toward mechanically produced logs with boilerplate information that fails to adequately describe the documents and the nature of the privilege claimed. The Court ordered a detailed privilege log and that unprotected documents

The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs. The Fed. R. Civ. P. provide the following guidance on what information is to be included in an adequate privilege log:

[A party must] describe the nature of the documents, communications, or tangible things not produced or disclosed and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.¹⁰⁵

But the 1993 Advisory Committee Notes recognized that the specific information provided in asserting the privilege *may vary* depending on the volume of the materials involved.¹⁰⁶

be turned over, and the Court warned that parties would be “ruthlessly” held to their Rule 26 obligations. On reconsideration, the court again criticized the use of “machines [to] produce privilege logs without human beings intervening to use the English language.” *Id.* The court observed that the “mechanical language” made it impossible to determine whether a document was actually privileged. *Id.* In partially denying the motion, the court held that “failures by respondent to adequately and accurately identify the documents for which it is claiming privilege should not be grounds for reconsidering.” *Id.*

105. FED. R. CIV. P. 26(b)(5)(A)(ii). In 2006, the Advisory Committee acknowledged that the review of ESI has only increased the risks of waiver and the potential burden of avoiding such waiver. FED. R. CIV. P. 26(b)(5) Advisory Committee Note.

106. See FED. R. CIV. P. 26(b)(5) Advisory Committee Note (“Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.”).

In applying Rule 26(b)(5)(A)(ii), courts have differed on what constitutes a reasonable logging exercise.¹⁰⁷ Some courts have even published standing orders and guidance or local rules for logging privileged information.¹⁰⁸ Courts have also

107. See *In re Rivastigmine Patent Litig.*, 237 F.R.D. 69 (S.D.N.Y. 2006) (Defendants in this multidistrict patent litigation moved to compel production of numerous communications that Plaintiffs claimed were protected by the attorney-client privilege. Court found the categorical log inadequate for, among others reasons: failure to identify specific legal professionals protected by the privilege under foreign law, i.e., patent attorneys as opposed to law firms generally, to which the privilege would apply. In response to the inadequacy of the log, the Court ordered that the underlying documents be produced in their entirety). *But see* *United States v. Magnesium Corp. of America*, No. 01-00040, 2006 WL 1699608 (D. Utah June 14, 2006) (Court found that a detailed privilege log was not necessary when the documents to be logged (generated over the previous 5 years) would number in the thousands and when it “seem[ed] clear that most of the documents at issue would be protected from disclosure by the work product privilege, the attorney-client privilege, or the joint defense privilege.”).

108. See S.D. Ala. Categorical Logs: 1998 Introduction to Civil Discovery Practice Sec. I.K(2) introduces the required contents of a privilege log as follows: “For documents (individually or by category): [list of required data points.]” Sec. I.K(5) states that “Any agreement between the attorneys to waive or to alter the contents of the privilege log is normally accepted, so long as it does not delay the progress of the case or otherwise interfere with Court management.” http://www.alsd.uscourts.gov/sites/alsd/files/Discovery_Practice.PDF; see also N.D. Cal. Model Stipulated Order Re: Discovery Par. 8(c) provides: “Communications may be identified on a privilege log by category, rather than individually, if appropriate.” <http://www.cand.uscourts.gov/filelibrary/1119/Model%20Stip%20E-discovery%20Order>. The following N.D. Cal. Magistrate Judges’ standing orders allow privilege logs to contain privilege information “for each document or for each category of similarly situated documents.” Laporte Standing Order Par. 2(g); Ryu Standing Order Par. 13; Westmore Standing Order Par. 19.

placed the burden on litigants to meet and confer about the logging methodology.¹⁰⁹ Other courts have provided specific guidance to exclude post-complaint data from logging and production.¹¹⁰ Courts have also considered the burden of logging individual email strings.¹¹¹ The Federal Trade Commission has

109. District of Delaware Default Standard for Discovery, Including Discovery of Electronically Stored Information (“ESI”) 1(d)(i) requires parties to confer on “alternatives to document-to-document logs”: The parties are to confer on the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged. No privilege logging of “information generated after the filing of the complaint.” Default Standard 1(d)(ii), <http://www.ded.uscourts.gov/sites/default/files/Chambers/SLR/Misc/EDiscov.pdf>.

110. Del. Chancery Categorical Logs: 2013 discovery guidelines allow parties to agree to categorical logs. It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial. “The Court generally does not expect parties to log post-litigation communications.” As for logging email chains, it recommends that “parties should attempt to agree on the procedures that both sides will use.” It also advocates for the involvement of senior lawyers, particularly senior Delaware counsel, in the process. *See* <http://courts.state.de.us/chancery/rulechanges.stm>; <http://courts.state.de.us/chancery/docs/CollectionReviewGuidelines.pdf>; <http://courts.delaware.gov/chancery/docs/CompleteGuidelines.pdf>.

111. S.D.N.Y. Pilot § II.E. For purposes of creation of a privilege log, a party need include only one entry on the log to identify withheld emails that constitute an uninterrupted dialogue between or among individuals; provided, however, that disclosure must be made that the emails are part of an uninterrupted dialogue. Moreover, the beginning and ending dates and times (as noted on the emails) of the dialogue and the number of emails within the dialogue must be disclosed, in addition to other requisite privilege

provided guidance for working with staff to reduce the burden of privilege logging.¹¹² Even state bar associations are considering strategies to reduce the burden of logging.¹¹³

Comment 4(a): Producing parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for the identification and logging of ESI withheld from production on the grounds of privilege.

Sedona Principle 6 provides that “[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their

log disclosure, including the names of all of the recipients of the communications.

112. 77 FED. REG. 59301 (FTC comments on the 2012 revision of Rule of Practice 2.11 (dealing with withholding materials requested by the Commission) notes FTC’s discretion to allow categorical privilege logs: “Parties should bear in mind that, as provided in paragraph (b), staff may relax or modify the specifications of paragraph (a), in appropriate situations, and as the result of any agreement reached during the meet and confer session. Under certain circumstances, less detailed requirements (for example, allowing documents to be described by category) may suffice to assess claims of protected status. This revision is designed to encourage cooperation and discussion among parties and staff regarding privilege claims. Consistent with existing practices, the Commission also codified in this rule its existing authority to provide that failure to comply with the rule shall constitute non-compliance subject to Rule 2.13(a). Paragraph (b) elicited no comments and is adopted as modified.”).

113. NY State Bar Faster-Cheaper-Smarter (FCS) Working Group Proposes adoption of Fed. R. Evid. proposals regarding categorical privilege logs, categories of documents to exclude, metadata-based indexing, and email chain categorization. *Report of the Faster-Cheaper-Smarter Working Group of the Commercial and Federal Litigation Section of the New York State Bar Association*, 12–14, NEW YORK STATE BAR ASSOCIATION, available at <http://nysbar.com/blogs/nybusinesslitigation/FCS%20Report%20-%20Final.pdf>. In addition to metadata-based indexing, they suggest taking small samples of indexed documents for *in camera* review by the court, and then generalizing production or logging from these samples. *Id.*

own electronically stored information.”¹¹⁴ Inherently, this principle also applies in the context of the identification, segregation, and logging of privileged ESI. In this regard, the identification of privileged information is, in large part, a fact-based inquiry. It is the responding party that has access to those facts and is best situated to identify whether particular ESI is subject to a claim of privilege. Similarly, the responding party is also best situated to determine the procedures, methodologies, and technologies appropriate for identifying and logging privileged material.

Comment 4(b): Parties should cooperate to reduce the burdens and costs associated with the identification, logging, and dispute resolution relating to the assertion of privilege with respect to the review of ESI.¹¹⁵

In July 2008, The Sedona Conference released *The Sedona Conference Cooperation Proclamation*, which states:

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information (“ESI”). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive,

114. The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2nd Ed, 2007), available at <https://thesedonaconference.org/download-pub/81>.

115. This comment is not intended to draw into question Sedona Conference Principle 6 for Electronic Document Production which remains a bedrock principle, and, in the context of the assertion of privilege, the responding party is best situated to evaluate the foundation upon which any claim of privilege is made as well as the procedures, methodologies, and technologies for the identification of electronically stored information withheld from production on the grounds of privilege.

but unproductive discovery disputes—in some cases precluding adjudication on the merits altogether—when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.¹¹⁶

The Cooperation Proclamation challenges lawyers to rethink their litigation roles and strategies. The Proclamation notes that lawyers have a duty “to strive in the best interest of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court.” Cooperation in the area of the identifying, logging, and dispute resolution surrounding the assertion of privilege with respect to the review of ESI has the potential to reduce the parties’ risk and costs, while promoting judicial economy.¹¹⁷

To this end, parties should utilize Rule 502 to attempt to agree upon protocols, processes, tools, and technologies to limit the costs and burdens of the identification, review, and logging of privileged information.¹¹⁸ Outlined herein are examples of

116. The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (2009 Supp.).

117. See also The Sedona Conference, *Cooperation Guidance for Litigators & In-House Counsel*, THE SEDONA CONFERENCE, at 15 (March 2011), available at <https://thesedonaconference.org/download-pub/465> (Cooperation Point #12 provides: “Reaching agreement to minimize the cost of privilege reviews may now be easier under Federal Rule of Evidence 502.”). The parties should be guided by the concept of reasonableness embodied in Fed. R. Evid. 502, The Sedona Conference commentaries, and case law. They should balance the chance of inadvertent production with the burden of eliminating inadvertent production.

118. John Rosenthal & Patrick Oot, *Protecting Privilege with Rule 502*, REAL EDISCOVERY, Winter 2010, at 8 (suggesting that any protective order between the parties address not only inadvertent disclosure but also cost-effective privilege logging processes).

strategies that some parties, commentators, or courts have either adopted or urged their adoption, which can dramatically reduce the cost and burden associated with privilege review and logging. The strategies listed are by no means exhaustive, and there are certainly other strategies that parties can design and pursue to facilitate the identification and logging of privileged ESI.

Exclusion of custodians from the logging process. Certain custodians are only likely to have information relevant to the claims and defenses of a particular matter that came to their attention after the litigation commenced or as part of the litigation process. The information they possess, therefore, is likely to be privileged. Examples of such custodians might include outside litigation counsel or in-house counsel responsible for the litigation. The burden of identifying and logging privilege information can be substantially reduced by not having to identify and log privileged information from such custodians.

Exclusion of documents generated after the date the litigation commenced. Another strategy to reduce the burden of privilege review is to omit the requirement to identify or log privileged information generated by or sent to the litigation team after the date of the filing of the lawsuit or when litigation is reasonably anticipated. Many documents generated after that date often fall within work-product protection as they relate to the prosecution or defense of the litigation. Some court rules expressly exclude these records from the privilege log obligation. Of course, each litigation varies and there may very well be categories of relevant information generated after the date of the commencement of the litigation that should be produced.

Use of objective privilege logs. One strategy that has been used with some success is the use of objective privilege logs. Under this strategy, the producing party agrees to run a set of

privilege-screener search terms.¹¹⁹ For any ESI that is identified by the screening process, the producing party provides in the first instance a list of documents that are claimed to be privileged in the form of the objective metadata (author, recipient, date created, document title, etc.) that is generated from the litigation support system. The receiving party can then designate documents or categories of documents on the objective privilege log that it would like the producing party to review in greater detail and provide a traditional Rule 26(b)(5)(A)(ii) log for those entries/categories.¹²⁰ The producing party then has the burden of logging those entries and supporting any claim of privilege. This procedure has been used successfully in complex litigation, resulting in substantial cost savings to the parties.¹²¹

Foregoing logging of documents with privilege redactions. Another strategy to reduce the burden of privilege logging might be to forego logging documents produced with privilege redactions while providing extracted field text from the topmost email to the receiving party. If the author, recipient, and subject information *within* the email chain is also left unredacted (so that this information is available for lower emails in the thread),

119. Designing screener terms should take into consideration the nature of the privileged documents and persons involved in privileged communications. It is recommended that the terms be tested against the data set to ensure that they are reasonably designed to identify potentially privileged documents, without undue false positives or false negatives.

120. Alternatively, an objective log could be produced after conducting a first pass review for responsiveness and privilege. The receiving party could then designate documents or categories of documents on the objective privilege log that it would like the producing party to review in greater detail and provide traditional Rule 26(b)(5)(A)(ii) log entries/categories.

121. The procedure was originally designed by John Rosenthal and William Butterfield and later endorsed by Magistrate Judge Facciola in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL No. 1869, Misc. No. 07-489 (October 8, 2009) (D.D.C.).

it seems that a privilege log would be largely redundant of information already available within the document and supplied in the metadata. Parties would have to consider this option within the context of Rule 26(b)(5)(A), which requires that a party provide sufficient information to allow other parties to assess its privilege claim. However, opposing parties' Rule 26(b)(5)(A) concerns may be able to be addressed by including some type of privilege claim field with the produced metadata or, depending on the technology available, inserting a short description of the privilege claim within the redaction box.

Agreeing to a hierarchical privilege or staged review of privileged ESI. One strategy to consider is to agree to review certain documents individually for privilege whereas other categories are reviewed on a sampling basis. Similarly, agreeing to a staged privilege review in which certain materials are reviewed for privilege and produced or logged first and other materials are reviewed and produced or logged later, if necessary.

Agreeing to a quick peek procedure. A voluntary quick peek provision with appropriate protection for waiver under Rule 502(d) may be appropriate in circumstances or with certain types of ESI such as form contracts or documents.

Categorical approach to identification and logging of privileged ESI. Litigants might also consider excluding certain categories of documents from privilege logs. Under this approach, in lieu of logging at least some portion of the privileged documents, parties would identify categories for privileged documents, provide sufficient information about the privilege claim as well as the general subject matter of the category, and then agree or not agree that such categories should be formally logged. This approach was first discussed by Patrick Oot and Anne Kershaw

in their testimony before the Federal Rules Committee regarding the adoption of Rule 502.¹²² The approach was later expanded upon and formalized by U.S. Magistrate Judge John Facciola of the District of Columbia and Jonathan Redgrave in a law review article suggesting the Facciola-Redgrave Framework, described as follows:

The Framework involves the formal and informal exchange of information to substantiate the categories, with the goal of eliminating many potential disputes. They then propose a requirement of a detailed description for the information withheld as privileged which remains subject to dispute so that the necessity of in camera review is reduced to a minimum. The preparation of this more detailed log for a narrowly targeted population will be more useful and, in effect, much less burdensome because the number of documents which must be logged has been reduced to a minimum.¹²³

The Facciola-Redgrave Framework also sets out proposed limitations for logging the “last-in-time” email in each string where each embedded component of the email is available, and exact duplicates. This approach works particularly well in complex litigation, where many of the privileged documents can be categorized together by subject matter, date, author, or recipient.¹²⁴

122. See also Patrick L. Oot, *The Protective Order Toolkit: Protective Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 (2009).

123. Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 22 (2009).

124. Some courts have found categorical logging to comply with the requirements of Fed. R. Civ. P. 26(b)(5). See, e.g., *GenOn Mid-Atlantic LLC v.*

Comment 4(c): Litigants should use appropriate information search and retrieval methods leveraging processes and technology to improve quality and efficiency in protecting privilege during the discovery process.

Counsel has affirmative ethical duties to understand the risks and benefits of new technologies and to protect confidential client information from unnecessary disclosure.¹²⁵ Software that offers significant improvements in addressing the discovery of ESI can also be harnessed to assist in managing the sometimes “harrowing burden” of addressing privilege review and log preparation.¹²⁶ At this stage there is no “magic bullet”; ultimately, privilege review and document-by-document logging and redaction remain intensely manual processes. However, a

Stone & Webster, 2011 U.S. Dist. LEXIS 133724 (S.D.N.Y. Nov. 10, 2011) (accepting category logs if a document-by-document listing would be unduly burdensome and if a more detailed description would offer no significant material benefit in determining the privileged nature).

125. See 2012 Technology and Confidentiality Amendments to ABA MODEL RULES OF PROF’L CONDUCT, R. 1.1 Competent Client Representation (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice including the benefits and risks associated with relevant technology”) and R. 1.6 Confidentiality of Information (“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.”). See also, The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 SEDONA CONF. J. 217 (2014) at Practice Points 4 & 8.

126. In selecting appropriate technology, counsel should evaluate the data set. For example, scanned paper sources and unsearchable image files offer more limited opportunities to leverage advanced technology, but privilege analysis will be enhanced by rendering these files searchable by applying Optical Character Recognition (OCR) processing. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008) (party claiming inadvertent production of privileged materials erroneously assumed certain .pdf files were not searchable and failed to render other files searchable through optical character recognition (OCR) processing).

well-developed privilege review and logging protocol leveraging available technologies can alleviate the burden. Combining such a protocol with the protection of Rule 502(d) and incorporating the agreed-upon protocol into the parties' discovery plan minimizes the risk of dispute and waiver. The following is a discussion of some of those technologies.

A. Use of Search and Retrieval Technologies Generally

In a leading case assessing the reasonableness of a producing party's privilege and work-product screening and review process, *Victor Stanley, Inc. v. Creative Pipe*,¹²⁷ Judge Grimm considered whether a party's efforts in conducting pre-production privilege screening and review were sufficient to protect it from a finding of waiver under pre-Rule 502 standards. On the limited record provided by defendants (the producing party), the court found that defendants' efforts were inadequate. Judge Grimm noted that the

[u]se of search and information retrieval methodology for the purpose of identifying and withholding privileged or work-product protected information from production, requires the utmost care in selecting methodology that is appropriate for the task because the consequence of failing to do so, as in this case, may be the disclosure of privileged/protected information to an adverse party, resulting in a determination by the court that the privilege/protection has been waived.¹²⁸

Drawing on The Sedona Conference *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-*

127. *Victor Stanley, Inc.*, 250 F.R.D. 251.

128. *Id.* at 262.

Discovery and the flaws outlined by Judge Grimm in *Victor Stanley* in the defendants' search methodology, certain principles can be extrapolated to provide broader guidance in developing standards for assessing reasonableness under Rule 502(b)(2):

- **Anticipate the need to explain and substantiate search and retrieval methodology.** Expect to be required to account for the chosen methodology to the court and parties in legal proceedings, including explaining: reasons for the specific choice of search and retrieval methods in the given legal context, the credentials of those who helped design the strategy and searches that were conducted, and the overall process in which the use of data search and retrieval technology was embedded.
- **Establish quality control measures for assessing the reliability and accuracy of results.** Provide evidence that search results were tested and verified, including through statistically valid sampling techniques.
- **Perform due diligence in selecting technology and services and remain alert to evolving technologies and methods.**
- **Assess data types in selecting appropriate technology and protocols to assist with privilege detection and analysis.**

B. Search Terms

Despite what appears to be an attack on the use of search terms in the context of document review, the use of appropriately crafted and tested search terms can be used to improve the

thoroughness of privilege detection and to create workflow efficiencies.¹²⁹ One method is to run general and matter- or entity-specific privilege ontology searches against potentially responsive data, highlighting terms to facilitate privilege review. A general privilege ontology includes common legal terminology that may indicate the presence of privilege. Terms typically found in a general privilege ontology search range from individual words (for example: privilege, privileged, legal) and phrases (“work product,” “voir dire”) to complex Boolean search logic constructions (privileged /2 confidential; ((A C or AC) /3 (privilege*) or (communication*)). The scope of the general privilege ontology search and exact search syntax will depend on the review platform being used and the level of searching it can support. Terms can also be designed to identify potentially privileged materials from non-domestic sources and in languages other than English. For example, search terms for data including U.K. materials might include local names for an attorney and variant spellings (solicitor, barrister, counselor, QC).

For non-English sources, a case team can work with a legally-trained fluent speaker to develop appropriate terms. For example, search terms used to capture words for attorney in various European languages include: abogad*, advogad*, advokat*, avocat*, Rechtsanwaelt*, and Rechtsanwalt*. A customized ontology can be developed on a case- and entity-specific

129. For example, one court has commented in this context that although it is “universally acknowledged” that keyword searches are helpful for search and retrieval of ESI, “all keyword searches are not created equal,” referencing the “growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review.” Privilege ontologies are often both over-broad and too narrow in identifying privileged records. These issues can be addressed through iterative review and revision of terms supplemented by systematic testing and sampling.

basis. For a company, this may include the names and email addresses of known in-house and outside counsel from the appropriate time period, along with individual email addresses (jdoe@xylaw.com) and general domain names (*@xylaw.com). Software programs that report email domain names in a data set can be used to build searches designed to identify counsel. Some corporate legal department email addresses include an identifying term and this metadata can help with detection. Terms can also be designed to identify data relating to other known litigation and legal issues reflected in the data set.

Search terms might also be used to screen out and segregate documents that are likely to contain privileged material. Records that do not contain privileged terms might be prioritized for review as they are more likely to yield non-privileged documents that can be expedited for production. And records that do not contain privilege terms may be directed to less experienced reviewers, while documents containing privilege terms and data for custodians who are attorneys can be assigned to a more experienced review team.

C. Advanced Search Methodologies

Advanced technologies may further enhance privilege detection and reduce the review burden. For review purposes, email threading and near-duplicate programs can be used to identify records related to those containing privileged ontology terms, allowing entire conversations or successive drafts of documents to be batched for streamlined analysis. Functionality that supports computer-aided review can be harnessed to identify privileged records.

Concept or clustering engines can be used to identify records related to privileged records. These techniques can be especially valuable as pre-production quality control measures when run against the putative production set to locate records

that may not have been recognized as being privileged in the regular review process.

Specific pre-production analysis software is also available for this purpose, running fuzzy hash value and other searches against the data set and load file to detect for qualitative analysis, suspicious records, and metadata included in the production before a transfer is made.

At this stage, few courts have been called on to analyze the use of advanced analytical software in discovery in general, and fewer still have evaluated its application in the context of protecting privilege and work-product protection. Those courts that have assessed the adequacy of a producing party's use of search technology in the context of privilege and work-product protection have generally found the efforts wanting.¹³⁰ Nevertheless, analysis and commentary surrounding these cases with mostly negative outcomes are instructive and provide guidance in developing standards under Rule 502(b)(2) for using technology to help establish that "reasonable steps" were taken to prevent disclosure.

D. Technology-Assisted Review

Numerous authors and ESI vendors have advocated Technology-Assisted Review ("TAR") as a means to potentially reduce the burden on privilege identification and review. Using TAR, a training set comprising a subset of the producing party's documents is fed into a set of algorithms to extrapolate or identify ESI that is similar to the training set. Commentators have

130. See, e.g., *Victor Stanley, Inc.*, 250 F.R.D. 251 (finding that privilege/protection was waived by defendants' "voluntary production" to plaintiff); see also Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up To Its Potential?*, XVII RICH. J.L. & TECH. 8 (2011), available at <http://jolt.richmond.edu/v17i3/article8.pdf>.

argued that TAR might be used to exclude from review documents that have been agreed to as clearly privileged based on sender/recipient/date/content criteria.¹³¹ It is also possible to use TAR to generate categorical logs which include more detail regarding what and why documents are withheld, as well as a log of the documents that were not personally reviewed but fall under the category. On this front, the development, use, and acceptance of TAR engines are in their formative stages. It is too early to tell whether and to what extent these newer technologies can be used effectively in privilege review.

131. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII RICH. J.L. & TECH. 11 (2011), available at <http://jolt.richmond.edu/v17i3/article11.pdf>.

APPENDIX A: RULE 502 & EXPLANATORY NOTE ON EVIDENCE
RULE 502

Prepared by the Judicial Conference Advisory Committee
on Evidence Rules (Revised 11/28/2007)

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(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).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of

a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a federal proceeding; or
- (2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of Court Orders. 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.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

- (1) “attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
- (2) “work-product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have 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. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. MD. 2005) (Grimm, J.) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. Moreover, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to

waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D. D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D. D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure

of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins.*

Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the at-

torney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken”). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D. Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is “constrained by principles of comity, courtesy, and . . . federalism”). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review

and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court 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 as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may 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”). The rule provides a party with a predictable protection from a court order—predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work-product review and retention.

Under 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.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information “in connection with” a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court’s determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and

1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination. The definition of work-product "materials" is intended to include both tangible and intangible information. See *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

APPENDIX B: RULES RELATING TO THE CLAIM OF PRIVILEGE

A. Federal Rules of Civil Procedure Rule 26(b)(5) – Language of the Rule

The 2006 Amendments added a procedure for claiming privilege and work product after inadvertent production during discovery. The rule did not resolve the issue of whether the production constituted a waiver.¹³²

B. Rule 26 of The Federal Rules of Civil Procedure: General Provisions Regarding Discovery; Duty of Disclosure

1. Discovery Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

2. Claims of Privilege or Protection of Trial Preparation Materials

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

3. Summary of Advisory Committee Notes

Subdivision (b)(2). The [2006] amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in lo-

132. 12 OKLA. ST. § 3226(B)(5)(b) (2010) (“[t]his mechanism” does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived).

cating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it

believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of—and the ability to search—much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified

as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

C. Federal Rule of Evidence 502 – Rulemaking and Legislative History of the Rule¹³³

1. Advisory Committee on the Federal Rules of Evidence

On April 24, 2006, The United States Judicial Advisory Committee on the Federal Rules of Evidence held a mini-conference inviting a broad-based coalition of judges, academics, and

133. Patrick L. Oot, *The Protective Order Toolkit: Protective Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237 (2009).

practitioners to discuss the state of privilege protection in litigation and the need for rules reform.¹³⁴ After the hearings, the committee approved the proposed new Rule 502 for publication to the general public and scheduled two hearing dates where the committee would consider public testimony.

On January 29, 2007, there were 24 speakers in courtroom 24A at 500 Pearl Street in New York to testify before The Advisory Committee about the benefits of Proposed Federal Rule of Evidence 502. The participants sought to persuade the Advisory Committee to approve the expansion of privilege protection for all parties in litigation and regulatory filings by providing hard data about the true cost of protecting privilege for a single matter.

Described in part of the testimony was the laborious and tedious process of multi-tier document review that litigants wade-through in an effort to locate relevant documents and to prevent privileged information from disclosure. It was further described that plaintiffs and defendants used this expensive and time-consuming process in hopes to avoid the (pre-Rule 502) perils that occur when a party inadvertently produces a privileged document. One participant revealed to the Advisory Committee the cost of responding to document requests and protecting privilege for a single real-life matter. His corporate employer spent over \$13.5 million reviewing and logging documents for relevancy and privilege in a single matter.¹³⁵ The testimony also focused on the issues associated with manual review in terms of time, cost, accuracy, and consistency.

134. The materials for the April 24, 2006, meeting can be found at <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-evidence-april-2006>. The Sedona Conference Advisory Board was represented at the meeting by several members and observers.

135. See Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, ID Number: G00148170, KNOWLEDGE

The testimony discussed alternate, less-expensive techniques to protect privilege that would be possible if Rule 502 was enacted. For example, it was explained how a litigant could “bucket” or “set-aside” documents that contain law-firm domain names and documents which advanced search engines can flag as potentially privileged.¹³⁶ If a producing party had a multi-jurisdictionally enforceable Protective Order under Rule 502 with a claw-back, that party could feel more comfortable rapidly producing or even providing an initial quick-peek to the remaining corpus of data. The parties could also exchange electronically exported logs of the “potentially privileged” withheld bucket. Subsequently, the requesting party could develop better targeted search methods and requests for the set-aside data sets. Allowing litigants to conduct a real initial investigation furthers both a better understanding of the case and the goals of Federal Civil Procedure Rule 1.¹³⁷

2. Advisory Committee Report

After the public hearings, on May 15, 2007, the Advisory Committee issued a Report of the Advisory Committee of Evidence Rules, modifying the previously published proposed

STRATEGY SOLUTIONS (April 20, 2007), *available at* http://www.knowledgestrategysolutions.com/wp-content/uploads/cost_of_ediscovery_threatens_148170-2.pdf. Coincidentally, this 2005 statistic is often cited as one of the few data-points available regarding the cost of document review in complex litigation and regulatory filings in the United States. *See also* Adreas Kluth, *The Big Data Dump*, THE ECONOMIST (August 28, 2008), <http://www.economist.com/node/12010377>. *See also*, Daniel Fisher, *The Data Explosion*, FORBES (October 1, 2007), <http://www.forbes.com/forbes/2007/1001/072.html>.

136. *See* Report of the Advisory Committee on Rules of Evidence (May 15, 2007), *available at* <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-evidence-may-2007>.

137. FED. R. CIV. P. 1.

Rule.¹³⁸ The report dropped the selective waiver provision, stretched the jurisdiction of the rule (and Protective Orders) to state forums (for disclosures made in federal court) and productions to federal agencies, almost eliminated subject-matter waiver, and instituted principles of reasonableness to avoid waiver for inadvertent disclosure.¹³⁹

The report cited precedent that “set out multi-factor tests for determining whether the inadvertent disclosure is a waiver.”¹⁴⁰ Although the report did not codify the inquiry, it included a pentad test drawn from the case law. In determining whether waiver applies for inadvertent disclosures, courts should consider:

- (1) the reasonableness of the precautions taken;
- (2) the time taken to rectify the error;
- (3) the scope of discovery;
- (4) the extent of discovery; and
- (5) the over-riding issue of fairness.¹⁴¹

The Advisory Committee also provided guidance to courts with additional considerations when interpreting the *reasonableness of the precautions taken*. Interestingly, the additional considerations refresh twenty-year-old waiver tests with elements contemplating the massive data volumes litigants face when managing discovery. The reasonableness considerations include:

138. See Report of the Advisory Committee on Evidence Rules, *available at* <http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-evidence-may-2007>.

139. *Id.*

140. *Id.* (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985)).

141. *Id.*

- (1) the number of documents to be reviewed;
- (2) the time constraints for production;
- (3) the use of software applications and linguistic tools in screening for privilege; and
- (4) the implementation of an efficient records management system before litigation.¹⁴²

Finally, the committee expressly stated that Rule 502 does not require a post production review, but litigants should follow up on any obvious indications of inadvertent production.¹⁴³

3. Legislative Enactment

Both The Committee on Rules of Practice and Procedure and The Judicial Conference approved the proposed Rule for transmittal to Congress.¹⁴⁴ On September 26, 2007, Hon. Lee Rosenthal, Chair of The United States Judicial Conference transmitted the resulting proposed Rule 502; developed from over 70 public comments, the testimony of over 20 witnesses, the views of the Subcommittee on Style, and the Advisory Committee's own judgement.¹⁴⁵ The transmittal letter also included a proposed Committee Note that the Judicial

142. *Id.*

143. *Id.*

144. Because the draft Rule involved an evidentiary privilege, congressional action was required before the Rule could be adopted. *See* 28 U.S.C. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

145. Letter from Hon. Lee H. Rosenthal to Hon. Patrick Leahy, Hon. Arlen Specter, Hon. John Conyers, Jr., and Hon. Lamar Smith, transmitting Proposed New Federal Rule of Evidence 502 to Judiciary Committee (September 26, 2007), *available at* http://federalevidence.com/pdf/2008/06-June/Hill_Letter_EV_502on9-26-07.pdf.

Conference sought to include in the legislative history of Rule 502.¹⁴⁶

Senator Leahy introduced the proposed rule in the Senate on December 11, 2007. On January 31, 2008, the Senate Judiciary Committee approved the bill unanimously without amendment and published its findings to the full Senate with a written report.¹⁴⁷ After incorporating the Advisory Committee Notes, the bill passed in the Senate on February 27, 2008, and The House of Representatives on September 8, 2008. The bill was enacted as Public Law 110-322 on September 18, 2008, to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work-product doctrine.¹⁴⁸

146. *Id.*

147. S. REP. NO. 110-264 (February 25, 2008) ("The rule proposed by the Standing Committee is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens associated with the conduct of diligent electronic discovery.").

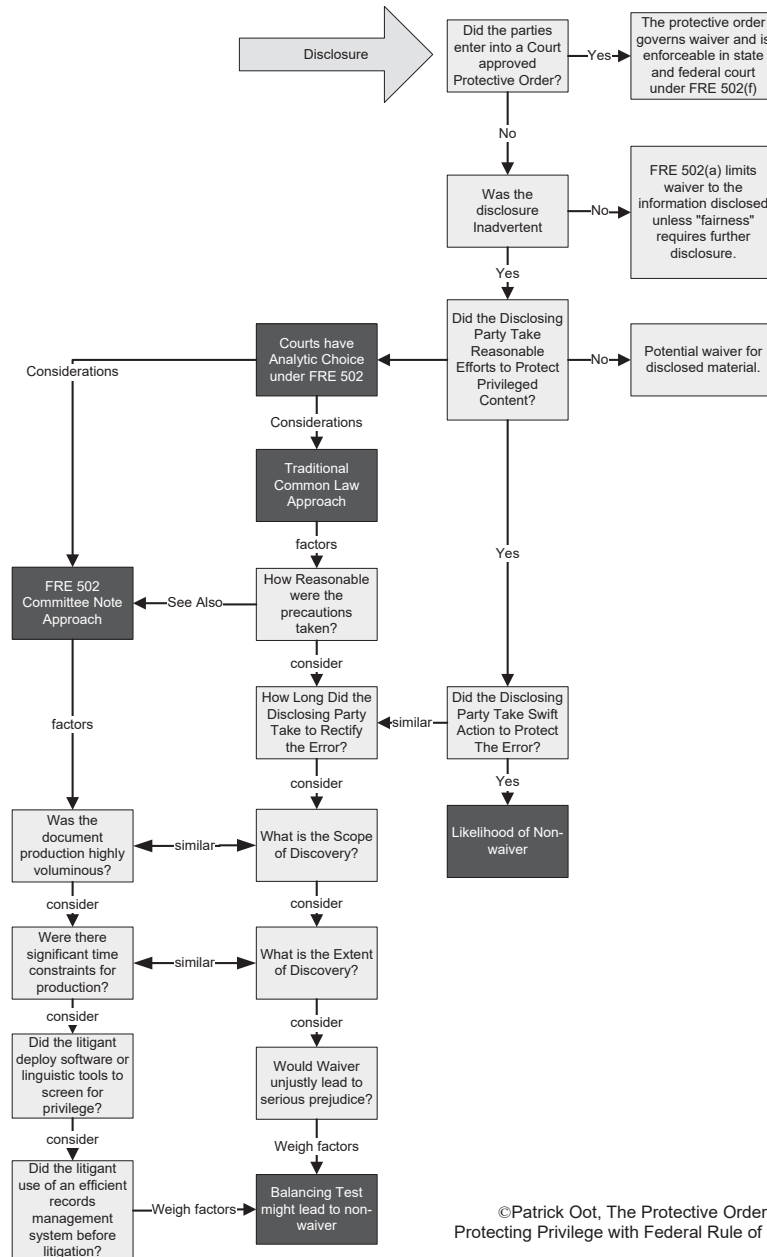
148. See 154 CONG. REC. S1317 (Feb. 27, 2008) (remarks of Sen. Leahy) ("I ask unanimous consent to have printed in the Record the Judicial Conference's Committee Note to illuminate the purpose of the new Federal Rule of Evidence and how it should be applied."); 154 CONG. REC. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson Lee) ("In order to more fully explain how the new rule is to be interpreted and applied, the Advisory Committee also prepared an explanatory note, as is customary, for publication alongside the text of the rule. The text of the explanatory note appears in the Record in the Senate debate."). Administration of George W. Bush, Acts Approved by the President, 1234 (2008).

4. Language of Federal Rule of Evidence 502

Rule 502(a)	Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver: Rule 502(a) limits waiver of the privilege normally to the communication or materials disclosed, and not to the entire subject matter of the communication. The scope of any waiver is therefore confined to the information disclosed unless “fairness” requires further disclosure.
Rule 502(b)	Inadvertent Disclosure: Rule 502(b) clarifies that inadvertent disclosure does not result in waiver when the holder of the privilege “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”
Rule 502(c)	Disclosure Made in a State Proceeding: Rule 502(c) addresses circumstances where disclosure was first made in a state proceeding and is later considered in a federal proceeding. The provision applies the federal or state law that furnishes the greatest protection to the privilege and work product.
Rule 502(d)	Controlling Effect of a Court Order: Rule 502(d) recognizes that a federal court may enter a confidentiality order providing “that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.”
Rule 502(e)	Controlling Effect of a Party Agreement: Rule 502(e) allows parties to enter into an agreement to limit the effect of any disclosure. The agreement is only binding on the parties unless the agreement is included in a court order.
Rule 502(f)	Controlling Effect of This Rule: Rule 502(f) notes that the rule “applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings” and “even if state law provides the rule of decision.”
Rule 502(g)	Definitions: Rule 502(g) includes definitions for “attorney-client privilege” and “work-product protection.”

APPENDIX C: NAVIGATING FRE 502 IN FEDERAL COURT

Navigating FRE 502 in Federal Court



APPENDIX D: MODEL RULE 502(d) ORDER

[COURT NAME]
[DISTRICT OR COUNTY]

)		Case No. _____
Plaintiffs,)		
)		
vs.)		
)		
)		
)		
Defendants.)		
)		
)		

[PROPOSED] STIPULATED ORDER REGARDING THE
DISCLOSURE OF PRIVILEGED INFORMATION

The [insert name of parties], by and through their respective counsel, have jointly stipulated to the terms of Stipulated Order Governing the Disclosure of Privileged Information, and with the Court being fully advised as to the same, it is hereby ORDERED:

I. APPLICABILITY

1. This Order shall be applicable to and govern all deposition transcripts and/or videotapes, and documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, affidavits, declarations and all other information or material produced, made available for inspection, or otherwise submitted by any of the parties in this litigation as well as testimony adduced at trial or during any hearing (collectively "Information").

II. PRODUCTION OF DISCOVERY MATERIALS CONTAINING
POTENTIALLY PRIVILEGED INFORMATION

1. The production of any privileged or otherwise protected or exempted Information, as well as the production of Infor-

mation without an appropriate designation of confidentiality, shall not be deemed a waiver or impairment of any claim of privilege or protection, including, but not limited to, the attorney-client privilege, the protection afforded to work-product materials, or the subject matter thereof, or the confidential nature of any such Information, as to the produced Information, or any other Information.

2. 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).
3. The producing party must notify the receiving party promptly, in writing, upon discovery that a document has been produced. Upon receiving written notice from the producing party that privileged and/or work-product material has been produced, all such Information, and all copies thereof, shall be returned to the producing party within ten (10) business days of receipt of such notice and the receiving party shall not use such information for any purpose, except as provided in paragraph 5, until further Order of the Court. The receiving party shall also attempt, in good faith, to retrieve and return or destroy all copies of the documents in electronic format.
4. The receiving party may contest the privilege or work-product designation by the producing party, shall give the producing party written notice of the reason for said disagreement. However, the receiving party may not challenge the privilege or immunity claim by arguing that the disclosure itself is a waiver of any applicable privilege. In that instance, the receiving party shall, within fifteen (15) business days

from the initial notice by the producing party, seek an Order from the Court compelling the production of the material.

5. Any analyses, memoranda or notes which were internally generated based upon such produced Information shall immediately be placed in sealed envelopes, and shall be destroyed in the event that (a) the receiving party does not contest that the Information is privileged, or (b) the Court rules that the Information is privileged. Such analyses, memoranda or notes may only be removed from the sealed envelopes and returned to its intended purpose in the event that (a) the producing party agrees in writing that the Information is not privileged, or (b) the Court rules that the Information is not privileged.
6. 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.

STIPULATED AND AGREED TO on _____.

[INSERT NAME OF PLAINTIFF]

By: _____

[INSERT NAME OF DEFENDANT]

By: _____

IT IS SO ORDERED:

[Insert name.]

United States District Court Judge

DATED:

Dated: _____

APPENDIX E: MODEL RULE 502(d) ORDER
POSTED BY HON. ANDREW J. PECK (S.D.N.Y.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
:
: RULE 502(d) ORDER
:
:
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----- X

ANDREW J. PECK, United States Magistrate Judge:

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.

SO ORDERED.

Dated: New York, New York

[DATE]

Andrew J. Peck
United States Magistrate Judge

Copies by ECF to: All Counsel
Judge _____

APPENDIX F: FEDERAL RULE 502—STATE LAW ANALOGUES

Federal Rule 502 applies to disclosures in federal proceedings and to federal offices and agencies. The rule addresses waiver in connection with such disclosures in the initial federal proceeding and in subsequent federal and state proceedings. Rule 502 also contains a provision concerning waiver in a federal court with respect to a production in a prior state proceeding.

However, the applicable state's privilege, work product, and waiver law govern disclosures made solely in a state proceeding and may govern disclosures made initially in a state proceeding, if the applicable state law affords more protection than federal law. Traditionally, different states have employed different tests to determine whether the attorney-client privilege or the work-product doctrine has been waived.

Since Federal Rule 502 was enacted in September 2008, a number of states have adopted versions of Federal Rule 502. For example, Arizona, Alabama, Delaware, Illinois, Indiana, Iowa, Kansas, Vermont, Virginia, Washington, and West Virginia have enacted rules or statutes that contain most of the provisions of Federal Rule 502, namely 502(a), (b), (d), (e), and (g).¹⁴⁹

149. ARIZ. R. EVID. 502 (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in an Arizona proceeding, and subsection (c) of the Arizona rule addresses disclosures in federal proceedings and another state's proceedings);

ALA. R. EVID. 510 (contains analogues to Fed. R. Evid. 502(a), (b), (c), (d), (e), and (g) with respect to disclosures in an Alabama proceeding);

DRE 510 (Delaware Uniform Rule of Evidence 510 contains analogues to Fed. R. Evid. 502(a) – (e) with respect to disclosures made to law enforcement agencies and in state proceedings);

ILL. R. EVID. 502 (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in an Illinois proceeding or to an Illinois office

The Alabama, Arizona, Illinois, Kansas, Vermont, Washington, and West Virginia enactments also contain provisions concerning disclosures made in federal proceedings or another state's proceedings, which are analogues to Federal Rule 502(c).¹⁵⁰ Wisconsin's statute contains analogues to Rule 502(a) and (b).¹⁵¹

or agency, and subsection (c) of the Illinois rule addresses disclosures in federal proceedings and another state's proceedings, and disclosures to federal, or another state's, offices or agencies);

IND. R. EVID. 502 (contains analogues to Fed. R. Evid. 502(a), (b), (d), and (e) with respect to disclosures in court proceedings);

IOWA R. EVID. 5.502 (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in court or agency proceedings);

KAN. STAT. ANN. § 60-426a (West 2012) (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in court or agency proceedings, and subsection (c) of the Kansas rule addresses non-Kansas proceedings);

VT. R. EVID. 510(b)(1-6) (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in Vermont proceedings or to a Vermont office or agency, and subsection (3) of the Vermont rule addresses non-Vermont proceedings);

VA. CODE ANN. § 8.01-420.7 (West 2012) (contains analogues to Fed. R. Evid. 502(a), (b), (d), and (e) with respect to disclosures in a proceeding or to any public body);

WASH. R. EVID. 502 (contains analogues to Fed. R. Evid. 502(a), (b), (d), (e), and (g) with respect to disclosures in Washington proceedings or to Washington offices or agencies, and subsection (c) of the Washington rule addresses non-Washington proceedings);

W. VA. R. EVID. 502 (contains analogues to Fed. R. Evid. 502(a), (b), (c), (d), (e), and (g) with respect to disclosures in a West Virginia court or agency).

150. ALA. R. EVID. 510; ARIZ. R. EVID. 502(c); ILL. R. EVID. 502(c); KAN. STAT. ANN. § 60-426a(c) (West 2012); VT. R. EVID. 510(b)(3); WASH. R. EVID. 502(c); W. VA. R. EVID. 502(c).

151. WIS. STAT. § 905.03(5)(a) and (b) (2013) (contain analogues to Fed. R. Evid. 502(a) and (b), although the Wisconsin statute uses the term "inadvertent" instead of "intentional" in its Rule 502(a) counterpart).

Maryland's rule predated Federal Rule 502 but has provisions that are analogous to Rule 502(b), (d), and (e).¹⁵²

The rules of several states only contain Rule 502(b) equivalents.¹⁵³ Most of those rules provide, in substance, that an inadvertent disclosure does not operate as a waiver if the privilege holder took reasonable steps to prevent the inadvertent disclosure and promptly took reasonable steps to rectify the inadvertent disclosure after it was discovered.

It is also worth noting that the Louisiana rule requires the receiving party to return or promptly safeguard the inadvertently produced privileged material—without notification from the producing party—if it is clear that the material received is privileged.¹⁵⁴ That provision is more akin to the ethical requirements of certain jurisdictions under those circumstances.

152. MD. CODE ANN., MD. RULES § 2-402(e)(3) and (4) (West 2012) (contains analogues to Fed. R. Evid. 502(b), (d), and (e)).

153. TENN. R. EVID. 502 (generally similar to Fed. R. Evid. 502(b)); LA. CODE CIV. PROC. ANN. art. 1:1424(D) (2012) (generally similar to Fed. R. Evid. 502(b) in that an inadvertent disclosure made in connection with litigation or administrative proceedings “does not operate as a waiver if [the privilege holder] took reasonably prompt measures” after learning of “the disclosure, to notify the receiving party of the inadvertence of the disclosure and the privilege asserted.” After receiving such notice, “the receiving party shall either return or promptly safeguard the [inadvertently disclosed] material,” but may assert waiver.);

OKLA. STAT. tit. 12, § 2502(E) and (F) (2012) (Subsection E is similar to Fed. R. Evid. 502(b). Subsection F addresses waiver in connection with productions to a “governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority.”).

154. LA. CODE CIV. PROC. ANN. art. 1:1424(D) (2012) (Without receiving notice from the producing party, “if it is clear that the material received is privileged and inadvertently produced, the receiving party shall either return or promptly safeguard the material, and shall notify the sending party . . . with the option of asserting a waiver.”).

Some states, such as Arkansas, Florida, Massachusetts, New Hampshire, and Texas, have rules that address waiver in connection with inadvertent productions.¹⁵⁵ Those statutes do not, however, mirror the language of Federal Rule 502(b) and do not contain other subsections of Rule 502.

155. ARK. R. EVID. 502(e) and (f) (Under subsection (e) of the Arkansas rule, an “[i]nadvertent disclosure does not operate as a waiver if the disclosing party follows the procedure specified in” the Arkansas analogue to Fed. R. Civ. P. 26(b)(5) and, if challenged, “the circuit court finds in accordance with [the Arkansas analogue to Fed. R. Civ. P. 26(b)(5)(D)] that there was no waiver.” Subsection (f) of the Arkansas rule provides that a disclosure “to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.”);

FLA. R. CIV. P. Rule 1.285(a) and (c) (2011) (Under subsection (a) “[a]ny party, person, or entity, after inadvertent disclosure of any materials pursuant to these rules, may thereafter assert any privilege recognized by law as to those materials. This right exists without regard to whether the disclosure was made pursuant to formal demand or informal request.” Subsection (c) of the Florida rule allows any party receiving notice of inadvertent disclosure to challenge the assertion of privilege on the grounds that, *inter alia*, “[t]he circumstances surrounding the production or disclosure of the materials warrant a finding that the disclosing party, person, or entity has waived its assertion that the material is protected by a privilege. . . .”);

MASS. GUIDE EVID. § 523(c)(2) (2012) (“disclosure does not waive the privilege if . . . (2) there is an unintentional disclosure of a privileged communication and reasonable precautions were taken to prevent the disclosure.”);

N.H. R. EVID. 511 (“A claim of privilege is not defeated by . . . a disclosure that was made inadvertently during the course of discovery.”);

TEX. R. CIV. PROC. § 193.3(d) (West 2012) (“Privilege Not Waived by Production. A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted.”).

During the initial stages of the rulemaking process, proposed Federal Rule 502 contained a provision addressing non-waiver for the production of privileged or protected materials to a governmental entity in connection with its investigation, regardless of whether the production was inadvertent. That provision proved to be controversial and was not included in the final version of Rule 502 that was submitted to Congress. Nevertheless, the Arkansas rule extends non-waiver protection to disclosures made to government entities, regardless of whether the disclosure was inadvertent.¹⁵⁶ In that respect, Arkansas' rule is broader than Federal Rule 502. The Oklahoma rule similarly provides that a production to a governmental entity will not result in a waiver to non-governmental entities or persons but further provides for the possible waiver of undisclosed communications on the same subject matter.¹⁵⁷

States that have not adopted versions of Federal Rule 502 may nevertheless have rules similar to Federal Rule of Civil Procedure 26 or otherwise permit parties to include non-waiver or clawback provisions in protective orders. Accordingly, clawback orders may still be a valuable tool in states that have not

156. ARK. R. EVID. 502(f) (a disclosure "to a governmental office or agency in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.").

157. OKLA. STAT. tit. 12, § 2502(F) (2012) (Under subsection F, the disclosure of attorney-client privileged or work-product information "to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver . . . in favor of nongovernmental persons or entities." Further, "[d]isclosure of such information does not waive the privilege or protection of undisclosed communications on the same subject matter unless: 1. The waiver is intentional; 2. The disclosed and undisclosed communications or information concern the same subject matter; and 3. Due to principles of fairness, the disclosed and undisclosed communications or information should be considered together.").

adopted a Rule 502 analogue, even if those orders do not provide all of the protections afforded by a Federal Rule 502(d) order.