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THE SEDONA CONFERENCE COMMENTARY ON THE EFFECTIVE USE OF FEDERAL RULE OF EVIDENCE 502(d) ORDERS

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

Author:

The Sedona Conference

Editors-in-Chief & WG1 Steering Committee Liaisons:

Philip J. Favro

The Hon. Andrew J. Peck (ret.)

Drafting Team Leaders:

Nathaniel C. Giddings

Leeanne Mancari

Drafting Team:

Anthony DiSenso

Howard Goldberg

Todd Heffner

Henry J. Kelston

Daniel Lim

Scott A. Milner

Angelica M. Ornelas

Kaleigh Powell

Jeff Rickard

Cristin K. Traylor

Judicial Observer:

The Hon. Katherine Parker

Staff editor:

David Lumia

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PREFACE

Welcome to the final, August 2021, version of The Sedona Conference *Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders*, a project of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The mission of The Sedona Conference is to move the law forward in a reasoned and just way.

This *Commentary* is intended to encourage more robust use of Rule 502(d) non-waiver orders. More than 12 years since the adoption of Rule 502 in 2008, there remains an apparent misunderstanding of the differences between Rule 502(d) and Rule 502(b), resulting in the slow adoption of Rule 502(d) orders as a standard in federal litigation. The *Commentary* attempts to clarify the confusion regarding Rule 502(d)'s protections and limitations while also providing guidance in addressing certain challenges with using 502(d) orders.

The *Commentary* was a topic of discussion at the Working Group 1 meetings in 2019 and 2020, and an initial draft was distributed for member comment earlier this year. The draft was revised based on member feedback and subsequently published for public comment. Where appropriate, the comments received during the public comment period have now been incorporated into this final version.

On behalf of The Sedona Conference, I thank all of the drafting team members for their dedication and contributions to this project. Team members who deserve recognition for their work

are: Anthony DiSenso, Howard Goldberg, Todd Heffner, Henry Kelston, Daniel Lim, Scott Milner, Angelica Ornelas, Kaleigh Powell, Jeff Rickard, and Cristin Traylor. The Sedona Conference also thanks Nathaniel Giddings and Leeanne Mancari for serving as the Drafting Team Leaders, and Phil Favro and the Hon. Andrew Peck for serving as Steering Committee Liaisons and Editors-in-Chief. We also wish to recognize the Hon. Katharine Parker for her contributions as Judicial Observer.

We encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent remedies and damages; patent litigation best practices; trade secrets; data security and privacy liability; and other "tipping point" issues in the law. 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. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
August 2021

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I. INTRODUCTION

Federal Rule of Evidence ("Rule") 502 governs what happens when there is a "disclosure of communication or information covered by the attorney-client privilege or work-product protection."[1] Congress adopted this Rule in 2008 for two primary reasons. First, it was intended to address the "widespread complaint" that litigation costs related to the protection of privilege have become "prohibitive." Indeed, there was deep concern that an innocent or minor disclosure could result in subject-matter waiver of all privileged communications in a litigation.[2] Second, it was intended to "provide 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."[3]

Rule 502 attempts to accomplish these goals primarily through Rule 502(d). Rule 502(d) permits parties to request entry of a court order preventing waiver for privileged documents produced in the proceeding. By so doing, a Rule 502(d) order provides the parties with greater certainty and therefore has greater potential to limit the costs associated with privilege review and retention.

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1. FED. R. EVID. 502.

2. FED. R. EVID. 502 Explanatory Note; *see also id.* ("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."). The Explanatory Note is reproduced in Appendix C.

3. *See* FED. R. EVID. 502(d) Explanatory Note.

Another important aspect of Rule 502 is that it creates a uniform rubric for assessing the waiver of privilege under Rule 502(b). Importantly, Rule 502(b) is the "default" rule; where a Rule 502(d) order is not entered, Rule 502(b) applies.

The Sedona Conference's consistent position is that parties should collectively seek entry of a Rule 502(d) non-waiver order (so-called "Rule 502(d) orders"). As explained in *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*:

> Rule 502(b) establishes a uniform approach in the federal courts to determine whether an inadvertent production results in waiver, and if so, the scope of the waiver. However, *the burden of asserting and proving inadvertence lies with the responding party and that burden can require substantial effort and documentation.* Moreover, given the multiple factors to be considered and the discretion of courts in weighing the 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*.[4]

4. The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 150–51 (2018) (emphasis added) [hereinafter *The Sedona Principles, Third Edition*]. Numerous practitioners have also advocated for more widespread embrace of the Rule. *See, e.g.*, 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").

A lack of understanding, however, regarding Rule 502(d)'s potential benefits and the differences between Rule 502(b) and 502(d) has contributed to a surprisingly slow adoption of Rule 502(d) orders as a standard in federal litigation. Another factor potentially contributing to underuse of Rule 502(d) orders is a belief among some practitioners that Rule 502(d) has shortcomings that have reduced its effectiveness.[5]

This *Commentary* addresses these issues to encourage more robust use of Rule 502(d) orders.[6] The *Commentary* is comprised of the following parts:

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5. *See* Swift Spindrift, Ltd. v. Alvada Ins., Inc., No. 09 Civ. 9342, 2013 WL 3815970, at *4 (S.D.N.Y. July 24, 2013) (noting that "remarkably few lawyers seem to be aware of [Rule 502(d)'s] existence"); Ranger Constr. Indus., Inc. v. Allied World Nat'l Assurance Co., No. 17-cv-81226, 2019 WL 436555, at *2, n.2 (S.D. Fla. Feb. 4, 2019) (noting that it was "frankly surprised that the sophisticated attorneys in this case did not enter a written [Rule] 502 claw-back agreement early on in this litigation, either separately or as part of an ESI Protocol Agreement" and "encourag[ing] counsel in all cases involving e-discovery to consider the benefits of jointly entering into a [Rule] 502(d) claw-back agreement and/or an ESI Protocol Agreement early on in the case.").

6. The Sedona Conference has addressed various aspects of Rule 502(d) in previous publications and encouraged parties and courts to use this Rule. *See, e.g.*, *The Sedona Principles, Third Edition*, *supra* note 4, at 147–62 ("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) ("Principle 2. Parties, counsel, and courts should make use of Federal Rule of Evidence 502(d) and its state analogues"); *see also* Martin R. Lueck & Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek*

- Part II provides an overview of Rule 502(b) and Rule 502(d).
- Part III highlights the benefits of Rule 502(d) orders.
- Part IV outlines the protections and limits of Rule 502(d).
- Part V discusses potential challenges associated with Rule 502(d) orders in certain matters and highlights some considerations for how practitioners and courts could address those issues and still take advantage of the protections Rule 502(d) offers.

Finally, this publication contains three appendices. Appendix A contains "model" language for a proposed Rule 502(d) order (though practitioners should consider additions to this model as necessary). Appendix B contains a list of U.S. district courts that have promulgated model Rule 502(d) orders as of the date of this publication. Appendix C reproduces the Explanatory Note to Federal Rule of Evidence 502.

By both emphasizing how practitioners and jurists may benefit from using Rule 502(d) orders and by noting issues that could otherwise impede their effectiveness, this *Commentary* should result in more widespread use of Rule 502(d) orders.

Productions, 10 SEDONA CONF. J. 229 (2009); 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).

II. COMPARISON OF RULE 502(b) AND RULE 502(d)

Many practitioners do not fully appreciate the significant differences between Rules 502(b) and 502(d). In order to understand the benefits of using a Rule 502(d) order, it is necessary to understand the default provisions of Rule 502(b) that apply when the parties have not entered a Rule 502(d) order. As a default rule, Rule 502(b) risks leading to waiver of privilege, additional costs of motion practice, and increased burdens on courts. This Part addresses this issue by comparing these subparts.

A. Rule 502(b), Generally

Rule 502(b) is the "default" rule and addresses ***inadvertent*** disclosure.[7] It provides that a disclosure "does not operate as a waiver in a federal or state proceeding" if the responding party shows that three requirements are met:

1. the disclosure was 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).[8]

Whether a responding party has satisfied the requirements of Rule 502(b) requires a threshold determination of whether the disclosure of the privileged or protected information was

7. *See* Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co., No. 2-11-cv-02082, 2013 WL 5332410, at *14 (D. Nev. Sept. 23, 2013) (noting that Rule 502(b) "applies as a default in the event there is no agreement otherwise.").

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

inadvertent. As noted in *The Sedona Principles*, this can impose a significant burden on the responding party:

> [T]he burden of asserting and proving inadvertence lies with the responding party and that burden can require substantial effort and documentation. Moreover, given the multiple factors to be considered and the discretion of courts in weighing the factors and the evidence presented, both waiver and its scope remain uncertain.[9]

As Rule 502(b) further requires, whether a waiver has occurred additionally depends on the court's analysis of the responding party's diligence to prevent the inadvertent disclosure. This can also impose a burden on the courts and the parties, as courts need to evaluate whether a responding party has taken "reasonable steps" to both prevent and rectify the disclosure. In making this determination, the courts generally look to four factors, none of which alone is dispositive:

1. the reasonableness of precautions taken;
2. the time taken to rectify the error;
3. the scope of discovery from which the inadvertent production was made; and
4. the extent of disclosure and the overriding issue of fairness.[10]

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9. *See The Sedona Principles, Third Edition*, *supra* note 4, at 150.

10. FED. R. EVID. 502 Explanatory Note (discussing two cases setting forth non-exhaustive factors the courts may assess in the Rule 502(b) inquiry: 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)).

These factors are not memorialized in Rule 502(b)'s language because, as the Explanatory Note indicates, Rule 502(b) "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."[11] Thus, courts have considered other factors in addition to those set forth above.[12]

To determine whether a waiver has occurred under Rule 502(b), courts have inquired into the responding party's discovery and review processes to ascertain whether "reasonable steps" were taken to prevent the disclosure of privileged material.[13] For example, if the responding party has used "advanced analytical software applications and linguistic tools in screening

11. FED. R. EVID. 502 Explanatory Note.

12. *See, e.g.*, Williams v. District of Columbia, 806 F. Supp. 2d 44, 50 (D.D.C. 2011) (explaining that "how many documents it reviewed relative to its overall production, the complexity of the review required, and the time it had to gather, review, and produce responsive documents" would be relevant factors to consider); *cf.* Thorncreek Apartments III, LLC v. Vill. of Park Forest, No. 08 C 1225, 2011 WL 3489828, at *5 (N.D. Ill. Aug. 9, 2011) (abandoning a multifactor analysis in favor of asking "whether the production was a mistake").

13. Inquiry into the responding party's discovery and review processes as part of the Rule 502(b) analysis is necessary even though "discovery on discovery" is typically disfavored. *See* Gross v. Chapman, No. 19-cv-2743, 2020 WL 4336062, at *2 (N.D. Ill. July 28, 2020) (denying plaintiffs' request for "discovery on discovery" and citing *The Sedona Principles* and related case authority); *see also The Sedona Principles, Third Edition*, *supra* note 4, at 123 ("[A]s a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations, and there should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere 'speculation') of a material failure by the responding party to meet its obligations.") (citing cases).

for privilege and work product," that tends to support the assertion that the party has taken "'reasonable steps' to prevent inadvertent disclosure."[14] Other pertinent factors may include the responding party's privilege screening terms, privilege review process, and the number of documents it has produced.[15]

Importantly, Rule 502(b) *does not* require a responding party to review for privilege post-production "to determine whether any protected communication or information has been produced by mistake."[16] However, the rule *does* direct a responding party to address any "obvious indications that a protected communication or information has been produced inadvertently."[17]

Finally, Rule 502(b) also applies to the inadvertent production of privileged or work-product-protected information 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

14. FED. R. EVID. 502 Explanatory Note.

15. *See* Smith v. Auto-Owners Ins. Co., No. 15-cv-1153, 2016 WL 11117291, at *5 (D.N.M. Oct. 5, 2016) (failing to mark document as confidential was indication that defendant did not intend to produce it); Desouza v. Park W. Apartments, Inc., No. 3:15-CV-01668, 2018 WL 625010, at *3 (D. Conn. Jan. 30, 2018) (placing privileged document in public file to which plaintiff had access was not a reasonable precaution).

16. FED. R. EVID. 502 Explanatory Note.

17. *Id*.

be as great with respect to disclosures to offices and agencies as they are in litigation."[18]

B. Rule 502(d), Generally

Federal Rule of Evidence 502(d) permits either or both parties to request—and the court to enter—an order providing that the attorney-client or work-product protections are not waived in the instant litigation or any other federal or state proceeding by the disclosure of privileged or protected documents in that litigation.[19] It provides as follows:

> 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.[20]

If a Rule 502(d) order is entered in a litigation, the responding party generally can "claw back" a privileged or protected document it produced simply by notifying the other parties to the litigation that it is doing so. Unless the Rule 502(d) order contains other limitations on clawbacks,[21] the only challenge a requesting party can typically make to this clawback is whether

18. *Id*.

19. *See* Cuhaci v. Kouri Grp., LP, No. 20-cv-23950, 2021 WL 767661, at *1 (S.D. Fla. Feb. 26, 2021) ("Federal courts, including those in Florida, routinely enter such [Rule 502(d)] orders upon request of the parties.").

20. FED. R. EVID. 502(d).

21. Other provisions—such as those governing the volume or timing of clawbacks—that parties may choose to include in their Rule 502(d) order are discussed later in this *Commentary*. *See* Part V, *infra*.

or not the recalled document is, in fact, privileged.[22] Given their ease of use and self-executing relief, Rule 502(d) orders have been often referred to as "get out of jail free cards."[23]

Rajala v. McGuire Woods, LLP is instructive on this issue.[24] In *Rajala*, the plaintiff mistakenly produced privileged documents after the court had entered a Rule 502(d) order.[25] The defendant argued that the court should find a waiver, despite the Rule 502(d) order, because the plaintiff allegedly failed to take "reasonable steps" to preserve privilege.[26] The court rejected this argument and instead found that the Rule 502(d) order did not

22. *See* Brookfield Asset Mgmt., Inc. v. AIG Fin. Prods. Corp., No. 1:09-cv-08285, 2013 WL 142503, at *1 (S.D.N.Y. 2013) (finding that because the court entered a Rule 502(d) order "AIG has the right to claw back privileged meeting minutes, no matter what the circumstances giving rise to their production were").

23. *See* Elizabeth E. McGinn & Tihomir Yankov, *Guarding Against Privilege Waiver In Federal Investigations* (Sept. 20, 2016), *available at* https://buckleyfirm.com/articles/2016-09-20/guarding-against-privilege-waiver-federal-investigations ("It has been well over a year since Judge Andrew Peck gently excoriated the legal community for underusing the not-so-new privilege waiver protections of Federal Rule of Evidence 502(d). He has fondly referred to it as the 'Get Out of Jail Free Card' and offered that 'it is akin to malpractice not to get [a Rule 502(d)] order.'); *see also* Andrew Jay Peck, *A View From the Bench and the Trench(es) in Response to Judge Matthewman's New Paradigm for Ediscovery: It's More Complicated*, 71 FLA. L. REV. F. 143, 149 (2020).

24. Rajala v. McGuire Woods, LLP, No. 08-cv-2638, 2013 WL 50200 (D. Kan. Jan. 3, 2013).

25. *Id.* at *13–14.

26. *Id.* at *3. The defendant's position was that the disclosure of the document amounted to a "document dump" because the plaintiff failed to undertake a pre-production review of the entire DVD that disclosed the privileged communications due to technical difficulties.

require a showing of "reasonable steps" taken in a pre-production privilege review, and the plaintiff accordingly did not waive privilege regarding these documents.[27] In reaching this conclusion, the court observed with approval the plaintiff's argument that Rule 502(d) was "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."[28]

C. *The Interplay Between Rule 502(d) and Federal Rule of Civil Procedure 26(b)(5)(B)*

Federal Rule of Civil Procedure (FRCP) 26(b)(5)(B) sets out the procedures that apply when privileged or work-product information has been disclosed. The rule requires notice by the responding party, upon which the requesting party must, among other things, "promptly return, sequester or destroy the specified information."[29] The provisions of FRCP 26(b)(5)(B) apply whether a clawback is made under Rule 502(d) or Rule 502(b).

FRCP 26(b)(5)(B) does not delineate (beyond the vague term "promptly") deadlines by which a requesting party must act in response to a clawback request. Rule 502(d) and Rule 26(b)(5)

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27. *Id*.

28. *Id.* at *5. The court continued by observing that the Rule 502(d) order in that case was "designed to reduce the time and costs attendant to document-by-document privilege review, and was entered with the express goal of eliminating disputes regarding inadvertent disclosure of privileged documents, which would disrupt the discovery process and cause the attorneys in this case to expend significant resources and time arguing about what steps were taken to prevent disclosure and to rectify the error." *Id.*

29. FED. R. CIV. P. 26(b)(5)(B).

permit the parties the flexibility to negotiate such deadlines in a manner best suited to the needs of case.[30]

FRCP 26(b)(5)(B) also allows the requesting party to "promptly present the information" subject to a clawback dispute "to the court under seal for a determination of the [privilege] claim." Some courts hold that presentation of the document sought to be clawed back is necessary for a resolution of the claim.[31] The Advisory Committee Notes to the 2006 amendment to Rule 26 expressly provide: "In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility."[32] On the other hand, responding counsel may prefer that the clawed-back documents be returned and the issue before the court decided based on the information in the privilege log.

Given the foregoing, parties may wish to discuss whether any time limits should be included in their Rule 502(d) order (or in a protective order or similar document) or whether (and if so,

30. Paul W. Grimm, Lisa Yurwit Bergstrom, & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 J. RICH. J. L. & TECH. 8, 68 (2011) ("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).").

31. *See* U.S. Home Corp. v. Settlers Crossing, LLC, No. DKC 08-1863, 2012 WL 5193835, at *5 (D. Md. Oct. 18, 2012) ("It would be wholly illogical to read Rule 26(b)(5)(B) as prohibiting the use of documents 'subject to a claim of privilege' when resolving that very claim of privilege.").

32. *See* Part IV.K, *infra*, for a discussion of related ethical issues.

how) documents or their contents can be submitted to the court as part of a privilege dispute.[33]

33. *See* Part V.A, *infra*, for a discussion of the benefits and drawbacks of including specific clawback time limits.

III. THE BENEFITS OF RULE 502(d) ORDERS

The principal advantage of a Rule 502(d) order over Rule 502(b) is the predictability litigants have regarding the protection of privileged information. That predictability can (1) streamline the privilege review process, decreasing costs for the responding party while also reducing the time a requesting party should anticipate receiving and reviewing documents; and (2) promote the conservation of judicial resources.[34] Each of these benefits is discussed below.

A. Streamlining the Privilege Review and Expediting Production

A Rule 502(d) order provides parties with more certainty regarding waiver. Rule 502(d) specifically enables the responding party to develop a privilege review and workflow that best meets the particular needs of the case. For instance, the responding party may tailor the privilege review to the data, costs, and risks at hand without concern that the procedure selected may not be deemed "reasonable" under Rule 502(b). This allows the responding party to avoid a waiver of privilege across all related litigations in the event of an inadvertent disclosure.[35] Another example could involve the responding party assessing whether a more cost-effective privilege review method, like privilege screening, sampling, or even artificial intelligence

34. The drafters of Rule 502(d) intended these benefits. *See* FED. R. EVID. 502 Explanatory Note.

35. Importantly, attorneys may still have an ethical obligation to take reasonable care to keep privileged information confidential when producing documents and to gain informed consent from the client before disclosing privileged information. *See* Part IV.K, *infra*; *see also* Edwin M. Buffmire, *Enter the Order, Protect the Privilege: Considerations for Courts Entering Protective Orders Under Federal Rule of Evidence 502(d)*, 81 FORDHAM L. REV. 1621 (2013) (citing Model Rule of Professional Conduct 1.6(a)).

tools, would better fit the needs of a particular case. This, in turn, has the potential to reduce costs for the responding party.[36] Moreover, such an order might allow a responding party to engage in a truncated privilege review—or none at all—without risking waiver.[37] With a 502(d) order in place, practitioners may feel comfortable that they need not conduct a fail-safe review to avoid potential privilege waiver stemming from inadvertent production.[38] In addition, the responding party will have the option (though not the obligation) to expedite production, which may provide a significant benefit to the requesting party.

B. Conserving Judicial Resources

Rule 502(d) orders also have the potential to reduce motion practice on privilege disputes, thereby conserving judicial resources.[39] This is because the entry of a 502(d) order can allow courts to bypass fact-intensive inquiries regarding a responding

36. *See* Winfield v. City of New York, No. 15-cv-05236, 2018 WL 2148435, at *4 (S.D.N.Y. May 10, 2018) ("The rule incentivizes parties to voluntarily agree to procedures that will alleviate the burdens of pre-production privilege reviews by offering protection from waiver of privilege to the producing party.").

37. *See Commentary on Protection of Privileged ESI*, *supra* note 6, at 104 (noting that courts can enter Rule 502(d) orders to prevent waivers without regard to the reasonableness of the procedures used to identify privileged documents). Such a practice is best employed through agreement with the requesting party to address burden issues. *See* Part IV.I.1, *infra*.

38. Practitioners should always consider their ethical obligations before agreeing to limit or forgo a privilege review. *See* Part IV.K, *infra.*

39. Rajala v. McGuire Woods, LLP, No. 08-cv-2638, 2013 WL 50200, at *5 (D. Kan. Jan. 3, 2013).

party's efforts to satisfy Rule 502(b)'s "reasonable steps" requirements that frequently accompany such motion practice.[40]

40. *See, e.g.*, Med. Mut. of Ohio v. AbbVie, Inc. (*In re* Testosterone Replacement Therapy Prods. Liab. Litig.), 301 F. Supp. 3d 917, 926 (N.D. Ill. Aug 2018) (accepting the argument that Plaintiff's disclosure was inadvertent and permitting clawback, citing among other reasons, that because the parties agreed to the 502(d) standard, it is inappropriate to evaluate the time it took to request the clawback because it "conflates the inadvertence inquiry with the question whether, under Rule 502(b)(3), the party took prompt steps to rectify the error."); *see also* Ranger Constr. Indus., Inc. v. Allied World Nat'l Assurance Co., No. 17-cv-81226, 2019 WL 436555, at *2 (S.D. Fla. Feb. 4, 2019) (noting surprise that counsel had not entered into a 502(d) order and lamenting that this has, in part, resulted in the court "expend[ing] extensive judicial resources, including presiding over a two-day evidentiary hearing and oral argument").

IV. USE OF RULE 502(d) ORDERS

The vehicle for obtaining the benefits of Rule 502(d) is through entry of a court order.[41] The simplest form of such an order—already endorsed by The Sedona Conference—tracks the language of Rule 502(d) and can be found in Appendix A.[42] The legislative history of the Rule and litigation concerning the Rule's specific contours, however, have highlighted a number of nuances that practitioners and courts should understand. They are discussed below.

A. Entry of an Order Is Required, but Consent of All Parties Is Not

A court may enter a Rule 502(d) order sua sponte[43] or on motion by a party supported by good cause.[44] Consent of an

41. Parties may enter into such an agreement without entry of a court order pursuant to Federal Rule of Evidence 502(e); however, without entry of a court order pursuant to Rule 502(d), such an agreement is only binding on the parties to the agreement and does not protect the parties from waiver in other cases. *See* FED. R. EVID. 502(e) and Explanatory Note.

42. *See also The Sedona Principles, Third Edition*, *supra* note 4, at 150–51 (noting that Rule 502(d) orders "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."); *Commentary on Protection of Privileged ESI, supra* note 6, App'x D.

43. *See* Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., No. 4:08-cv-684, 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009) ("[I]t is within this Court's authority to order discovery to proceed and that by complying with such order Dart has not waived the attorney-client or work-product privilege . . . .").

44. *See* Kappel v. Dolese Bros. Co., No. CIV-18-1003, 2019 WL 2411445, at *1 (W.D. Okla. June 7, 2019) (declining to adopt 502(d) provision within

adversary is not required.[45] The court in *Rajala v. McGuireWoods, LLP*[46] noted that the following Statement of Congressional Intent Regarding Rule 502(d) makes this clear:

> This subdivision is designed to enable a court to enter an order, *whether on motion of one or more parties or on its own motion*, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery.[47]

The Explanatory Note also points out that the parties' mutual assent is not required for an order to issue.[48] The Sedona Conference reinforced this notion when it declared that "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

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proposed Protective Order where moving party had failed to establish good cause for the clawback provision).

45. Rajala v. McGuire Woods, LLP, No. 08-cv-2638, 2013 WL 50200, at *3 (D. Kan. Jan. 3, 2013) ("[A] court may fashion an order, upon a party's motion or its own motion, to limit the effect of waiver when a party inadvertently discloses attorney-client privileged information or work product materials.") (footnote omitted).

46. *Id.* at *3.

47. *See* FED. R. EVID. 502(d) Addendum to Explanatory Note, Statement of Congressional Intent (emphasis added).

48. *See* FED. R. EVID. 502 Explanatory Note ("Party agreement should not be a condition of enforceability of a federal court's order.").

entry of such orders."[49] This is an important element, as requesting parties in, e.g., asymmetric lawsuits may not be inclined to agree to a Rule 502(d) order because they will not benefit from its protections. As outlined in Appendix B, *infra*, some courts include Rule 502(d) order language in their local rules or model orders.

B. Rule 502(d) Orders Do Not Generally Require Language Specifically Overriding Rule 502(b)

Rule 502(d) orders allow parties and courts to circumvent a protracted examination of the Rule 502(b) factors.[50] A minority of courts, however, have held that to avoid analysis of the Rule 502(b) factors, a Rule 502(d) order must explicitly disclaim application of Rule 502(b).[51] This *Commentary* takes the view that an explicit disclaimer of Rule 502(b) is unnecessary because the language of 502(d) stands on its own. Nevertheless, the model 502(d) order in Appendix A to this *Commentary* includes—out

49. *Commentary on Protection of Privileged ESI*, *supra* note 6, at 132–33.

50. *See* Part III.B, *supra*.

51. *See, e.g.*, U.S. Home Corp. v. Settlers Crossing, LLC, No. DKC 08-1863, 2012 WL 3025111, at *2 (D. Md. July 23, 2012) ("To find that a court order or agreement under Rule 502(d) or (e) supplants the default Rule 502(b) test, courts have required that concrete directives be included in the court order or agreement regarding *each* prong of Rule 502(b)") (emphasis original); Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06cv2804, 2010 WL 275083, at *4 (S.D. Cal. Jan. 13, 2010) (finding that because the protective order governing inadvertent disclosure did "not address under what circumstances failure to object to the use of inadvertently produced privileged documents waives the privilege," Rule 502(b) applied); Absolute Activist Value Master Fund Ltd. v. Devine, 262 F. Supp. 3d 1312, 1322–23 (M.D. Fla. 2017) (finding that when parties refer generally to the protections of Rule 502, courts should apply Rule 502(b)).

of an abundance of caution—a sentence specifically disclaiming application of Rule 502(b).[52]

C. *Rule 502(d) Orders Should Not Be Limited to "Inadvertent" Disclosures*

Because the text of Rule 502(d) is not limited to "inadvertent" disclosures, Rule 502(d) orders should be drafted in a way that avoids limiting them to inadvertent disclosures.[53] Indeed, by restricting a Rule 502(d) order to inadvertent disclosures, the parties run the risk that the court will engage in a Rule 502(b) analysis to determine whether a disclosure was or was not inadvertent. This is one of the principal problems with 502(b) that 502(d) eliminates.[54] In addition, limiting the order to

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52. *See* Appendix A at ¶4, *infra* ("The provisions of Rule 502(b) do not apply."). This language was not present in the prior versions of model Rule 502(d) orders in the *Commentary on Protection of Privileged ESI*. *See Commentary on Protection of Privileged ESI*, *supra* note 6, Appendices D, E.; *see also* John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 FORDHAM L. REV. 1589, 1617 (2013) ("[A] thoroughly drawn Rule 502(d) order should disclaim the application of Rule 502(b).").

53. *Compare* Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., No. 4:08-cv-684, 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009) (rejecting argument that "Rule 502 is limited to inadvertent disclosures"), *with* Abington Emerson Capital, LLC v. Landash Corp., No. 2:17-CV-143, 2019 WL 3521649, at *3 (S.D. Ohio Aug. 2, 2019) (declining to extend a Rule 502(d) order to intentional disclosures).

54. *See, e.g.*, *U.S. Home Corp.*, 2012 WL 3025111, at *6, n.15 (upholding the Magistrate Judge's decision to engage in a Rule 502(b) analysis where the Rule 502(d) order was limited to inadvertently produced documents, noting that this limitation "necessarily contemplated that some degree of precautionary measures be taken by the parties to avoid waiver"); United States v. Sensient Colors, Inc., No. 07-cv-1275, 2009 WL 2905474, at *2, n.4 (D.N.J. Sept. 9, 2009) (engaging a Rule 502(b) analysis where the parties' had stipulated to the following: "The Parties agree that the inadvertent production of privileged documents or information (including ESI) shall not, in and of itself,

"inadvertent" disclosures would foreclose the possibility of so-called quick-peek arrangements or production alternatives without a robust privilege review.

The model Rule 502(d) order set forth in Appendix A contains language—"whether inadvertent or otherwise"—to specifically address this issue.[55]

D. Rule 502(d) Orders Do Not Cover a Party's Affirmative Use of Its Own Documents

While Rule 502(d) safeguards a party against *disclosures* of documents (whether inadvertent or not), it does not provide protection when a party *uses* its own documents.[56] This is especially so when the party or its expert uses its own allegedly privileged documents.[57] For instance, in *Bama Companies, Inc. v.*

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waive any privilege that would otherwise attach to the document or information produced").

55. *See* Appendix A, ¶¶1, 4, *infra* ("The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise . . . . The provisions of Rule 502(b) do not apply."). The latter language was not present in the prior versions of model Rule 502(d) orders in the *Commentary on Protection of Privileged ESI*. *See Commentary on Protection of Privileged ESI*, *supra* note 6, Appendix D-E.

56. *See, cf.*, Potomac Elec. Power Co. & Subsidiaries v. United States, 107 Fed. Cl. 725, 731 (2012) (noting that Rule 502(d) does not apply to "intentional waivers made in the course of, for example, an advice-of-counsel defense") (*citing* FED. R. EVID. 502(d)); Hostetler v. Dillard, No. 3:13-cv-0351, 2014 WL 6871262, at *4 (S.D. Miss. Dec. 3, 2014) (finding waiver, notwithstanding entry of a Rule 502(d) order where a non-party disclosed allegedly privileged communications in a deposition, and the party claiming privilege did not claim privilege during the deposition).

57. *See* MICHAEL H. GRAHAM, WINNING EVIDENCE ARGUMENTS: ADVANCED EVIDENCE FOR THE TRIAL ATTORNEY § 502:1 (2006) ("The rule is intended to

Stahlbush Island Farms, Inc., a party's expert relied on (and produced) emails that the party later claimed to be privileged.[58] The court found that any privilege had been waived: "Once used in this manner by [the party's] testifying expert and produced to opposing counsel, attorney-client privilege was waived, regardless of whether disclosure was inadvertent or intentional."[59] Other cases are in accord.[60] The subject of use of the responding party's document by the requesting party, such as at a deposition, is discussed in Part V.B, *infra.*

E. Rule 502(d) Orders Are Enforceable in Any Federal or State Proceeding

Because Rule 502(d) allows for multijurisdictional protection, Rule 502(d) orders provide assurance to the responding party that disclosure of a privileged document in the federal proceeding that entered the order will not result in a privilege waiver in that litigation or in "any other federal or state

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facilitate discovery. It is not intended to permit a party affirmatively to introduce a favorable piece of privileged or protected information while simultaneously protecting unfavorable information.").

58. No. 18-cv-45, 2019 WL 3890922, at *1 (N.D. Okla. Aug. 19, 2019).

59. *Id*. at *2 (citing cases).

60. *See, e.g.*, Wadler v. Bio-Rad Labs., Inc., 212 F. Supp. 3d 829, 853 (N.D. Cal. 2016) ("The Court rejects Bio–Rad's argument that its disclosure of the expert reports does not result in any waiver because they were only offered in support of their Motion to Strike and not to advance their substantive legal positions. The Court finds no authority suggesting that an express and intentional disclosure of privileged communications in litigation does not result in waiver unless it is made in connection with an attempt to prevail on the merits of that party's position rather than simply attempting to gain an advantage on an evidentiary matter.").

proceeding."[61] The Advisory Committee explained that extending the Rule's reach in this manner was intended to result in further cost savings.[62]

F. Rule 502(d) Does Not Govern Previously Disclosed Information or Disclosures Made in State Proceedings

Rule 502(d) is forward-looking. Thus, a document that has been disclosed prior to entry of a 502(d) order (either in the

61. FED. R. EVID. 502. The Explanatory Note to Rule 502 observes that the drafter's intent behind Rule 502(d)'s multi-jurisdictional protection—namely, that its use as a cost-saving tool would not be as effective if it failed to provide protection outside the particular litigation in which the order was entered. *See* Part III.A, *supra*. For instance, *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.* upheld this multi-jurisdiction protection when it entered a Rule 502(d) order that protected against waiver of privilege in a related state court proceeding. No. 4:08-cv-684, 2009 WL 464989 (N.D. Tex. Feb 23, 2009). The defendant in *Whitaker Chalk* filed a motion to stay the federal court proceedings due to a concern that producing privileged documents in the federal case would result in a waiver of a claim of privilege over those documents in the underlying state court matter. In response, the court issued a Rule 502(d) order and ordered the federal discovery to proceed, stating that there was no reason "why a Texas court would not recognize an order entered under Rule 502." *Id*. at *4.

62. The Explanatory Note observes as follows: "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*." FED. R. EVID. 502 Explanatory Note (emphasis added).

present litigation or in an earlier lawsuit) cannot be clawed back pursuant to Rule 502(d) after the order's entry.[63]

Similarly, Rule 502(d) also does not apply to the disclosure of privileged material in a state proceeding in which there is not a non-waiver order. As the Explanatory Note indicates: "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."[64]

G. *Rule 502(d) Applies Only to the Attorney-Client Privilege and Work-Product Protection*

The text of Rule 502 limits its application to the attorney-client privilege and work-product protection,[65] as those terms are

63. *See e.g.*, Abington Emerson Capital, LLC v. Landash Corp., No. 2:17-cv-143, 2019 WL 3521649, at *2–4 (S.D. Ohio Aug. 2, 2019) (assessing whether the 502(d) order would be retroactive and deciding it would not apply to documents produced before the time the parties' began negotiating the 502(d) order and reserving judgment on the period the parties were actively negotiating to understand whether documents were produced during that time).

64. FED. R. EVID. 502 Explanatory Note.

65. *See* FED. R. EVID. 502 ("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."); *see also* FED. R. EVID. 502 Explanatory Note ("The rule's coverage is limited to attorney-client privilege and work product."); Winfield v. City of New York, No. 15-cv-05236, 2018 WL 2148435, at *4 (S.D.N.Y. May 10, 2018) (Rule 502 "does not address privileges other than attorney-client and work product."); Proxicom Wireless, LLC v. Target Corp., No. 19-cv-01885-Orl-37LRH, Order at 2 (ECF No. 60) (M.D. Fla. Mar. 25, 2020) ("Rule 502 applies to the disclosure of a communication or information covered by the attorney-client privilege or

defined in Rule 502(g).[66] This being the case, litigants should expect courts to restrict Rule 502(d) orders to these two privileges.[67] For example, in *Proxicom Wireless, LLC v. Target Corporation*, the court found that a Rule 502(d) order could not extend to confidential or proprietary information, as those concerns went beyond the plain language of Rule 502(d).[68]

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work-product protection.") (internal quotations and citation omitted); Grimm, *supra* note 30, at 3 ("Rule 502 is titled 'Attorney-Client Privilege and Work Product; Limitations on Waiver.' As the title makes clear, the rule applies only to the attorney-client privilege and the work product doctrine. It has no effect on any other evidentiary privilege, such as the vast array of governmental, or other common law privileges, including the confidential marital communications privilege, the psychotherapist-patient privilege, the clergy-communicant privilege, the 'law enforcement' or 'informer's' privilege, and the 'deliberative process' privilege.") (footnotes omitted).

66. Federal Rule of Evidence 502(g) defines "attorney-client privilege" as "the protection that applicable law provides for confidential attorney-client communications" and "work-product protection" is defined as "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

67. The Explanatory Note explains that Rule 502 is limited to attorney-client privilege and work product, and that the Rule was not intended to apply to any other evidentiary privileges. The Note also explains that the definition of work product "materials" is intended to include both tangible and intangible information. FED. R. EVID. 502 Explanatory Note; *but see* Fairholme Funds, Inc. v. United States, 134 Fed. Cl. 680, 686 (2017) (permitting the application of a Rule 502(d) order to the deliberative process and bank examination privileges).

68. Proxicom Wireless, LLC v. Target Corp., No. 6:19-cv-1886, 2020 WL 1671326, at *2 (M.D. Fla. Mar. 25, 2020); *see also* Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Commerce, No. 18-cv-03022, 2020 WL 4732095, at *2, n.1 (D.D.C. Aug. 14, 2020) ("Some courts have looked to Federal Rule of Evidence 502 for guidance over waiver in the deliberative process privilege context, however, as other judges have noted, the text of Rule

Nevertheless, some courts have extended Rule 502(d) orders to other privileges and protections. For instance, in *Digital Assurance Certification, LLC v. Pendolino*,[69] the court implemented a discovery protocol to govern inspection of forensic images of computer hard drives that purported to extend Rule 502(d)'s protections to "*any other privilege or immunity*."[70] Similarly, in *Hill Phoenix Inc. v. Classic Refrigeration SoCal, Inc.*,[71] a protective order purported to extend Rule 502(d)'s protections to "*any other recognized privilege or protection*."[72] Other cases[73] and some model orders contain similar language.[74]

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502 is expressly limited to the attorney-client privilege and work-product protection and should not be extended to the deliberative process privilege.") (citations omitted); *The Sedona Principles, Third Edition*, *supra* note 4, at 152 (noting that "parties cannot rely solely upon Rule 502" to protect all their interests in maintaining client confidentiality, other privileged communications, or personal information).

69. No. 6:17-cv-72, 2019 WL 161981, at *6 (M.D. Fla. Jan. 10, 2019).

70. *Id.* (emphasis added).

71. No. 8:19-cv-00695, 2019 WL 3942960, at *7 (C.D. Cal. Aug. 21, 2019).

72. *Id.* at *7 (emphasis added).

73. *See, e.g.*, ANZ Advanced Techs., LLC v. Bush Hog, LLC, No. 09-cv-00228, 2010 WL 11575131, at *11 (S.D. Ala. 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).

74. *See, e.g.*, The Model Stipulated Protective Order for the Western District of Washington, https://www.wawd.uscourts.gov/sites/wawd/files/ModelStipulatedProtectiveOrder.pdf ("[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

While courts may purport to enter non-waiver orders pursuant to Rule 502(d) affecting privileges beyond the attorney-client privilege and work-product protection, those orders have no stare decisis effect, nor should they be considered persuasive authority for extending the scope of Rule 502(d).[75] This is not to say that a court cannot enter an order that provides coextensive protections for other privileges through the pendency of a litigation. However, it would be relying on its inherent authority to govern the discovery process rather than on Rule 502(d). Accordingly, parties could stipulate to protections for other privileges, though that stipulation may not be enforceable in subsequent litigation against non-parties, since they are not protected by the language of Rule 502(d).

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a waiver by the responding 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). In line with this approach, the Seventh Circuit Council on eDiscovery and Digital Information requires parties to discuss "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* https://www.ediscoverycouncil.com/sites/default/files/StandingOrde8_10.pdf.

75. *See* Winfield v. City of New York, No. 15-cv-05236, 2018 WL 2148435, at *5-6 (S.D.N.Y. May 10, 2018) (rejecting precedent entering a non-waiver order that had no basis in law).

H. The Protections of Rule 502(d) Can Be Incorporated into Other Discovery Orders or Protocols

While courts may enter stand-alone 502(d) orders, they may alternatively include provisions addressing Rule 502(d) in ESI[76] protocols or protective orders. Indeed, courts have encouraged the use of Rule 502(d) provisions embedded within model ESI protocols and template protective orders. For example, the template ESI protocol for the Northern District of California incorporates Rule 502(d) language.[77] Appendix B sets out the districts that have such orders by local rule or model orders.

Using district court templates may reduce negotiation time and result in quick entry by the court. In some matters, however, the Rule 502(d) language in a standard model order may only be a starting point for more extensive negotiations.[78] When including a Rule 502(d) provision within an ESI protocol or protective order, counsel should ascertain whether the order has conflicting language in other provisions that address the

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76. Electronically Stored Information. *See The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition*, 21 SEDONA CONF. J. 263, 303 (2020).

77. *See* United States District Court for the Northern District of California, *E-Discovery (ESI) Guidelines*, https://www.cand.uscourts.gov/forms/e-discovery-esi-guidelines/. Other courts incorporate Rule 502(d) language into their model protective orders. *See, e.g.*, Western District of Washington Model Stipulated Protective Order, https://www.wawd.uscourts.gov/sites/wawd/files/ModelStipulatedProtectiveOrder.pdf ("[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 responding 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.").

78. *See* Part V, *infra*.

treatment of privileged documents or other types of "inadvertent" productions.

I. A "Quick Peek" Arrangement Relying on Rule 502(d) May Only Occur Where Both Parties Consent

A Rule 502(d) order "may provide for the return of documents without waiver irrespective of the care taken by the disclosing party."[79] This being the case, litigants and courts have relied on Rule 502(d) to execute what are known as "quick peek" arrangements.[80] A quick peek occurs when a responding party provides documents to the other side without review for privilege.[81]

1. Agreed Quick Peek

While the Explanatory Note to Rule 502 states that "the rule contemplates enforcement of . . . 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for

79. FED. R. EVID. 502 Explanatory Note.

80. *See* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (explaining 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 privilege documents").

81. *See* Tom Tinkham & Kate Johnson, *eDiscovery Without the Endless Battles What You Need to Know About Electronic Documents to Keep Your Client and Yourself Out of Trouble*, at 18-22, BENCH & BAR OF MINNESOTA, Feb. 2020, at 18 ("One way to limit this cost is the 'quick peek' approach: Parties enter into a clawback agreement coupled with a Rule 502 order, and agree that they will produce all documents, including privileged information, which the producing party can 'claw back' when the privilege nature becomes apparent. . . . The problem with this approach is that once the opponent has seen the privileged communication, they possess and can exploit the information it contains, even though they must return the documents. For this reason, this approach is rarely used.").

privilege and work product,"[82] these arrangements raise potential ethical and strategic pitfalls.[83] Quick peeks are rarely used and can be risky.

First, counsel would be producing documents it has never seen. In addition, commercially sensitive material could be produced. The material produced could include personal data or health information protected under other statutes or laws, thereby risking potential liability for disclosure. The production could contain highly relevant or sensitive material that could harm the responding party's case, of which the responding party should be aware from an advocacy perspective.

Second, once the requesting party has seen privileged documents, their contents cannot be removed from the minds of adversaries even if they do not retain the documents.[84] Accordingly, on the rare occasion when a quick-peek arrangement is contemplated, parties should consider the issue carefully, including setting clear expectations at the outset, obtaining client consent, and considering at least a minimal privilege review including, for example, documents with lawyer names, email

82. FED. R. EVID. 502 Explanatory Note.

83. T*he Sedona Principles, Third Edition*, *supra* note 4, at 124–26, 154–55; Laura C. Daniel, *Note: The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification in the Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663 (Nov. 2005).

84. *See* U.S. Equal Emp't Opportunity Comm'n v. The George Washington Univ., No. 17-cv-1978, 2020 WL 3489478, at *11 (D.D.C. June 26, 2020) (discussing the practical reasons for protecting documents that have not been reviewed for privilege, including that confidentiality of the material will be lost and that the opposing party will know the contents).

addresses, and law firm domains.[85] Notwithstanding these potentially dangerous issues, there are circumstances where litigants have agreed to a quick-peek arrangement, including a lack of resources (time or money) to conduct the review, expediting the exchange of information in advance of settlement discussions when the data is unlikely to have any privileged documents, or instances when a non-party is involved.[86]

2. Compelled Quick Peek

The Sedona Conference has unequivocally stated that "a court may not compel disclosure of privileged attorney-client communications absent waiver or an applicable exception."[87] In

85. The Sedona Conference previously stated that, "risks and limitations make 'quick peek' agreements and productions ill-advised for most cases." *The Sedona Principles*, *Third Edition*, *supra* note 4, at 154–55; *see also id.* at 124–26; Daniel, *supra* note 83.

86. When they are used, quick-peek agreements typically take one of two forms. First, the parties may simply agree that the responding party will produce all documents from one or more sources, with the ability to claw back any documents at a later date if it learns that a document is privileged. Second, the parties may agree to engage in a three-part process, wherein (1) the responding party may make available information without a full review for privilege, but that the responding party reserves the right to later assert privilege protections; (2) the requesting party reviews the documents and selects what it believes should be produced; and (3) the responding party reviews the selected information and withholds any information that the responding party deems privileged. *See* Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH & LEE L. REV. 673, 691-93 (Spring 2009).

87. *See Commentary on Protection of Privileged ESI*, *supra* note 6, at 137 (observing at Comment 2(e) that "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. . . . Indeed, due

fact, courts have recognized that they are forbidden from compelling disclosure of privileged information.[88] For example, in *U.S. Equal Employment Opportunity Commission (EEOC) v. The George Washington University*, the EEOC argued that the university should be ordered to run searches for privileged names and then produce the documents pursuant to a 502(d) Order.[89] The court correctly recognized that such an order would be an abuse of discretion and would result in privileged materials being produced.[90] The court cited to The Sedona Conference and other case law for the well-established principle that privileged information should be protected and parties should not be compelled to disclose such materials.[91]

Similarly, U.S. Magistrate Judge Katharine Parker refused to compel a quick peek at the request of the plaintiffs in *Winfield v. City of New York*.[92] In doing so, Judge Parker first noted that "[a]s a general matter, Rule 26(b)(1) limits the scope of discoverable information to *nonprivileged* information."[93] In addition to this restriction, the court observed that "the Federal Rules of

process is implicated when privileged communications are required to be disclosed, even for in camera review.").

88. *See* Mgmt. Comp. Grp. Lee, Inc. v. Okla. State Univ., No. CIV-11-967, 2011 WL 5326262, at *4, n.6 (W.D. Okla. Nov. 3, 2011) (declining to impose a quick-peek procedure on an unwilling party).

89. *George Washington Univ.*, 2020 WL 3489478, at *3, 9 (D.D.C. June 26, 2020).

90. *Id*. at *11.

91. *Id*. at *10.

92. No. 15-cv-05236, 2018 WL 2148435, at *8 (S.D.N.Y. May 10, 2018).

93. *Id*. at *5 (emphasis in original).

Evidence do not abrogate common law privileges . . . [or] create an exception to the law of privilege or authorize a court to compel disclosure of privileged information . . ."[94] Citing The Sedona Conference *Commentary on Protection of Privileged ESI*, Judge Parker reasoned that compelled disclosure of privileged information could also "implicate due process concerns."[95] Judge Parker concluded by unequivocally holding that the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and Second Circuit precedent prohibited the court from authorizing the compelled quick-peek procedure.[96] This is the majority position on the issue.[97]

J. Parties May Be Able to Incorporate Analogous 502(d) Safeguards in Nonfederal Proceedings

Practitioners have tools available to them to incorporate Rule 502(d)-like protections in arbitration, nonjudicial governmental proceedings, and state proceedings.

1. Arbitration and Regulatory Proceedings

Arbitration can require extensive discovery at times, including the production of ESI.[98] The same is true of regulatory

94. *Id*. at *6.

95. *Id*. at *6, n.3.

96. *Id*. at *6.

97. *Contra* Fairholme Funds, Inc. v. United States, 134 Fed. Cl. 680, 687–88 (2017) (granting the plaintiff's request for a quick peek of all 1,500 documents withheld by the defendant over the defendant's objection).

98. AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2013), *available at* https://www.adr.org/sites/default/files/Commercial%20Rules.pdf; JAMS Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases, JAMS (Jan. 6,

proceedings, including responding to civil investigative demands and subpoenas issued by federal, state, or local government agencies that are served during the investigative phase before a judicial proceeding.[99] However, there are no automatic protections for the disclosure of privileged materials in arbitrations or nonjudicial governmental proceedings.

The responding party may minimize the risk of waiving privilege by entering into a written agreement (similar to a

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2010), https://www.jamsadr.com/arbitration-discovery-protocols/. The rules for arbitration permit arbitrators to actively manage discovery that may occur during the arbitration process, including the authority to issue an order safeguarding or limiting the documents exchanged in discovery. *See* COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 98, at R-23 ("The arbitrator shall have the authority to issue any orders necessary to . . . without limitation: (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality").

99. *See* 31 U.S.C. § 3733 (2009) (authorizing the Attorney General, or designee, to issue civil investigative demands and request documents or other discovery materials during the investigative phase, prior to a judicial proceeding); NYC Charter 2203 (authorizing the Commissioner of the New York City Department of Consumer Affairs to serve subpoenas in furtherance of investigating consumer protection matters); Sea Salt, LLC v. Bellerose, No. 2:18-CV-00413, 2020 WL 2114922, at *4 (D. Me. May 4, 2020) (granting defendant's motion to compel privileged documents disclosed to the Federal Bureau of Investigation, and stating that, "[b]y disclosing the communications to the FBI, as to the attorney-client privilege, 'there is no doubt that [Plaintiff] waived any privilege it might have claimed as to the document itself.' . . . Disclosure of the information to law enforcement . . . [is] inconsistent with keeping it from the defendants insofar as the information would likely be disclosed as part of any criminal proceeding.") (internal citations omitted).

stipulation under Rule 502(e))[100] with the requesting governmental entity or entities or seek an order from the arbitrator. The agreement or order should prevent disclosure of any produced documents beyond the use of the requesting party, require the return of any disclosed privileged documents, and preclude the use of any clawed-back privileged documents.

This type of agreement would not bind non-parties to the agreement. For example, it would not bind the parties to a private follow-on action based on the arbitration or government investigation.[101]

2. State Proceedings Without a Parallel to Rule 502(d)

While several states have adopted versions of Rule 502(d), the majority of states do not have a Rule 502(d) equivalent.[102] However, even in states without an equivalent rule of evidence,

100. *See* FED. R. EVID. 502(e) ("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.").

101. *See* Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 CONG. REC. H. 7817–19 (2008) (noting that Rule 502 "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation"); *see also In re* Pac. Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012) ("The only justification behind enforcing such agreements would be to encourage cooperation with the government. But Congress has declined to adopt even this limited form of selective waiver.") (citing Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

102. *See Commentary on Protection of Privileged ESI*, *supra* note 6, at Appendix F; *see also* N.J. R. EVID. 530(4) (effective July 1, 2020).

the parties may decide to execute a non-waiver agreement or employ other state court tools to address the issues.[103]

Where the parties execute a non-waiver agreement, even in states without a Rule 502(d) equivalent, Federal Rule of Evidence 502(c) may provide protection in any subsequent federal litigation. Rule 502(c) provides protection in federal court if the privilege would not have been waived if the document had been produced in a federal proceeding under Rule 502, *or* there would not have been a waiver under the law of the state where the disclosure occurred.[104] Where the privileged status of a document would not have been waived in the underlying state court action, the application of Rule 502(c) confers de facto protection in a federal proceeding.[105]

For example, in *United States Fire Insurance Co. v. City of Warren*, the requesting party moved to compel, claiming that the production of attorney-client privileged documents in a state court proceeding served as a waiver in the subsequent federal

103. *See, e.g.*, ARIZ. R. EVID. 502(d); COLO. R. EVID. 502(d); DEL. R. EVID. 510(d, f); ILL. R. EVID. 502(d); IND. R. EVID. 502(d); IOWA. R. EVID. 5.502(d); MD. R. CIV. P. CIR. CT. 2-402(e)(5); N.J. R. EVID. 530(c)(4); VA. CODE § 8.01–420.7(c); VT. R. EVID. 510(b)(4); WASH. R. EVID. 502.

104. FED. R. EVID. 502(c).

105. *See* FED. R. EVID. 502 Explanatory Note ("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.") (citing 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")).

proceeding.[106] In response, the court held that Rule 502(c) required it to apply the more protective of federal or state (Michigan) law. Because the production would not have served as a waiver under Michigan law, the court denied the motion to compel production of the documents previously produced in state court.[107]

K. Rule 502(d) and Counsel's Ethical Obligations

There are times when a party may decide to produce documents without performing a thorough privilege review. If a 502(d) order has been entered, the responding party should have the benefit of not waiving privilege on those documents. Nevertheless, clients may not be well served by the production of privileged documents even when balanced against the client's interest in saving time or resources associated with a lengthier privilege review. Before deciding to proceed in this manner, the lawyer for the responding party should consider potential ethical issues.[108]

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106. U.S. Fire Ins. Co. v. City of Warren, No. 2:10-cv-13128, 2012 WL 1454008 (E.D. Mich. Apr. 26, 2012).

107. *Id.* at *16–17; *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)).

108. Rule 1.6 of the American Bar Association (ABA) Model Rules of Professional Conduct imposes an ethical duty for lawyers to maintain their client's confidences and "not reveal information relating to the representation of a client unless the client gives informed consent." MODEL RULES OF PROF'L CONDUCT R. 1.6 (AM. BAR. ASS'N 2019). 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

In addition, counsel should obtain client approval before producing documents without performing a privilege review or performing only a limited review. The pros and cons of the approach should be clearly explained to the client, as once the requesting party has reviewed a privileged document, it would have knowledge of the legal advice and strategy contained therein, even if the requesting party must return the physical document or ESI.[109]

Finally, production of privileged documents may raise ethical issues for the requesting party.[110] Every state has adopted a unique set of mandatory ethics rules, and lawyers should consult the appropriate set of ethics rules in their jurisdiction to determine whether they are permitted to review an inadvertently

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client." *Id*. Further, Model Rule 1.15 involves a lawyer's duty to "ensure the safekeeping of their client's property, which includes their documents and ESI." *Id*., R. 1.15; *see also The Sedona Principles, Third Edition*, *supra* note 4, at 161. Obtaining a Rule 502(d) order can provide additional protection to client confidences. *See* Buffmire, *supra* note 35, at 1628–29. Lawyers may enhance their "zealous representation" and better safeguard a client's confidences by having a Rule 502(d) order in place, so that any produced privileged documents can potentially be returned without waiver implications. *See The Sedona Principles, Third Edition*, *supra* note 4, at 160.

109. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 238–39 (2010) ("[C]lient can only provide 'informed' consent if attorneys explain the factual and legal issues relevant" to privilege review protocols that may have a higher risk of inadvertent disclosure); *see also* Buffmire, *supra* note 35, at 1629 (suggesting that "attorneys should counsel clients about the benefits of Rule 502(d), not unilaterally decide to disclose privileged information").

110. *See* Novartis Pharms. Corp. v. Superior Court, No. D077934, 2021 WL 1918774 (Cal. App. Ct. May 13, 2021) (describing the ethical duties of counsel for the requesting party in California upon their discovery of an inadvertently produced privileged document).

produced privileged document. Some states do not prohibit review,[111] while others contain a requirement to notify the responding party of the potentially privileged document.[112] Some jurisdictions explicitly require lawyers who receive inadvertently produced privileged information to stop reading the document.[113] The parties could agree to a provision requiring the requesting party to immediately cease review of the document and notify the responding party of the privileged document production even if not mandated by applicable ethical rules.

111. *See, e.g.*, RULES REGULATING THE FLORIDA BAR, r. 4-4.4(b) (Fla. Bar).

112. ILL. SUP. CT. R. 4.4(b) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows that the document or electronically stored information was inadvertently sent shall promptly notify the sender.").

113. D.C. RULES OF PROF'L CONDUCT, r4.4(b) (D.C. BAR) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing."). A comment to that rule provides more explanation. *See* D.C. RULE 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. . . . ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").

V. USING RULE 502(d) ORDERS TO PROMOTE CERTAINTY AND CLARITY DURING PRIVILEGE DISPUTES

Despite the potential for faster productions, cost savings, and certainty offered by Rule 502(d) orders, a significant number of lawyers and courts still rely on Rule 502(b).[114] There are myriad reasons for this, including confusion and a general lack of familiarity with Rule 502(d) orders or concern that a simple 502(d) order is not sufficiently detailed and will lead to undesired consequences.[115] This *Commentary* discusses ways below in which parties and the courts can address these issues—not by relying on Rule 502(b), but by entering into a Rule 502(d) order.

The "model" 502(d) order attached to this *Commentary* is likely sufficient in most cases. Where parties wish to address clawback issues in more detail, they can consider additional provisions. As U.S. District Judge Paul Grimm has observed, more specificity may protect against the risk of nonenforcement by the court.[116] As a result, more specificity may result in greater predictability, particularly when the parties have considered

114. For example, not all District Courts have addressed privilege nonwaiver issues in their adopted rules or model orders. *See* Appendix B.

115. For instance, the requesting party might be concerned that a Rule 502(d) order may allow an opponent to perform a "data dump," thereby potentially shifting the burden of a privilege review to the requesting party while shielding the responding party from the consequences of this tactic.

116. Grimm, *supra* note 30, at 78 ("[I]n drafting a nonwaiver agreement, parties should pay particular attention to whether they should impose upon themselves a particular deadline within which they must give the notice contemplated by Federal Rule of Civil Procedure 26(b)(5)(B) that they are invoking a post-production claim of privilege or work-product protection.").

the different scenarios that may arise in a case and delineated the process to follow if they arise.

Against this backdrop, the *Commentary* explores various issues where the parties may consider additional specificity for clawback provisions within 502(d) orders. In connection with the discussion of these issues, the *Commentary* examines some of the principal benefits and drawbacks of providing additional specificity in a 502(d) order.

A. Should the Rule 502(d) Order Set Clear Deadlines and Processes for Challenging Clawbacks?

As noted above, neither Rule 502(d) nor Rule 26(b)(5)(B) specify the time period in which a clawback (or a challenge thereto) needs to be made. In some cases, 502(d) orders lacking such specificity have devolved into time-intensive inquiries the Rule was intended to avoid.[117]

To address this issue, parties may wish to include specific time limits in a 502(d) order to give clear guidance on when they must take particular action after a clawback demand is made. For example, in some cases the parties may consider establishing a specific timeline for events such as (i) when the requesting party must sequester or destroy a document after receiving a clawback demand; (ii) when the responding party must provide either a redacted document or privilege log for the document at issue; (iii) when the requesting party must notify the

117. *Id*. at 78 ("[A] number of reviewing courts have held that parties were not entitled to the protection of non-waiver agreements they drafted because they failed to particularize what they were to do, and when they were to do so, upon discovering that privileged or protected information had been disclosed, or they failed to comply with the procedures that had been drafted into the agreement.") (footnote omitted).

responding party that it intends to challenge the clawback demand; (iv) when the parties must meet and confer regarding the challenge; and (v) the timing of any motion practice. Specific procedures addressing each of these scenarios may save time and expense in the future by giving parties clear direction on what they must do and when they must do it in the event of a dispute. Documenting the procedures can further the goal of predictability and provide more certainty as to the status of documents subject to a clawback demand.

This type of provision can create the potential for additional disputes. For example, a provision that establishes a timeframe for challenging a clawback demand could lead to litigation over whether the challenge was timely. These issues should be weighed when deciding whether to include additional clawback provisions beyond a basic 502(d) order.

B. Should the Rule 502(d) Order Distinguish Between Documents that Have Been "Used" and Documents That Have Been "Disclosed"?

Whether the Rule 502(d) order makes a meaningful distinction between "disclosure" and "use" or other similar words is a potentially important one. It could be argued that because Rule 502(d) (and Rule 502(b)) only uses the term "disclosure," the Rule does not provide protection once a document has been "used," such as at a deposition or a hearing.[118]

118. As the Eastern District of New York observed, "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." Certain Underwriters at Lloyd's, London v. Nat'l R.R. Passenger Corp., 218 F. Supp. 3d 197, 201 (E.D.N.Y. 2016); *cf. Commentary on Protection of Privileged ESI*, *supra* note 6, at

For example, in a deposition, if a document is shown to the deponent and the defending attorney immediately prevents any questioning about the contents of the document, the document has only been "disclosed," but not "used." In contrast, if the defending attorney fails to prevent such questioning, the document has been both "disclosed" and "used." A party's ability to claw back a "used" document is arguably thornier than the ability to claw back a "disclosed" document, as courts typically hold that the privilege has been waived if the clawback does not occur shortly after the time the responding party learns of the use.[119] Nevertheless, it may not be immediately apparent at the deposition that the document shown to the witness is privileged. Should the defending party have a reasonable time after the deposition to make that determination? Courts have discretion on a case-by-case basis to consider what constitutes timely action and from when it is measured.[120] The parties may, or may

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128–29 (discussing the difference between "use" and "disclosure" under Rule 502(d), but with respect to the responding party).

119. *See, e.g.*, Entrata, Inc. v. Yardi Sys., Inc., No. 2:15-cv-00102, 2018 WL 5438129, at *2 (D. Utah Oct. 29, 2018) (holding that the responding party was not entitled to claw back 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 despite a protective order provision preventing waiver due to a party's disclosure of privileged information); Arconic Inc. v. Novelis Inc., No. 17-cv-1434, 2019 WL 911417, at *2 (W.D. Pa. Feb. 26, 2019) (holding that the responding party must raise the privilege in a timely manner once the document is used or otherwise identified).

120. Klein v. Facebook, Inc., No. 20-cv-08570-LHK (VKD), 2021 U.S. Dist. LEXIS 105516, at *21 (N.D. Cal. June 3, 2021) ("the Court appreciates that some claims of privilege may not be identified until after a transcript is prepared. In such circumstances, it is important that the privilege claim be made promptly."); *see also* Novartis Pharms. Corp. v. Superior Court, No. D077934, 2021 WL 1918774 (Cal. App. Ct. May 13, 2021) (finding waiver where defendant objected to plaintiff's use of an inadvertently produced document during

not, wish to include provisions addressing this issue in a basic 502(d) order.

C. *Should the Rule 502(d) Order Set an Outer Limit on the Number of Documents that Can Be Subject to a Clawback?*

Rule 502(d) orders typically do not set a limit on the number of documents subject to a clawback. A common reason for this is the possibility of technical or vendor errors, leading to a production of a large number of privileged documents. The responding party's protection may be severely limited if the 502(d) order sets a restriction on the number of clawbacks. This could affect the waiver analysis of those documents in the instant litigation and any future action.

If a responding party makes a "data dump" without a privilege review, this could unfairly shift the burden of review to the requesting party. If a responding party plans to produce a large number of documents without review, the parties may want to discuss setting a limit on the number of clawbacks. If the purpose of the limited review is to produce documents as quickly as possible pursuant to the demands of the requesting party, then such a limit would be unwarranted. If, however, this limited review is being performed over the objection of the requesting party, methods for handling the issue could include: (1) The parties could determine a set number of documents that can be clawed back; or (2) they could designate a percentage of total documents produced, and the protections of the parties' 502(d) order could expire or revert to the 502(b) default standard for future productions. Such an approach could strike a balance between a responding party's interest in protecting

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deposition but then failed to "promptly request" the return of that document, waiting over five months to do so).

privileged documents and a requesting party's need to prepare the matter for trial without the universe of available evidence continually or dramatically shifting during the course of the litigation.[121] As an alternative to limits on the number of clawbacks, the parties may consider including a meet-and-confer provision in the 502(d) order to address this or other issues if they arise.

Litigants concerned about voluminous or late clawbacks should attempt to reach agreement on language that could address those concerns while still providing the benefits of Rule 502(d). Nevertheless, counsel should recognize that these provisions can be a double-edged sword, since each party may need to claw back documents subject to these provisions. The parties should carefully consider the direct and collateral impacts of such a provision.

121. Cost allocation could be a way to deal with burdens resulting from excessively voluminous clawbacks, though responding parties may view this as being extreme and balk at its inclusion.

VI. CONCLUSION

The Sedona Conference continues to recommend obtaining a Rule 502(d) order, most often in the form found in Appendix A to this *Commentary*, in every case in federal court.

APPENDIX A: MODEL RULE 502(d) ORDER

[COURT NAME]
[DISTRICT OR COUNTY]

_____	)	
Plaintiff(s),	)	
	)	
vs.	)	CASE NO: _____
_____	)	
	)	
Defendant(s).	)	
	)	

[PROPOSED] RULE 502(d) ORDER

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.

3. The provisions of Rule 502(b) do not apply.

SO ORDERED.

Dated: [City], [State]

[DATE]

_____

[Judge Name]

APPENDIX B: MODEL RULE 502(d) ORDERS FROM DISTRICT COURTS

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
Northern District of Alabama	No	
Middle District of Alabama	No	
Southern District of Alabama	No	
District of Alaska	No	
District of Arizona	No	
Eastern District of Arkansas	No	
Western District of Arkansas	No	
Central District of California	No	
Eastern District of California	No	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
Northern District of California	Yes [Model] Stipulated Order Re: Discovery Of Electronically Stored Information For Standard Litigation	[Model] Stipulation & Order Re: Discovery Of Electronically Stored Information for Patent Litigation Guidelines For The Discovery Of Electronically Stored Information
Southern District of California	Yes Model Protective Order (Patent Cases) [At 97]	
District of Colorado	No	Guidelines Addressing The Discovery Of Electronically Stored Information
District of Connecticut	No	
District of Delaware	No	Default Standard For Discovery, Including Discovery of Electronically Stored Information

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
District of Columbia	No	
Northern District of Florida	No	
Middle District of Florida	No	Middle District Discovery handbook
Southern District of Florida	No	Sedona Conference Model Rule 502(D) Order
Northern District of Georgia	No	
Middle District of Georgia	No	
Southern District of Georgia	No	
District of Guam	No	
District of Hawaii	No	
District of Idaho	No	

Court	Model / Standing Order?	Other Guidance
	Hyperlink to Local Rule or Model / Standing Order	
Northern District of Illinois	No	Protective Orders - Special Provisions
Central District of Illinois	No	
Southern District of Illinois	Yes	Joint Report Of Parties And Proposed Scheduling And Discovery Order (Class Action)
	Joint Report Of Parties And Proposed Scheduling And Discovery Order	
Northern District of Indiana	No	
Southern District of Indiana	No	
Northern District of Iowa	No	
Southern District of Iowa	No	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
District of Kansas	No	Guidelines For Agreed Protective Orders For The District Of Kansas Guidelines For Cases Involving Electronically Stored Information
Eastern District of Kentucky	No	
Western District of Kentucky	No	
Eastern District of Louisiana	No	Guidelines For The Discovery Of Electronically Stored Information
Middle District of Louisiana	No	
Western District of Louisiana	No	
District of Maine	No	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
District of Maryland	No	Principles For The Discovery Of Electronically Stored Information In Civil Cases Discovery Guidelines For The District Of Maryland [at 118]
District of Massachusetts	No	
Eastern District of Michigan	No	Model Order Relating To The Discovery Of Electronically Stored Information Model Case Management And Scheduling Order For Patent Cases
Western District of Michigan	No	
District of Minnesota	No	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
Northern District of Mississippi	No	Local Uniform Civil Rules
Southern District of Mississippi	No	Local Uniform Civil Rules
Eastern District of Missouri	No	
Western District of Missouri	Yes Rule 502(D) Model Order	Principles For The Discovery Of Electronically Stored Information
District of Montana	No	
District of Nebraska	No	Rule 502 Of The Federal Rules Of Evidence
District of Nevada	No	
District of New Hampshire	No	
District of New Jersey	No	

Court	Model / Standing Order?	Other Guidance
	Hyperlink to Local Rule or Model / Standing Order	
District of New Mexico	No	
Eastern District of New York	No	
Northern District of New York	Yes	
	Confidentiality Order (Patent)	
Southern District of New York	No	
Western District of New York	Yes	
	Local Patent Rules	
Eastern District of North Carolina	Yes	
	Default Protective Order In A Patent Case	
Middle District of North Carolina	No	
Western District of North Carolina	No	

Court	Model / Standing Order?	Other Guidance
	Hyperlink to Local Rule or Model / Standing Order	
District of North Dakota	No	
District of the N. Mariana Islands	No	
Northern District of Ohio	No	
Southern District of Ohio	Yes	Two-Tier Protective Order
	One-Tier Protective Order	
Eastern District of Oklahoma	No	
Northern District of Oklahoma	No	
Western District of Oklahoma	No	
District of Oregon	Yes	
	Model Order Regarding E-Discovery In Patent Cases	

Court	Model / Standing Order?	Other Guidance
	Hyperlink to Local Rule or Model / Standing Order	
Eastern District of Pennsylvania	No	
Middle District of Pennsylvania	No	
Western District of Pennsylvania	Yes	Appendix LCvR 16.1.A [at 10]
	Local Rules Of Court	
District of Puerto Rico	No	
District of Rhode Island	No	
District of South Carolina	No	
District of South Dakota	No	
Eastern District of Tennessee	No	
Middle District of Tennessee	No	
Western District of Tennessee	Yes	
	Stipulated Patent Case Protective Order	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
Eastern District of Texas	Yes [Model] Order Regarding E-Discovery In Patent Cases	
Northern District of Texas	No	
Southern District of Texas	No	
Western District of Texas	Yes Confidentiality and Protective Order	
District of Utah	No	
District of Vermont	No	Stipulated Discovery Schedule/Order
District of the Virgin Islands	No	
Eastern District of Virginia	No	
Western District of Virginia	No	

Court	Model / Standing Order?	Other Guidance
	Hyperlink to Local Rule or Model / Standing Order	
Eastern District of Washington	No	
Western District of Washington	Yes	
	[Model] Agreement Regarding Discovery of Electronically Stored Information and [Proposed] Order	
Northern District of West Virginia	No	
Southern District of West Virginia	Yes	
	Agreed Order Governing The Inadvertent Disclosure Of Documents Or Other Material Under Rule 502(D)	
Eastern District of Wisconsin	No	
Western District of Wisconsin	No	

Court	Model / Standing Order? Hyperlink to Local Rule or Model / Standing Order	Other Guidance
District of Wyoming	No	

APPENDIX C: EXPLANATORY NOTE ON EVIDENCE RULE 502

The following explanatory note was prepared by the Judicial Conference Advisory Committee on Evidence Rules, revised Nov. 28, 2007:

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) (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); *Byers v. Burleson*, 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 multi-factor 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 responding 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 responding 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 responding 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 attorney-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 nonparties 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").

[During the legislative process by which Congress enacted legislation adopting Rule 502 (Pub. L. 110–322, Sept. 19, 2008, 122 Stat. 3537), the Judicial Conference agreed to augment its note to the new rule with an addendum that contained a "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence." The Congressional statement can be found on pages H7818–H7819 of the Congressional Record, vol. 154 (September 8, 2008).]