

The Sedona Conference WG1 Brainstorming Group Outline re: Effective Use of Non-Waiver Orders Under Federal Rule of Evidence 502(d) (Oct. 2019)

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Outline re: Effective Use of Non-Waiver Orders Under Federal
Rule of Evidence 502(d) (October 2019)**

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**The Sedona Conference WG1
Effective Use of Non-Waiver Orders Under Federal Rule of Evidence 502(d)
Brainstorming Group
Detailed Outline for Proposed Publication**

Table of Contents

I. Introduction	1
A. Why is this Publication Needed?	1
B. Federal Rule of Evidence 502(d), Generally	1
C. Brief History of Rule 502 generally	1
D. The Benefits of Rule 502(d) Orders for Litigants, Lawyers, and the Courts	1
E. The Challenges Posed by Rule 502(d) Orders to Litigants, Lawyers, and the Courts	2
F. Past Sedona Conference Publications Addressing 502(d)-Related Issues	2
G. What this Publication Does that the Others Have Not	3
II. 502(d) Orders, Generally	4
A. Meaning of 502(d)'s various provisions	4
1. What does 502(d) say?	4
2. Definitions?	4
3. How have Courts Addressed Definitions and 502(d) Language?	4
B. "Other" Privileges Covered by 502(d) Orders	4
1. Generally Limited to Attorney-Client and Work Product Privileges	4
2. Courts Have Permitted Extension to Other Privileges	5
C. Form of 502(d) Orders	5
1. The Consent of All Parties is Not Necessary	5
2. 502(d) Orders Can Be Incorporated into Larger Discovery Orders/Protocols	6
D. 502(b) Orders versus 502(d) Orders	7
1. 502(b) Is the Default Rule	7
2. The Different Requirements of 502(b) and 502(d)	7
3. When Should 502(b) Be Used Instead of 502(d)?	8
E. Application in Non-Federal Proceedings	8
1. Arbitration	8
2. Non-Judicial Government Proceedings (e.g., CIDs)	8
3. State Proceedings Without a Parallel 502(d)	9
F. Benefits of 502(d) Orders	10
III. Ethical Considerations When Proceeding Under 502(d) Orders	11
1. The Responding Party	11
2. The Requesting Party	12
IV. 502(d) and "Quick Peek"	13
A. Agreed "Quick Peek"	13
1. When a "Quick Peek" Agreement May be Appropriate	13
2. Considerations When Entering into a "Quick Peek" Agreement	14

This document was created for discussion purposes only for the 2019 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by e-mail to comments@sedonaconference.org.

B.	Compelled “Quick Peek”	14
1.	Courts Declining “Quick Peek”	14
2.	Courts Ordering “Quick Peek”	16
V.	<i>Proposed Best Practices for Addressing Current Practice Issues with 502(d) Orders</i>	17
A.	Challenges with 502(d) Orders (And How They Can Be Addressed)	17
1.	Awareness, Familiarity, and Incentives	17
2.	Drafting & Procedure	18
3.	Clawback Provisions	19
4.	Shifting the Burden of Privilege Review to the Requesting Party	22
VI.	<i>Model 502(d) Order</i>	25
A.	“Best” Standard Language	25
B.	Insert for Quick Peek Issues	25
C.	Insert for Clawback Issues	25
VII.	<i>Appendices</i>	26
A.	Appendix A: Key 502(d) Cases about which Counsel and Courts Should Be Aware	26
B.	Appendix B: Model 502(d) Orders from District Courts	26
C.	Appendix C: State 502(d) Analogs	26

I. Introduction

A. Why is this Publication Needed?

- Litigants and courts have identified concerns with current practices relating to 502(d) orders that are not addressed by Sedona papers. A proposed paper can identify these concerns and delineate “best practices” to help litigants and the courts avoid these pitfalls.
 - o Unclear drafting language
 - o Shifting burdens from responding party to requesting party
 - o Late or overly broad clawbacks
 - o The ability of a requesting party to use the clawed back document to challenge the assertion of privilege
- Lack of awareness of Rule 502(d) orders and their potential benefits.

B. Federal Rule of Evidence 502(d), Generally

- 502(d) generally provides that the parties may request – and the court can enter – an order providing that neither the attorney-client nor work product privileges (collectively the “privilege”) are waived in any federal or state proceeding by the disclosure of documents in that litigation

C. Brief History of Rule 502 generally

- *Intent for the rule from Advisory Committee Notes as Rule 502(a)-(g):*
 - o Implemented in 2008
 - o Address the prohibitive costs of eDiscovery review by reducing the need for in-depth review of every document for privilege
 - o Reduce the risk of subject matter waiver
 - o Protect the privilege outside current litigation
 - o Reduce over-broad claims of privilege (i.e., over-designating documents as privileged)
 - o Caselaw on waiver is inconsistent
- *Specific to Section 502(d):*
 - o Ensure an order on the topic is enforceable as to the disclosures made in federal court
 - o The rule was intended to allay concerns that an inadvertent production could result in a waiver of the applicable privilege under 502(b), or even a subject matter waiver

D. The Benefits of Rule 502(d) Orders for Litigants, Lawyers, and the Courts

- Prevents waiver of produced privileged documents without the need for any further showings (“Get out of jail free card”)
- Streamline review and reduce costs
- Avoid the costs and delays of satellite discovery and motion practice regarding the responding party’s efforts to satisfy the requirements of Rule 502(b)

E. The Challenges Posed by Rule 502(d) Orders to Litigants, Lawyers, and the Courts

- Ethical considerations for both the responding party and requesting party
- Shifting review of privilege to requesting party
- If parties are now faced with the possibility of finding privileged documents in every step of litigation, adds burden/time to litigation (ex: during depositions)
- Drafting errors with 502(d), which inject uncertainty by confusing 502(b) and 502(d) standards
- “Quick Peek”
- Delayed clawbacks/prejudice to opposing parties
- Interplay with proportionality

F. Past Sedona Conference Publications Addressing 502(d)-Related Issues

- *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 147-62 (2018)
 - o “An effective Rule 502(d) order need not be complex and can simply provide that: (a) the production of privileged or work-product protected documents, including ESI, is not a waiver, whether the production is inadvertent or otherwise, in the particular case or in any other federal or state proceeding, and (b) nothing contained in the order limits a party's right to conduct a review for relevance and the segregation of privileged information and work product material prior to production.”
- *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103-06, 130-40 (2016)
 - o Establishes 4 Principles:
 - 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 identification, logging, and dispute resolution relating to the assertion of privilege
 - o Model 502(d) order
 - o State law analog 502(d) provisions
- *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 SEDONA CONF. J. 229 (2009) ([link](#))
 - o The first part of this paper explains in more detail how Rule 502(d) covers quick peek productions, and how it relates to other subdivisions in Rule 502.
 - o In light of the viability of quick peek productions, the second part of the paper examines whether a court can compel quick peek productions on non-consenting parties.
- Daniel J. Capra, et al., *Limitations on Privilege Waiver under New Federal Rule of Evidence 502* (Sedona Conference Voices from the Desert Series CD-ROM, rel. 25, Nov. 2008)

- Other Publications of Note:
 - o John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 Fordham L. Rev. 1589 (2013) (arguing that “lawyers should maximize the use of Rule 502(d) orders”)

G. What this Publication Does that the Others Have Not

- Identifies practice issues with 502(d) orders that are not addressed by current Sedona publications.
- Recommends best practices to avoid, ameliorate, or otherwise address the 502(d) order practice issues that have arisen since the publication of *The Sedona Principles, Third Edition* and *The Sedona Conference Commentary on Protection of Privileged ESI*.
- Provides model language the counsel and courts can insert into a 502(d) order to address current practice issues with 502(d) orders.

II. 502(d) Orders, Generally

A. Meaning of 502(d)'s various provisions

1. *What does 502(d) say?*

- (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

2. *Definitions?*

- “Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and
- “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

3. *How have Courts Addressed Definitions and 502(d) Language?*

- Courts rely on applicable state law to analyze attorney-client privilege claims, and courts look to federal law to review claims of work product.
 - o *City of Almaty, Kazakhstan v. Ablyazov*, No. 15-CV-05345 (AJN) (KHP), 2019 WL 2865102 (S.D.N.Y. July 3, 2019)
- When reviewing the language of 502(d), courts often consider the plain language of the rule and the rule’s purpose.
 - o *Winfield v. City of New York*, No. 15-cv-05236 (LTS) (KHP), 2018 WL 2148435 (S.D.N.Y. May 10, 2018)
 - o *Arconic Inc. v. Novelis Inc.*, No. 17-cv-1434, 2019 WL 911417 (W.D. Pa. Feb. 26, 2019)

B. “Other” Privileges Covered by 502(d) Orders

1. *Generally Limited to Attorney-Client and Work Product Privileges*

- Privileges other than work product or attorney/client generally are not addressed in a 502(d) order
- The Rule limits itself to “disclosure of a communication or information covered by the attorney-client privilege or work-product protection”
- Courts don’t appear to expressly discuss the fact that the plain language of 502 covers only attorney-client privilege.
 - o For example, the Seventh Circuit Council on eDiscovery and Digital Information Model Standing Order does not limit itself to attorney-client privilege but instead requires counsel to meet and confer regarding “the potential need for a protective order and any procedures to which the parties might

agree 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.”

- *See Kappel v. Dolese Bros. Co.*, No. CIV-18-1003-C, 2019 WL 2411445, at *1 (W.D. Okla. June 7, 2019) (denying Defendant’s motion for a protective order including an order under 502(d), but limiting the discussion to “privilege” in general rather than attorney-client)

2. Courts Have Permitted Extension to Other Privileges

- Western District of Washington Model Stipulated Protective Order: “[P]ursuant to Fed. R. Evid. 502(d), the production of any documents in this proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute a waiver by the producing party of any privilege applicable to those documents, including the attorney-client privilege, attorney work-product protection, *or any other privilege or protection recognized by law.*” (emphasis added)
- *Digital Assurance Certification, LLC v. Pendolino*, No. 6:17-cv-72-Orl-41TBS, 2019 WL 161981, at *6 (M.D. Fl. Jan. 10, 2019): “Pursuant to Federal Rule of Evidence 502(d), by engaging in the protocol established in this Order, the parties shall not be deemed to have waived the attorney-client privilege, work product protection, *or any other privilege or immunity* with respect to such disclosure in this case or in any other federal or state proceeding.” (emphasis added).
- *ANZ Advanced Techs., LLC v. Bush Hog, LLC*, No. 09-00228-KD-N, 2010 WL 11575131, at *11 (S.D. Al. May 4, 2010): “Pursuant to Federal Rule of Evidence 502(d), by engaging in the protocol described in this Order, the parties will not waive the attorney-client privilege, work product protection, and/or *any other privilege or immunity* with respect to such disclosure in this case or in any other Federal or State proceeding.” (emphasis added).
- *Hill Phoenix Inc. v. Classic Refrigeratino Social, Inc.*, No. 8:19-cv-00695-DOC (JDEx), 2019 WL 3942960, at *7 (C.D. Cal. Aug. 21, 2019): “Pursuant to Federal Rule of Evidence 502(d) and (e), the parties agree to the following procedures for the inadvertent disclosure of privileged materials For the purpose of this order, ‘Protected Information’ means documents and information in any form . . . protected from discovery by the attorney-client privilege, the work-product doctrine . . . *and any other recognized privilege or protection* with regard to discovery.” (emphasis added).

C. Form of 502(d) Orders

1. The Consent of All Parties is Not Necessary

- 502(d) orders do not require consent or agreement from all parties to litigation. In addition to a joint application, either party may enter a contested motion for a 502(d) order
- A court can *sua sponte* put in place a 502(d) order (esp. by local rule). *Rajala v. McGuide Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).
- A party can file a motion for protective order demonstrating good cause for necessity of non-waiver provision.

2. *502(d) Orders Can Be Incorporated into Larger Discovery Orders/Protocols*

- 502(d) orders can be incorporated into other discovery protocols and orders, such as the protective order, but this is not necessary.
 - o It can be more efficient to have a single, clear, comprehensive order regarding the protection for privileged and/or confidential documents
 - o On the other hand, protective and ESI orders can take a long time to negotiate, and a stand-alone 502(d) order could be entered if the parties agree that one should be entered
- Courts have begun suggesting standardized templates for protective or ESI orders that incorporate 502(d) language.
 - o *See, e.g.,* Western District of Washington Stipulated Protective Order ([link](#))
- Standardized templates available through individual courts, districts, or organizations encourages parties to enter such comprehensive protective orders and reduce negotiation time
- The failure to have a comprehensive protective order may lead to unintended outcomes or require the court to infer intent based on sources other than the agreements of the parties.
 - o *See irth Sols., LLC v. Windstream Communs., LLC*, No: 2:16-cv-219, 2018 WL 575911 (S.D. Ohio Jan. 26, 2018) (finding that the agreement between the parties was not detailed enough to constitute something enforceable between the parties because the intentions were not clear so the court had to conduct its own analysis under 502(b).)
- But, if the 502(d) order is incorporated into a more comprehensive discovery order, the parties should consider how the 502(d) order interplays with other privileges and other provisions in that order, including:
 - o The clawback of confidential material separate and apart from the clawback of inadvertently produced privileged material; and
 - o The application of and clawback procedure for any other privileges (*e.g.*, bank secrecy, governmental privileges);
 - o Upon clawback, the duties of the requesting party (*e.g.*, should the requesting party segregate or destroy privileged documents upon notification, and how quickly does the requesting party need to respond to the clawback?);
 - o Upon clawback, the duties of the responding party (*e.g.*, what level of specificity on the assertion of privilege must the responding party provide, and how quickly does the responding party need to provide this information?);
 - o Expressly reject the reasonableness analysis under 502(b) and fully adopt the protections under 502(d);
 - o The timing, contents, and specificity required for privilege logs; and
 - o How to contest an assertion of privilege.
- The parties could address the above issues through entry of an order pursuant to Rule 502(d)
 - o *See Great-West Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, No. 2:11-cv-02082-APG-CWH, 2013 WL 5332410 (D. Nev. Sept. 23, 2013)
 - o *See Certain Underwriters at Lloyd's, London v. AMTRAK*, 218 F. Supp. 3d 197 (E.D. NY 2016).
- Consider the three approaches of interplay set forth by *irth Sols*

- *See Irth Sols., LLC v. Windstream Communs. LLC*, No. 2:16-cv-219, 2017 WL 3276021 (S.D. Ohio Aug. 2, 2017) (contemplating three approaches to clawback agreements: (1) return of inadvertently produced documents, regardless of the terms of the clawback agreement and the care taken by the responding party; (2) waiving the privilege assertion where the production is completely reckless; and (3) application of Fed. R. Evid. 502(b)'s reasonableness prong if the clawback agreement does not include specific terms explaining what precautions must be taken to meet the reasonableness standard.)

D. 502(b) Orders versus 502(d) Orders

1. 502(b) Is the Default Rule

- Unless there is a 502(d) order, then 502(b) automatically governs.
 - *See Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, No. 2:11-cv-02082-APG-CWH, 2013 WL 5332410, at *14 (D. Nev. Sept. 23, 2013) (Rule 502(b) “applies as a default in the event there is no agreement otherwise.”)
 - *See In re Qualcomm Litig.*, No. 3:17-cv-108-GPC-MDD, 2018 WL 6617294, at *4 (S.D. Cal. Dec. 18, 2018) (responding party incorrectly argued that magistrate judge erred when by applying 502(b) to determine whether responding party had waived privilege).

2. The Different Requirements of 502(b) and 502(d)

- Different requirements apply depending on whether 502(b) or 502(d) govern
 - Each subdivision provides a separate exception to the general rule that disclosure of attorney-client communications or attorney work product constitutes a waiver of that privilege or protection.
- 502(b) requires the party seeking to clawback documents to demonstrate (1) disclosure was inadvertent, (2) holder of the privilege or protection took reasonable steps to prevent disclosure and (3) holder promptly took reasonable steps to rectify the error, including following FRCP 26(b)(5)(B).
 - *See In re Qualcomm Litig.*, No.: 3:17-cv-108, 2018 WL 6617294 (S.D. Cal. Dec. 17, 2018)
 - *See* Fed. R. Evid. 502(b) advisory committee's note (“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.”)
- 502(b)'s reasonableness test is fact-intensive and can burden the parties and the courts with extensive motions practice.
- Proceeding under 502(b) can open the party to other issues
 - *See Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SECOND CONF. J. 1, 150 (2018) 150 (noting that “the burden of asserting and proving inadvertence . . . can require substantial effort and documentation).

3. *When Should 502(b) Be Used Instead of 502(d)?*

- The parties' comfort in their ability to satisfy the requirements under 502(b) which may be the preference if:
 - o The parties are concerned that the responding party will perform a data dump or make a careless production thereby shifting burden to requesting party and then responding party uses 502(d) to avoid ramifications of this type of production; in these scenarios requesting party may want to reserve the right to seek waiver if responding party did not meet requirements under 502(b)
 - o The parties are experiencing issues with negotiating 502(d) order with appropriate language to avoid issues noted above [but they can go to the court and request one anyway]
 - o The parties lack of understanding of 502(d) and comfort with 502(b)
 - o The parties have different interests (e.g., plaintiff has limited number of privileged documents)

E. Application in Non-Federal Proceedings

1. *Arbitration*

- No 502(d) equivalent, but parties are always free to adopt any agreement they wish, which should mirror a 502(d) order and adopt a no-fault standard when it comes to potential waiver of privilege
- Arbitrators will generally adopt any clawback agreement between the parties as part of the case management order and assist in enforcing it, but such an order would be limited to that particular arbitration
- Arbitration is almost always a confidential proceeding, so the risk of an inadvertently produced document resulting in waiver in another proceeding is very low (and would likely only be the result of a breach of that confidentiality agreement), that said, there are at least two things that can be done to protect against such a waiver:
 - o Include a provision in the clawback agreement that makes this agreement binding between the parties in any other subsequent arbitration or legal proceeding between them; and
 - o Include a provision in the clawback agreement in which the parties agree that should they ever be before a Federal court (or a state court that has an analog to 502(d)), they will jointly move for the judge to enter 502(d) order that mirrors the clawback agreement from the arbitration. This could be accomplished in any proceeding to confirm or challenge an arbitration award. However, there may be issues with imposing a "retroactive" order after the fact.

2. *Non-Judicial Government Proceedings (e.g., CIDs)*

- No 502(d) equivalent.
- Evaluate whether Government will be amenable to enter into 502(e)-type of non-waiver agreement.
- If so, considerations for inclusions within non-waiver disclosure agreement:
 - o The scope of application;

- Any reservation of rights for Parties to seek 502(d) Order if the matter moves to Federal Court involving the parties (however, there may be issues with imposing a “retroactive” order after the fact); and
- The process should there be an inadvertent production including handling of production shared by one agency to another
- What’s the impact on follow-on civil litigation in federal courts, if any?
 - Impact of waiver related to privileged documents inadvertently produced under non-waiver disclosure agreement but before 502(d) Order is entered in waiver arguments in other state or federal proceedings
- What is the impact on later-filed government action in federal courts, if any? [Cite to Congressional advisory committee notes]

3. *State Proceedings Without a Parallel 502(d)*

- Some states have an equivalent of 502(d) (*e.g.*, Minnesota and Colorado).
 - For states that have a 502(d) equivalent, parties are encouraged to seek such an order.
- The majority of states do **not** have a 502(d) equivalent.
 - In states without a 502(d) equivalent, courts may order non-waiver provisions, but the protections will be limited to the parties in the matter which the order was issued.
 - When a state equivalent of 502(d) is not available, parties in state proceedings should adopt non-waiver orders providing that any disclosed privileged material will not serve as the basis for waiver in future state or federal litigation between the parties.
 - The order should state that the court issuing the order retains jurisdiction between the parties for documents exchanged in the present litigation, and to the extent possible, including after case conclusion.
- Parties in state proceedings should use protective orders and confidential designations to limit the further distribution of privileged documents.
 - To the extent that third parties have been provided copies of privileged documents by the requesting party, the requesting party shall be required assist in retrieving copies from third parties.
- Parties in federal proceedings that have previously produced privileged documents in state proceedings should consider the protections of 502(c).
 - 502(c) provides non-waiver protection in federal court for privileged documents disclosed in state proceedings.
 - In addition, to obtain 502(c) protection, the disclosure of a privileged document must qualify for non-waiver protection had it been made in either a federal proceeding *or* under the law of the state where the disclosure was made.
- The parties could include a provision in the clawback agreement in which the parties agree that should they ever be before a Federal court, they will jointly move for the judge to enter 502(d) order that mirrors the clawback agreement from the state proceeding.

F. Benefits of 502(d) Orders

- Streamlining review --- Simplifies due diligence process
 - o *See Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2013 WL 50200, at *5 (D. Kan. Jan. 3, 2013) (“Federal Rule of Evidence 502(d) . . . 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, i.e., to determine that the privilege or protection is not waived by disclosure connected with the litigation.”) (internal quotations, citations, and modifications omitted)
 - o *See Rule 502 Potential*, 17 RICH. J.L. & TECH. at 34 (“Rule 502(d) and (e) and Rule 26(b)(5)(B) are intended to operate in concert to permit parties to negotiate their own non-waiver agreements under whatever terms they want, even if inconsistent with Rule 26(b)(5)(B) or 502(b).”).
- Lower costs for responding party
 - o Provides the responding party additional review options including privilege screens and sampling rather than a linear, document-by-document review
 - o Counterpoint is potential increased costs for production and hosting of additional data
 - o *See Sedona Conference Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 104 (2016) (“[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.”) & 130, cmt. 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.”)
- Faster productions for requesting party
- Assurances on scope of a waiver/non-subject matter waiver
 - o Also reaches to not just the immediate federal litigation but also “any other federal or state proceeding.”
- May also promote conservation of judicial resources
 - o Reduces motions practice litigating whether a party satisfied the requirements under 502(b)
 - o Model orders incorporating 502(d) orders may garner less motion practice requesting entry of such an order

III. Ethical Considerations When Proceeding Under 502(d) Orders

1. *The Responding Party*

- The production of privileged documents also raises ethical considerations for both the requesting party and the responding party.
- Rule 1.6 of the Model Rules of Professional Conduct imposes an ethical duty for lawyers to maintain their clients' confidences and "not reveal information relating to the representation of a client unless the client gives informed consent."
 - In addition, "[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."
- Rule 1.3 of the Model Rules of Professional Conduct states that "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."
- Rule 1.15 of the Model Rules of Professional Conduct involves a lawyer's duty "ensure the safekeeping of their client's property, which includes their documents and ESI."
 - o See The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 Sedona Conf. J. 1, 161 (2018).
- Rule 3.4 of the Model Rules of Professional Conduct requires fairness to the opposing party and counsel. "A lawyer shall not...in pretrial procedure...fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."
- Lawyers may run afoul any number of these rules if they do not review their client's documents to remove privilege information prior to production.
- It could be argued that relying on a 502(d) order is not a reasonable safeguard for a client's confidences and that it is not in the best interest of the client to produce sensitive privilege documents that may be harmful to the client's case.
-
- Producing a set of documents that has not been reviewed for privilege (or not carefully reviewed) may also fail to comply with the discovery request and burden the requesting party in violation of the fairness rule.
- Client sign off needed for any quick peek or limited review procedures.

2. *The Requesting Party*

- Rule 1.3 could also implicate the fact that requesting counsel cannot “unlearn” the privileged information. As recognized by the Sedona Conference, once the information has been disclosed, “the knowledge cannot be erased from their minds.”
 - o See The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 Sedona Conf. J. 1, 154 (2018).
 - o See *Arconic*, 2019 WL 911417 at **3-4 (The attorney has a duty to be a zealous advocate, which might mean using the privileged information to comport with Rule 1.3)
- Ethics rules promulgated by various states may require the requesting party to notify the responding party of any information produced in discovery that it deems to be privileged.

IV. 502(d) and “Quick Peek”

- Overview of “Quick Peek”
 - o A quick peek occurs when ESI is produced to the opposing party before or without a full review for privilege, confidentiality or privacy.

A. Agreed “Quick Peek”

- A quick peek agreement is permissible and even contemplated in the Advisory Committee Notes to Rule 502(d) (“[T]he 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”).
- As discussed above, however, there are ethical limitations to a broad use of quick peek agreements.
 - o Rule 1.6(a) of the Model Rules of Professional Conduct prohibits a lawyer from revealing information related to the representation of a client without the client’s informed consent.
- Looking beyond the ethical limitations, there are also strategical limitations.
 - o Taking no measures to protect privilege is in stark contrast with the requirement that a privileged communication be kept confidential.
 - o A cavalier approach to privilege will undoubtedly be raised in a clawback dispute even where there is a quick peek agreement.
- Further, even where privilege is not expected in a particular document set, there may be proprietary or confidential information worth protecting.
- On the requesting party side, a quick peek is more likely to result in irrelevant information being produced, thus increasing the burden on the requesting party’s counsel.
- A quick peek agreement should only be considered where counsel for the responding party has a thorough understanding of what types of documents are in the set proposed for the quick peek and has fully disclosed the risks of a quick peek to the client (such as a disagreement with the requesting party that material is privileged upon an attempt to claw it back, the fact that opposing counsel cannot un-see certain information if discovered prior to clawing it back, etc.).
- Counsel for the requesting party should also consider the additional burden this imposes as it shifts a large part of the document review burden from the responding party to the requesting party.

1. *When a “Quick Peek” Agreement May be Appropriate*

- **Limited Resources.** Privilege review is expensive. There may be situations, such as a bankruptcy matter, where resources are extremely limited and it is truly in the client’s best interest to negotiate a quick peek agreement with opposing counsel. Even without limited resources, for matters where the amount in controversy is less than the cost of a privilege review it may make sense to consider such an option.

- **Settlement purposes.** Some parties may utilize quick peek agreements with a potential adversary when settling a matter (this does not apply to pre-litigation settlement discussions because in that case, 502(d) is not yet available). Both parties may benefit from a quick review of a limited set of documents with the agreement that anything privileged may be clawed back without objection and without waiver implications. A quick review such as this may encourage settlement prior to engaging in costly discovery by showing the strengths and weaknesses of the case.
- **Unique data types.** Another possibility for utilizing a quick peek process is to limit it to certain data types which are unlikely to contain privileged information. While email data is highly likely to contain privileged material, a client may be able to point to certain sets of documents which are unlikely to have had input from counsel. It may be appropriate to negotiate for a quick peek as to certain document sets to reduce the overall discovery burden.
- **Non-party.** A quick peek may be appropriate with a non-party who has no interest in the outcome of the litigation.

2. Considerations When Entering into a “Quick Peek” Agreement

- **Minimal Privilege Review.** It is advisable to conduct at least a minimal privilege review by running searches for the names of known counsel and law firms. This smaller set of documents can then be reviewed for privilege. This prevents a later argument that *no* steps were taken to protect privilege.
- **Confidentiality Designations.** It also may be advisable to agree to designate all documents in a quick peek production as highly confidential, with a process outlined for redesignating documents intended for use in the action. This removes the burden of reviewing the entire document population for confidentiality while still allowing the requesting party to have the designation quickly revisited as needed.
- **Document dump.** The requesting party may want to add a provision to the quick peek agreement requiring the responding party to have a good faith belief that the information produced is relevant to the proceeding to avoid the burden of sifting through large amounts of irrelevant data.

B. Compelled “Quick Peek”

- While most courts have concluded that “quick peek” are not required, some courts have, in limited circumstances, compelled a “quick peek.”

1. Courts Declining “Quick Peek”

- In general, courts concluding that quick peek is inappropriate have concluded that 502(d) does not permit them to compel such.
 - o *See* Sedona Conference, Commentary on Protection of Privileged ESI, Comment 2(e), 17 Sedona Conf. J. 137 (2016) (“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.”)

- There are also due process considerations implicated by compelled disclosure of at least attorney-client communications.
 - o *See In re Grand Jury Proceedings (Doe)*, No. 91-56139, 1993 WL 6598, at **3-4 (considering whether due process rights were violated by the district court's refusal to hold an evidentiary hearing on the applicability of the crime-fraud exception to privilege before enforcing grand jury subpoena including certain communications alleged by Doe to be protected by privilege.)
 - o *See Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 Sedona Conf. J. 232 (2010) (“[A] court will not be able to compel parties to produce [privileged material] upon no showing. Quite simply, [the] case law establishes that the attorney-client privilege cannot be broken in a cavalier manner.”).
- The Supreme Court and the Second Circuit have held that a party may not be compelled to produce putatively privileged documents even for *in camera* review without an evidentiary showing.
 - o *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (An order directing production of privileged material to an adversary would be an even greater intrusion into the privilege and thus, would warrant a correspondingly greater showing to warrant disclosure)
 - o *See In re Dow Corning Corp.*, 261 F.3d 280, 284 (2d Cir. 2001) (Affirming that “compelled disclosure of privileged attorney-client communications, absent waiver or an applicable exception, is contrary to well established precedent,” and noting that the lack of authority for ordering disclosure of privileged information subject to a protective order “no doubt stems from the common sense observation that such a protective order is an inadequate surrogate for the privilege.”)
 - o *See Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 160-162, 166 (2d Cir. 1992) (issuing a *writ of mandamus* vacating a district court order directing the responding party to disclose, on an attorneys’-eyes-only basis, privileged documents so that the opposing counsel could determine which documents it agreed were privileged and which would be subject to motion practice).
 - o *See Winfield v. City of New York*, 15-cv-05236 (LTS) (KHP), 2018 WL 2148435 at *16 (May 10, 2018) (“The attorney-client privilege is a substantive right, and 502(d) cannot be read to provide for the compelled disclosure of documents where the privilege has been asserted because, “the Rules Enabling Act explicitly prohibits abridging, enlarging, or modifying any substantive right.”)
 - In *Winfield v. City of New York*, 15-cv-05236, 2018 WL 2148435, at *15-20 (S.D.N.Y. May 10, 2018), the court declined to allow for quick peek for four reasons: (1) while acknowledging a court’s broad authority to fashion discovery orders, the Court noted that any order must comply with the Federal Rules of Civil Procedure, which limit discoverable material to that which is not privileged; (2) the Federal Rules of Evidence do not abrogate common law privileges and the Rules Enabling Act prohibits the creation of any rule that would abridge or modify a substantive right, the attorney-client and legislative and deliberative process privileges are all substantive rights; (3) 502(d) covers the attorney-client privilege and work product privileges and *does not* cover the deliberative process or bank examination privileges; and (4) while the *Fairholme* court suggested that it did not have the resources to perform an *in camera* review of the disputed documents, it could have appointed a special master).
 - In the wake of *Fairholme*, the requesting party suggested that the Court adopt a similar order to address their contemplated challenge to more than 3,000 documents on the responding party’s privilege log. The responding party had asserted a number of different privileges, including the legislative and deliberative process privileges.
 - While the Court did not find that material withheld pursuant to the Work Product Doctrine constituted a substantive right, the Court nevertheless found that there was nothing in 502(d) that

allowed a court to compel disclosure of work product over the responding party's objection. *See id.* at *19

- *See Crosmun v. Trustees of Fayetteville Tech. Cmty. Coll.*, No. COA18-1054, 2019 WL 3558764 (N.C. Ct. App. Aug. 6, 2019) (concluding that an order permitting the requesting party to access all of a responding party's documents without regard to whether the ESI was privileged violated the responding party's privileges pursuant to North Carolina law (which has no 502(d) equivalent): "In short, the Protocol Order provides Plaintiffs' agent direct access to privileged information, which disclosure immediately violates Defendants' privileges. It furthers that violation by directing that agent, having attempted to screen some privileged documents out through the use of search terms, to produce potentially responsive documents without providing Defendants an opportunity to examine them for privilege. If, following that continued violation, Plaintiffs—their agent notwithstanding—receive privileged documents, Defendants must attempt to clawback that information, reducing their privilege to a post-disclosure attempt at unringing the eDiscovery bell. Such compelled disclosure of privileged information is contrary to our law concerning both attorney-client privilege and work-product immunity. As a result, we hold the trial court misapprehended the law concerning attorney-client privilege and the work-product immunity (however understandably given its undeveloped state within the eDiscovery arena), vacate the Protocol Order, and remand for further proceedings.") (internal citation omitted).

2. Courts Ordering "Quick Peek"

- To the extent compelled quick peeks would ever be appropriate, some commentators have suggested that they could be used as a less severe sanction than outright waiver to deal with improper assertions of privilege.
 - *See* Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions, 10 Sedona Conf. J. 229, 235 (2010)
- Courts ordering quick peek:
 - *See Fairholme Funds, Inc. v. United States*, 134 Fed. Cl. 680, 681, 686 (2017) (relying on 502(d) to order the responding party to provide all documents on their privilege log to the requesting party for its review; notably, the documents at issues were putatively covered by the deliberative process and bank examination privileges, not the attorney-client privilege.
 - The Court, while acknowledging that the 502(d) was not designed to compel a party to produce documents on its privilege log, primarily relied on a Court's broad discretion to manage discovery and the need to quickly and efficiently resolve discovery disputes. The Court also noted the protections afforded by 502(d) and the protective order in place in the case. *Id.* At 687.
 - The Court's reliance on 502(d) appears misplaced because the rule does not cover either the deliberative process or bank examination privileges asserted by the responding party.
 - It should be noted that in both *Winfield* and *Fairholme*, the receiving parties sought to compel disclosure of documents on the producing parties' privilege logs *post-production*. However, "quick peek" agreements are typically understood to address pre-production review procedures, *not* the wholesale disclosure of documents over which a privilege has already been asserted. Indeed, the goal of 502(d) was to allow parties to reduce the cost of pre-production privilege reviews. *See* Fed. R. Evid. 502(d) advisory committee's note.

V. Proposed Best Practices for Addressing Current Practice Issues with 502(d) Orders

A. Challenges with 502(d) Orders (And How They Can Be Addressed)

1. Awareness, Familiarity, and Incentives

a. The Challenges

- **Awareness**: There is a lack of awareness in the bar of Rule 502(d)
 - o See *Ranger Constr. Indus., Inc. v. Allied World Nat'l Assurance Co.*, No. 17-81226-CIV, 2019 WL 436555, at *2 (S.D. Fla. Feb. 5, 2019) (noting that the parties “could have quickly resolved th[e] matter among themselves with a simple claw-back of the privileged documents by Defendant under FRE 502(b) or other similar agreement” and expressing “surprise[] that the sophisticated attorneys in th[e] case did not enter into a written 502 claw-back agreement early on in th[e] litigation, either separately or as part of an ESI Protocol Agreement.”)
 - o See Paul W. Grimm, Lisa Yurwit Bergstrom, and Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8, 2 (Spring 2011) (hereinafter “*Rule 502 Potential*”) (“a disappointingly small number of lawyers seem to be aware of the rule and its potential.”).
- **Familiarity**: Courts find themselves reluctant to enforce 502(d) orders, instead favoring the 502(b) test and overlooking the express guidance from the advisory committee notes: “[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party”
 - o See Fed. R. Evid. 502(d) advisory committee’s note.
 - o See *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2009 WL 2168892, at *2-*4 (D. Kan. July 21, 2009) (rejecting requesting party’s argument that responding party could mass produce documents with an agreement under Rule 502(d) that defendant had not waived privilege because “[s]imply turning over all ESI materials does not show that a party has taken “the reasonable steps” to prevent disclosure of its privileged material”)
 - o See *Rule 502 Potential*, 17 RICH. J.L. & TECH. at 79 (noting that decision in *Spieker* ignored guidance from advisory committee notes and stating that “parties should be permitted the flexibility to enter into non-waiver agreements that permit less than full compliance with Rule 502(b)(2) preproduction review”).
- **Incentives**: In cases with asymmetrical discovery, the requesting party may have little incentive to obtain a 502(d) order.
 - o Requesting parties that frequently litigate and request documents from a party may also have less incentive to enter into 502(d) orders in hopes of using the waiver in future litigation.

b. Potential Solutions

- Increased awareness and reduced confusion can lead to more widespread use of 502(d) orders, furthering the purpose of Rule 502.
 - o See *Sedona Principles, Third Edition*, 19 SEDONA CONF. J. at 150 (“[G]iven the multiple factors to be considered and the discretion of courts in weighing the [502(b)] factors and the evidence presented, both waiver and its scope remain uncertain. Parties can reduce the burdens and eliminate many of these uncertainties by asking the court to enter a Rule 502(d) order.”)

This document was created for discussion purposes only for the 2019 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by e-mail to comments@sedonaconference.org.

- *Rule 502 Potential*, 17 RICH. J.L. & TECH. at 34 (noting that courts' interpretation of 502(b) has not been uniform, "which undermines the very purpose of the Rule.").
- Further adoption of template orders by courts.

2. *Drafting & Procedure*

a. The Challenges

- Drafting: Parties have artfully crafted their way out of the otherwise certain protection of a Rule 502(d) Order through common drafting errors.
 - The most common drafting error is the inclusion of the inadvertent and/or reasonableness standards from Rule 502(b).
 - Rule 502(d) offers litigants a way to avoid these standards and gain a more certain process for clawing back privileged material.
- Procedure: Another common error is to overlook the step of seeking to have the court enter as an Order the parties' 502(d) agreement.
 - The agreement is still effective as to the parties in the lawsuit, but without formal entry by the court the additional protections of 502(d) preventing waiver in any other federal or state proceeding are not present.

b. Potential Solutions

- Practitioners need to draft proposed orders that clearly define the framework to be applied to privilege disputes in a given case, recognizing that an effective 502(d) order should be used to avoid the disputes of inadvertence and reasonableness that must be decided in the context of 502(b).
 - Rather than including language from Rule 502(b) in the Order, the best practice is to explicitly state that the parties intend for the 502(d) Order to override the elements of Rule 502(b).
- Litigants should not generally refer to Rule 502 or Rule 502(d) as a sort of "catch all" protection as some courts have interpreted this to allow Rule 502(b) to fill in any gaps in the 502(d) Order.
 - See *Absolute Activist Value Master Fund Ltd. v. Devine*, 262 F. Supp. 3d 1312, 1323 (M.D. Fla. 2017) (finding that when parties refer generally to the protections of Rule 502, courts should apply 502(b))
 - See *Maxtena, Inc. v. Marks*, 289 F.R.D. 427, 444 n. 16 (D. Md. 2012) (same)
- Parties have the option to include language like: "The provisions of 502(b) do not apply to this Order." This will potentially help avoid any confusion as to the applicable standard.
 - See *Irth Solutions, LLC v. Windstream Communications, LLC*, No. 2:16-cv-219, 2017 WL 3276021, at *12 (S.D. Ohio Aug. 2, 2017) ("If drafted thoughtfully and then followed, clawback agreements effectuate the dual purposes of Rule 502—providing a predictable, uniform set of standards under which parties can determine the consequences of a disclosure, while simultaneously reducing discovery costs. **For example, the predictability is achieved when the parties draft an agreement that is explicit in stating that Rule 502(b)'s reasonableness prong is irrelevant.**") (emphasis added)
 - See *Great-W. Life & Annuity Ins. Co.*, 2013 WL 5332410, at *13 ("[P]arties must adequately articulate the desire to supplant analysis under Rule 502(b) in any agreement under Rule 502(d) or (e)").

3. *Clawback Provisions*

- Clawback Provisions, Generally
 - o What is a clawback provision?

a. The Challenges

- Timing:
 - o The party producing the allegedly privileged document must *timely* assert such privilege.
 - o Parties cannot reserve the right to claw back *any document at any time*.
 - o The question is, however, “timely from when?”
 - o In *Arconic Inc. v. Novelis Inc.*, No. 17-cv-1434, 2019 WL 911417 at *2 (W.D. Pa. Feb. 25, 2019), in examining Arconic’s arguments concerning the lack of a timeframe in the Protective Order for clawing back privileged documents, the Court stated that timeliness will be determined, in part, based on if and when a disputed document is used during the course of the litigation. Once the document is used or otherwise identified as being a document that the opposing party may rely upon, the responding party must raise the privilege in a timely manner. “Privilege disputes at trial would be unduly disruptive and will not be tolerated.”
 - o While 502(d) covers disclosure of the document during deposition, what about use? Such as at a deposition? Can it be clawed back then?
- Procedures:
 - o Parties must comply with the terms of Stipulated Protective Orders in order to benefit from clawback provisions.
 - o Privilege may be waived (even in the case of a protective order) if a party fails to comply with the requirements of a stipulated protective order.
 - o See *Entrata, Inc.*, No. 2:15-cv-00102, 2018 WL 5438129 at *2 (D. Utah Oct. 29, 2018) (responding party was not entitled to clawback a document after it effectively waived any applicable privilege by failing to seek to preclude the introduction and use of the document during a deposition, even with a protective order in place preventing a waiver due to a party’s disclosure of privileged information).
 - The Magistrate Judge entered a Stipulated Protective Order requiring producing parties to “provide a written request [to the Requesting Party] for the return of those documents ... within a reasonable time after determining the documents should not have been produced.”
 - The Protective Order also provided that “[i]f the Producing Party discovers that privileged, work-product, or otherwise protected documents and things have been inadvertently produced based upon the Receiving Party’s use of such information during a deposition ... the Producing Party may orally request the return of the information and the Receiving Party must immediately cease examination or argument regarding the specific substantive content of the document.” *Id.*
 - Yardi, the Defendant, produced a privileged document multiple times throughout the case, and the document was used ultimately at a deposition. Citing F.R.E. 502(d) and Fed. R. Civ. P. 26(b)(5)(B), six days after the deposition Yardi moved to clawback the document (under both attorney/client communication and work product grounds), arguing that it was inadvertently produced.
 - Yardi did not represent, however, that it had complied with the provisions of the Stipulated Protective Order.

- The Magistrate Judge denied Yardi's clawback attempt, primarily on the grounds that the document was not privileged.
 - In denying Defendant's objection to the Magistrate Judge's Order, the District Court stated that, even if Yardi had complied with the written notice requirement of the Stipulated Protective Order – which it had not – it would still not be entitled to clawback the document.
 - First, the Court stated that the Protective Order and F.R.E. 502(d) “apply only to waiver in connection with **disclosures**, and say nothing of waiver by other means ... Accordingly, while an appropriately worded protective order may prevent waiver due to a producing party's **disclosure** of privileged information, that party's subsequent failure to timely and specifically object to the **use** of that information—during a deposition, for example—*can* waive any applicable privilege.” *Id.* at *8 (emphases in original) (internal citations omitted).
 - Therefore, Yardi waived work product protection for the document by failing to seek to preclude its use at the relevant deposition.
 - Issue to be discussed: Does a 502(d) order protect you if it says “disclosure” and then a purportedly privileged document is used at a deposition --- difference between “disclosure” and “use”
- Breadth: How large of a clawback is too large?
- See *Arconic Inc. v. Novelis Inc.*, No. 17-cv-1434, 2019 WL 911417 at *1 (W.D. Pa. Feb. 25, 2019).
 - The Special Master resolved specific privilege disputes regarding three documents produced by Arconic and later clawed back pursuant a Stipulated Protective Order. Neither party objected to the Special Master's finding that the documents at issue were, in fact, privileged. Arconic objected, however, to the Special Master's recommendations concerning how the Protective Order would apply “going forward.”
 - The Special Master's report and recommendation recognized that the Protective Order in this case provided the “maximum protection allowed under Federal Rule of Evidence 502(d).”
 - However, the Special Master also found that Arconic's decision to adopt “a screening methodology based on electronic term searches rather than performing a comprehensive pre-production privilege review took unfair advantage of the Rule 502(d) protections, imposed an excessive burden on the special master to rule on disputed documents, led to confusion at depositions, and caused uncertainty to Novelis about which documents it could use to prepare its case
 - The Special Master stated that this also “caused uncertainty to the requesting party as to which documents it could use to prepare its case.”
 - The District Court requested further briefing and arguments from the parties to determine what level of privilege review, if any, would be necessary moving forward, and what technology the parties could use moving forward.

b. Potential Solutions

- Generally:
- The parties can enter into a clawback agreement that specifies limits to clawbacks and the procedure to be employed when a clawback is made.
 - Items that the parties should think about in forming this clawback agreement include as follows:
 - Deadlines for every step of the process—shorter is typically better, this will help avoid unnecessary fights surrounding whether the documents can be used in depositions, motions, etc.

- Consideration of all possible privileges and protections of documents that may need to be clawed back, including: work product, confidential documents, sensitive financial documents, documents implicated by various privacy laws, etc.
- A requirement that the party clawing back documents to provide the level of detail for each clawed-back document that would be found on the privilege log (*e.g.*, privilege or protection being asserted and basic metadata like sender/recipient, date, and author)
- Language that prevents disqualification of lawyer viewing any clawed-back documents so long as that lawyer follows the terms of the parties' agreement on how to handle inadvertently produced documents
- An affirmative duty of both parties to alert the other party to documents they believe were inadvertently produced
- In addition, the parties should give consideration to a non-signatory to the clawback agreement producing documents that one of the parties to the clawback agreement may wish to claw back.
 - This situation may arise in the agency setting, with a seconded employee whose paycheck employer produces documents, because of a subpoena, etc. (remember also that work product enjoys protections much broader than A/C privilege, and can be shared with aligned parties).
 - The privilege or other protection is really that of one of the parties to the clawback agreement, but a third party has produced the document.
- Timing:
 - Some agreements allow at any time, but a reasonable time limit may be inserted, after which 502(b) applies.
 - For example, the 502(d) order could specify when a clawback can and *cannot* be made:
 - *E.g.*, X days before a deposition where document will be used; X days before a merits hearing where document will be used; after the deposition or hearing?)
 - For a disputed clawback on eve of deposition, possible stipulation to provisional designation of testimony pending resolution of dispute. More complicated if the deponent is not an author or recipient of the document.
 - For merits hearing, similar arrangement possible if not before a jury.
- Procedure:
 - What may a party do with the documents once a clawback request is made?
 - Delete, return, or sequester
 - But, for what purpose can the documents be used if a challenge is going to be made?
 - What happens when the privileged documents have already been reviewed for deposition/trial prep?
 - Are the requesting parties obligated to train their own attorneys on recognizing privilege in the other party's documents?
 - Counsel should attempt to work out disputes among each other and should include a meet and confer requirement in the clawback agreement.
 - While courts may be willing to address these issues, placing the issue in the court's hands may lead to resolutions that please neither party (like resorting to a 502(b) order).
 - *See Arconic v. Novelis*, No. 17-cv-1434, 2019 WL 911417 (W.D. Pa. Feb. 25, 2019)

- The process will then depend on how the parties chose to handle the question of what purpose can the documents be used if a challenge is going to be made (no purpose vs. limited purpose of challenging clawback).
 - Something along the lines of “only for purposes of challenging the clawback request” or “for no purpose whatsoever.”
 - There is a tension between not allowing one party to hold on to documents inadvertently produced and giving that party adequate grounds to challenge the clawback request.
 - Without possession of the documents, it is obviously difficult to challenge the clawback request.
 - That said, challenging a clawback request without the clawed back documents is not so different from a challenge based upon a privilege log.
 - An option is that the documents must be deleted, returned, or sequestered, and if a party is going to challenge them, the responding party is then required to submit those documents for in-camera inspection—effectively creating a burden shifting approach. The responding party would then be required to explain the basis for clawing back the documents.
- If there is no purpose for which the documents can be used, the party who received the inadvertently produced documents, then deleted, returned, and/or sequestered the documents will need to file a motion to compel production of documents.
 - It is a good idea to set a deadline for such a motion.
- If the party who received the inadvertently produced documents is allowed to retain the documents for the limited purpose of challenging the clawback determination, the parties can decide in the clawback agreement who will have to file the motion, or they can chose to have the clawback agreement remain silent on this point.
 - Again, it is a good idea to set a deadline for such a motion.
 - Consider including a provision that both parties will agree to jointly request in camera review of any disputed documents.
- **Breadth:**
 - Some 502(d) orders impose a limit on # of documents or % of production, after which 502(b) applies.
 - Examples of limits in agreements, consequences of no limit.
 - Can discuss cases such as *Entrata v. Yardi Systems* and how the failure of the party claiming privilege to observe those limitations can lead to waiver of the privilege. Concerns regarding overly broad clawbacks.
 - See *Arconic Inc. v. Novelis Inc.*
 - See *In re: Target Corporation Customer Data Security Breach Litigation*, 0:14-md-02522 (D. Minn.)

4. Shifting the Burden of Privilege Review to the Requesting Party

- Discuss whether it is appropriate to essentially shift the burden of a privilege review to the requesting party, the various issues that may arise, and the proportionality implications.

a. The Challenges

- **Fairness:**
 - Shifting the burden of privilege review contravenes the concept of “fairness” to the requesting parties, as they would have to expend additional time and cost reviewing the other side’s documents.
 - There may also be a cost associated with hosting additional documents.

- Although the requesting party may argue that shifting the burden of privilege review is a means of cost-shifting not allowed by law, at least one court has held that a 502(d) order is not a “traditional cost-shifting order” because the responding party still bears the cost of collection, processing, searching and production.
 - See *Radian Asset Assur., Inc. v. Coll. Of the Christian Bros. of N.M.*, No. CIV 09-0885JB/DJS, 2010 WL 4928866 (D.N.M. Oct. 22, 2010) (“[R]ule 502 is not a cost shifting tool”).
- Proportionality:
 - A 502(d) order could erode a parties’ proportionality and burden arguments and could green light Courts requiring massive productions because of “get out of jail free” card
 - See *EEOC v. FedEx Ground Package System*, No.: 2:15-cv-00256-MRH (W.D. Pa. March 21, 2018) ([link](#)) (concluding that the parties’ use of a 502(d) order and the requesting party’s willingness “to do the leg work, within the protections of Fed. R. Evid. 502(d)” addressed the responding party’s costs/expense objection).
- Added Burden on Court:
 - The burden issue may also affect the court if it has to review the documents at issue.
 - See *Arconic Inc. v. Novelis Inc.*, Civil Action No. 17-1434, No. 17-cv-1434, 2019 WL 911417, at *1 (W.D. Pa. Feb. 26, 2019) (special master found that the screening methodology based on running privilege terms rather than comprehensive privilege review was an “inefficient use of resources” and that the responding party “took unfair advantage of the Rule 502(d) protections, imposed an excessive burden on the special master to rule on disputed documents, . . . and caused uncertainty to the requesting party as to which documents it could use to prepare its case”).

b. Potential Solutions

- Avoid Document Dumps: Producing parties still need to take steps to avoid “document dumps.”
 - See *Rajala v. McGuireWoods LLP*, Civil Action No. 08-2638-CM-DJW, 2010 WL 2949582, *7 (D. Kan. July 22, 2010) (the plaintiff was concerned that it would be required to perform the privilege review for the defendants, so the court left open the ability to grant additional relief if the defendants abused “the clawback provision by engaging in a “document dump” and making no effort whatsoever to review for privileged or protected documents”)
 - See *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95, 134 (2016)
 - See *Arconic*, 2019 WL 911417 at **3-4 (in a matter where one party clawed back over 1,000 documents with a 502(d) order in place, the court questioned whether relying entirely on 502(d) without pre-production review is an appropriate use of such an order going forward in the matter.)
- A Responding Party Must Conduct a Privilege Review:
 - In *Chevron Corp. v. The Weinberg Group*, Civil Action No. 1:11-mc-004098-JMF at ECF No. 62, p. 2-3 (D.D.C. Oct. 26, 2012), the parties submitted dueling Rule 502(d) proposals following a protracted privilege dispute.
 - The Weinberg Group proposed disclosing all privileged documents, “without redacting opinion work product,” so long as disclosure would not amount to a waiver over their right to assert a privilege if Chevron attempted to make use of those documents.

- The Weinberg Group also proposed allowing Chevron to use the privileged documents in the underlying proceeding, provided Chevron notified The Weinberg Group of its intention to utilize a particular document, and sought Court approval to use the privileged material.
- In rejecting The Weinberg Group's proposal to shift the burden to Chevron to prove that a document is *not* privileged, Magistrate Judge Facciola stated that, "such a procedure would amount to an unfair and impermissible burden for Chevron ... To force Chevron to challenge each document, one by one, in hopes of figuring out which parts of it are and are not privileged, would negate the intent and purpose of my initial order, which was to force the *Weinberg Group*, not Chevron, to go through each document and redact material that fell within a genuine privilege."
- Ultimately, Magistrate Judge Facciola entered a Rule 502(d) Order that allowed Chevron to use privileged documents produced by The Weinberg Group, while still granting the Defendant the ability to challenge their use.

VI. Model 502(d) Order

A. “Best” Standard Language

- Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding.
 - *See* N.D. Cal. Model Stipulated Order Re Discovery of Electronically Stored Information for Standard Litigation (emphasis supplied);
 - *See Sedona Principles, Third Edition*, 19 SECOND CONF. J. at 150-51 & n.121.

B. Insert for Quick Peek Issues

- *To be added at a later date.*

C. Insert for Clawback Issues

- *To be added at a later date.*

VII. Appendices

A. Appendix A: Key 502(d) Cases about which Counsel and Courts Should Be Aware

- *To be added at a later date.*

B. Appendix B: Model 502(d) Orders from District Courts

- *To be added at a later date.*

C. Appendix C: State 502(d) Analogs

- *To be added at a later date.*