NEW FEDERAL RULE OF EVIDENCE 502: PRIVILEGES, OBLIGATIONS, AND OPPORTUNITIES

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The long-awaited Federal Rule of Evidence 502 became law on Sept. 19, 2008.[1] Previously, litigants dealing with large amounts of potentially relevant electronically stored information (ESI) faced a difficult choice regarding the potential waiver of privilege or work-product protections: Litigants either absorbed the extremely high costs of reviewing all such information to guard against a potential waiver through an inadvertent production or risked such a waiver through truncated reviews designed to save money and not likely to involve a substantive review of every page. Assessing the risks and benefits associated with this choice in a given case was compounded by the fact that when mistakes happened the standards for evaluating the consequences varied from district to district.

Rule 502 reduces the risks parties and counsel face. The new rule codifies, for the first time, a national standard that addresses the waiver of privilege resulting from inadvertent production of material. The new rule also creates codified authority for federal courts to issue orders regarding the nonwaiver of privileges that will be enforceable in other federal and state court proceedings. A review of the new rule and its history illustrates that counsel should not only understand their obligations and but also realize that they have new opportunities to help clients and courts better manage the privilege review and assertion process in litigation.

How Did We Get Here?

It's the Volume, Stupid![2]

Over the last 10 years, parties and courts have had to deal with not only the changing landscape of discovery brought about by the various types and nature of electronically stored information but also by the sheer volume of the information.[3] One of the places where the amount of ESI makes the most difference—and creates significant difficulty—is in the area of searching for and identifying potentially privileged materials and then identifying them on meaningful privilege logs. Courts bemoan the possibility of reviewing tens of thousands of privilege log entries and resist (sensibly) notions that they should review thousands of challenged documents in camera. Counsel often bemoans the limited usefulness of opaque privilege log entries and the substantial time required to produce the long and ultimately limited logs. Similarly, clients bemoan the extraordinary expenses involved in the painstaking review of information needed to identify and log privileged materials.

This world of extensive cost and delay—and moaning—arose from the interaction of the growing volumes of ESI in discovery with traditional notions of privilege and waiver that held parties to very high standards of conduct. The price of failure could be the waiver of privileges applicable to documents and, sometimes, the entire subject matter of the documents at issue.[4]

Before enactment of Rule 502, parties tried to patch together protections against waiver associated with the review of documents and ESI for privilege. The most common suggestion was a stipulated "clawback" agreement whereby the parties agreed to use good faith efforts to locate privileged documents but allowed for a safety mechanism by which the producing party could "claw back" an inadvertently produced document. Under the clawback agreement, even if a dispute over such a document arose, no party would assert a waiver of privilege based on the inadvertent production of the material (as opposed to a substantive challenge, such as the absence of any privilege in the first place). This mechanism permitted the parties to apply some degree of proportionality to the review process and also relieved the parties of the obligation to leave no stone unturned.

A more radical approach was entry into a "quick peek" production agreement, whereby documents and ESI would be produced to the opposing party *before* being reviewed for privilege, confidentiality, or privacy and would then be returned to the producing party after the opposing party identified which materials it wanted produced.[5] In theory, this method would greatly reduce the volume of documents that would need to be reviewed and logged, thus reducing the costs, streamlining the production, and reducing the number of disputes before the court.[6]

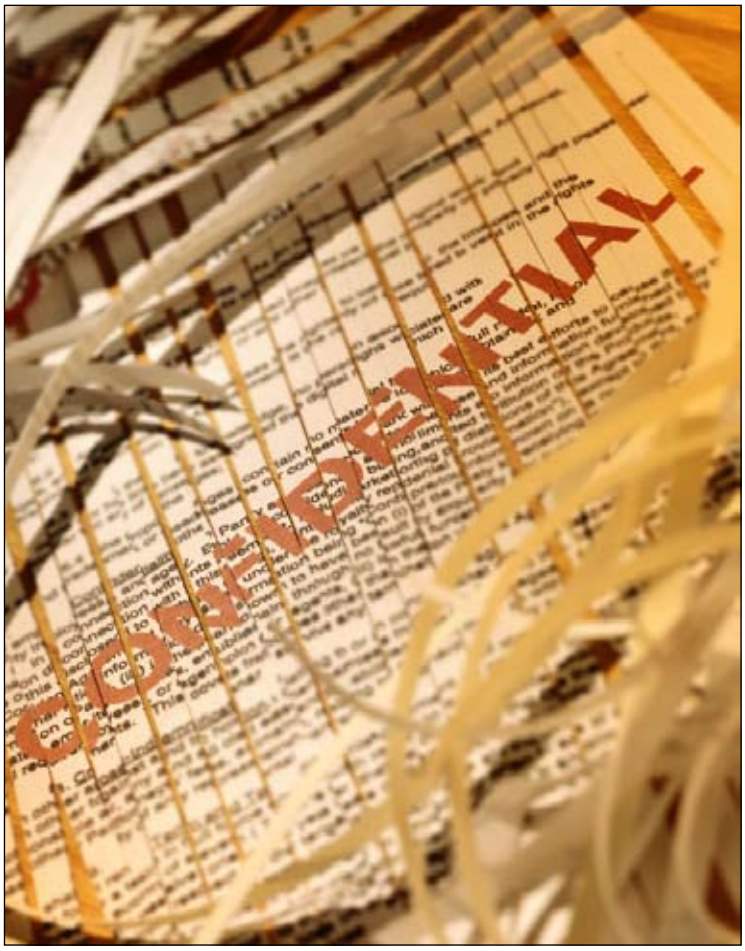
In the pre-Rule 502 world, both types of agreements carried distinct risks, particularly the quick peek agreement. In both instances, even if the parties agreed that production of potentially privileged documents would not constitute a waiver, the agreement did not bind those who were nonparties, thus providing no protection against the risk that a third party could seek to obtain and use the documents in another proceeding. These cases also raised the possibility that the third party might successfully argue for waiver of the subject matter, thereby forcing the party to produce undisclosed privileged information relating to the same topic as well. Moreover, unlike a clawback agreement, a quick peek agreement starts with the presumption that the producing party is not performing a thorough review for privilege. Accordingly, an argument existed that any production of privileged materials constituted a voluntary disclosure, which contravenes almost all jurisdictions' requirements that privilege must be zealously protected.

A Hopson's Choice[7]

A detailed analysis of the uncertainties faced by litigants with regard to the enforceability of production agreements and the risks of privilege waiver before the enactment of Rule 502 is found in *Hopson v. Mayor of Baltimore*.[8] In ruling on the discovery plan for the case, the court emphasized that there were "significant unresolved issues relating

to the nature of privilege review that must be performed by a party producing electronically stored information" raised by the case, including "whether non-waiver agreements entered into by counsel to permit post-production assertion of privilege are permissible, and effective for their intended purpose."[9] The opinion details the then-existing split among authorities regarding varying tests used to assess when a production of a privileged document in litigation (inadvertently or otherwise) could lead to a waiver of the privilege.

Analyzing the then-pending amendments to the Federal Rules of Civil Procedure, the court noted that counsel could be under the misconception that the new rules would permit them to do only a cursory preproduction privilege review, or even to forego reasonable review completely.[10] However, the court explained that the proposed changes to Rule 26 only provided guidance on procedures for reclaiming inadvertently produced material and did not address the substantive issue of whether such disclosure creates a waiver. The court further stated that "no prudent party would agree to follow the procedures recommended in the proposed rule" without a definitive ruling on the waiver issue.[11]



In the *Hopson* ruling, the court stressed the need for both the parties and the court to identify reasonable steps under the circumstances of each case. The opinion expresses a belief that courts that choose to adopt the parties' agreement calling for less than a full privilege review should "independently satisfy themselves that full privilege review reasonably cannot be accomplished" within the production period and also "that the procedures agreed upon by counsel regarding privilege production are in fact reasonable, and that more could not be accomplished within the production period" under the circumstances of the case.[12]

Pipe Dreams[13]

Three years later, in *Victor Stanley v. Creative Pipe*,[14] the same court that decided the *Hopson* case revisited the issue of privilege—this time with the amendments to the Federal Rules of Civil Procedure in place but with the proposed new Federal Rule of Evidence 502 still pending. In *Victor Stanley*, the court addressed the question of whether the efforts undertaken previously by counsel were sufficient to avoid privilege waiver in light of a challenge based on the inadvertent production of 165 electronically stored documents. The court's discussion highlighted the continued need for changes that Rule 502 could bring,

By way of background, after the defendants initially produced the hard copy of documents, the plaintiffs alleged that the production was incomplete, and the parties subsequently entered into a protocol identifying a large number of keyword searches aimed at locating responsive ESI. The defendants initially sought to include a clawback agreement allowing them to retrieve information that had been produced inadvertently, but after the judge extended the discovery deadline by four months, the defendants informed the court and the plaintiffs that the clawback agreement was unnecessary, and they would have sufficient time for a document-by-document privilege review. After the defendants produced the requested ESI, the plaintiffs identified documents that could be subject to attorney-client privilege or protected by the work product doctrine, and they immediately segregated these documents and notified the defendants, repeating this process multiple times during the review. The defendants asserted that all such documents had been produced inadvertently and therefore did not create a waiver of any kind.

The court concluded that the defendants had failed to take reasonable precautions to prevent disclosure and thus the privilege claims were waived. Notably, the court found that there would be a waiver under either the "strict" or "intermediate" waiver analysis regarding inadvertent production. The court relied on the following findings in its analysis: (1) the defendants failed to enter into a clawback agreement; (2) the keyword search executed by the defendants was not reasonable in terms of either design or execution; (3) the defendants made errors in the process (that is, they had produced privileged documents inadvertently); and (4) the defendants failed to discover the inadvertent productions until the plaintiffs pointed this out.

Both the *Victor Stanley* and *Hopson* cases highlight the problems facing litigants considering privilege waiver agreements before the enactment of Rule 502: either risk waiver or incur significant costs and delays. Even if parties

reached an agreement to minimize the waiver risk in the instant proceeding, and even if that agreement were entered into a court order, the protection against waiver would not extend beyond that action.

New Rule 502: Answers and Questions

Into this landscape comes new Federal Rule of Evidence 502. The new rule provides counsel and parties some consistency and predictability with respect to agreements they choose to enter, the effect of court orders regarding privilege agreements and waiver, and the effect of disclosure of privileged information in a federal court.[15] The Advisory Committee Note identifies the purpose of the revised rule as follows:

> 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.[16]

The major areas addressed under the new Rule 502 are:

- subject matter waiver,
- inadvertent disclosure,
- state court waivers,
- federal court orders, and
- party agreements.

There is some overlap between these areas, and the rule's effect and protection varies depending on whether or not there is a court order in place regarding waiver. The following is a more detailed discussion of each section of the rule.

Subject Matter Waiver

Under the new Rule 502, when a disclosure is made in a federal proceeding, the waiver does not extend to undisclosed information or communications unless (1) the waiver is intentional, (2) the disclosed and undisclosed communications relate to the same subject matter, and (3) the communications "ought in fairness" to be disclosed together.[17] Accordingly, subject matter waiver cannot result from an inadvertent production of information and does not automatically result even after a voluntary production.[18] Whereas certain jurisdictions have applied this standard or one that is similar, Rule 502 creates the first national standard for subject matter waiver, so long as the initial triggering disclosure occurs in a federal court.

The rule itself is silent on the issue of whether the question of subject matter waiver needs to be resolved in the federal court proceeding in which the potential waiver occurred. For example, if a party voluntarily disclosed a piece of protected information in a federal proceeding, but the issue of subject matter waiver was never raised before that court, could a state court then find subject matter waiver based on that disclosure? The Advisory Committee Note indicates that the issue need not be raised in the initial federal court action, but that any subsequent court addressing the scope of that disclosure must apply the federal standard set forth in Rule 502.[19]

Inadvertent Disclosure

Rule 502(b) protects a party from waiving a privilege in a federal or state proceeding if privileged or protected information is disclosed inadvertently in a federal court proceeding or to a federal public office or agency unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return. This has *generally* been the common approach under case law, although some jurisdictions have taken a more or less restrictive approach.[20] Some jurisdictions have gone so far as to find that *any* inadvertent disclosure of privileged information acts as a waiver, regardless of the steps taken to prevent such disclosure;[21] others have held that a disclosure only constitutes a waiver if the disclosure was intentional.[22] Rule 502 takes the middle-ground approach: considering both the intent of the producing party and the efforts taken by the producing party in determining whether an inadvertent disclosure constitutes a waiver.

The Advisory Committee Note discusses some considerations that will affect the reasonableness of a party's actions to prevent disclosure beyond those found in the text of the rule.[23] Additional factors include the number of documents to be reviewed and the time constraints for production. In addition, the presence of an established records management system before litigation may be relevant, and depending on the circumstances, the use of advanced analytical software applications and linguistic tools in screening for privilege and work product may support a finding that a party took "reasonable steps" to prevent inadvertent disclosure.[24]

As with the previous subdivision, neither the text of the rule nor the Advisory Committee Note addresses whether the issue of the waiver needs to be resolved by the federal court in which the disclosure occurred, or if the court may find a waiver in a later state or federal proceeding, as long as the court applies the federal standard articulated in the rule.

State Court Waivers

Rule 502(c) addresses the reverse of subdivisions (a) and (b): the effect of a state court waiver on a later federal court proceeding. This provision holds that a disclosure made in a state proceeding does not constitute a waiver in federal court as long as the disclosure:

- would not have been a waiver under Rule 502 if it had been made in a federal proceeding; and
- is not a waiver of the law of the state where the disclosure occurred.

This provision applies only to disclosures that are not the

subject of a state court order concerning waiver.

Like the earlier provisions regarding subject matter waiver and inadvertent production related to disclosure in federal court, this provision seeks to create consistency between state and federal courts. The rule does not affect a subsequent state court proceeding, whether it is in the original state or in a different state. As with other substantive privilege law issues, privilege laws of individual states continue to govern those issues.

Federal Court Orders

Rule 502(d) provides that "[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." This section is significant because it specifically permits a federal court to enter an order preventing disclosure of privileged or protected information from constituting a waiver in that court or in any other court. Although such an order may arise from a party agreement, the court may also issue such an order on its own.

Under this provision, a court may incorporate party agreements into an order, including a quick-peek agreement or a clawback agreement. Significantly, this provision does not require reasonable care—or any standard of care at all—to make such agreements enforceable in other jurisdictions, as long as the agreement is memorialized in an order. The Advisory Committee Note says specifically that "the court order may provide for return of documents *irrespective of the care taken by the disclosing party*; the rule contemplates enforcement of 'clawback' and 'quick peek' arrangements as a way to avoid the excessive costs of preproduction review for privilege and work product."[25]

Theoretically, under this section, the parties could agree to virtually abandon the privilege review process altogether, or they could agree to terms that clearly are not likely to address the relevant privilege issues. If the agreement is then blessed by the court, any disclosure made under that agreement would not be a waiver in any federal or state court, even if the disclosure would not have met the requirements for protection under the inadvertent disclosure provisions of Rule 502(b). This aspect of the rule differs significantly from the standard articulated by the court in *Hopson*, which required the parties to demonstrate that the procedures to which they had agreed were reasonable and strongly encouraged courts to approve only agreements that included reasonable procedures and only those in which the circumstances of the case prevented privilege review steps beyond those in the agreement.[26]

On its face, the language of Rule 502 is silent as to whether party consent is necessary for such an order to be entered; however, the Advisory Committee Note states unequivocally that party consent is not necessary: "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."[27]

Party Agreements

Rule 502(e) acknowledges that parties in a federal proceeding may enter into an agreement that provides for mutual protection against waiver in that proceeding, but, according to the rule, such an agreement is only binding on the signing parties, unless the agreement is incorporated into a court order. This is not new law, but merely codification of common law permitting such agreements between parties[28] and a clarification that such an agreement does not bind third parties without a court order. Parties seeking the protection of Rule 502(d) must have the court enter their agreements.

What Does Rule 502 Mean for Counsel?

Counsel can expect courts to begin issuing opinions that address some of the questions about the effects of Rule 502 and how it is applied in the real world. In the meantime, the following are significant takeaways for parties involved in discovery:

1. There is now a national standard to determine the effect of a voluntary disclosure on undisclosed information or communications on the same subject matter. An inadvertent disclosure cannot be the basis for a finding of subject matter waiver if the inadvertent disclosure was made in a federal proceeding.
2. There is now a national standard to determine what constitutes an inadvertent production of privileged documents in federal courts that would warrant continued protection of the privilege despite the disclosure. Inadvertent disclosure does not constitute a waiver if the holder took reasonable steps to both prevent and rectify the disclosure.
3. Application of these standards dovetails into the 2006 Federal Rules of Civil Procedure amendments regarding inadvertent production procedures. However, now parties who choose to enter the type of agreements contemplated by the amendments to the Rules of Civil Procedure may be able to extend the protection of that agreement against third parties and in other courts, as long as the agreement becomes part of a federal court order. Parties whose stipulations or agreements regarding privilege procedures have not been incorporated into a court order lose the potential benefit of nationwide and subsequent protection.
4. Federal courts have the authority (with or without party consent) to enter a wide range of orders that can include both clawback and quick-peek arrangements to facilitate the review and production of documents in cases. This feature places a premium on the ability of counsel to understand the inter-related issues of burden, privilege, and client sensitivities and to then be able to argue for—and against—certain types of orders and provisions as may be appropriate in any given case.
5. Creative and knowledgeable counsel will look for ways to bring greater focus to document and ESI reviews for litigation. By using defensible technology and filtering processes, highly skilled reviewers can review a smaller subset of material that is likely to be relevant to provide a more substantive review that will benefit case analysis and lower costs. Prudent counsel will advise clients about

the best document review strategy for a given case and eschew looking simply at the least expensive hourly or per-page approach to reviewing everything. **TFL**

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Endnotes

[1]President George W. Bush signed the bill on Sept. 19, 2008. The Senate passed the bill on Feb. 27, 2008, and the House passed it on Sept. 8, 2008. The full text of the new rule as enacted is available at www.uscourts.gov/rules/110-322.pdf.

[2]"It's the economy, stupid!" was a phrase in American politics widely used during Bill Clinton's successful 1992 presidential campaign against George H.W. Bush. The phrase, uttered by James Carville, a campaign strategist for Clinton, was intended to keep campaign staffers focused on an issue that would allow them to best defeat Bush, the incumbent President. en.wikipedia.org/wiki/It's_the_economy,_stupid#cite_note-0.

[3]*See, e.g., Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (ESI in discovery "may encompass hundreds of thousands, if not millions, of electronic records that are potentially discoverable.").

[4]154 Cong. Rec. H7818-19 (daily ed. Sept. 8, 2008) (noting that privilege case law has not kept up with "developments of expedited discovery and the electronic use of passing documents," resulting in the increased risk of subject matter waiver and "extravagant claims of privilege.").

[5]*The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production* (2d ed. 2007), Comment 10.d.

[6]*Id.* at Comment 10.a.

[7]This subheading is a play on the cliché, "a Hobson's choice," and the case *Hopson v. Mayor of Baltimore* cited herein. By way of background, a "Hobson's choice" is a choice in which only one option is offered. The phrase appears to have originated with the experience of Thomas Hobson (1544–1630), who owned a livery stable in Cambridge, England, and "in order to rotate the use of his horses, offered customers the choice of either taking the horse in the stall nearest the door or taking none at all." en.wikipedia.org/wiki/Hobsons_choice.

[8]232 F.R.D. 228 (D. Md. 2005) (Grimm, J.). *Hopson* was a putative discrimination class action involving requests for large amounts of ESI from the defendants.

[9]*Id.* at 231.

[10]*Id.* at 244, n.39.

[11]*Id.* at 234.

[12]*Id.* Ultimately, the court ordered the parties to meet and confer about a production protocol that could involve a streamlined privilege review if the defendant could demonstrate with particularity that a less than full review for privilege was needed.

[13]A pipe dream is defined as "any fantastic notion, hope, or story." dictionary.reference.com/browse/pipe%20dream. The genesis of the phrase appears to be the supposition that "the smoker of the pipe is smoking a substance that alters their perceptions to make something fantastical seem achievable." en.wikipedia.org/wiki/Pipe_dream. Please note that the use of this subtitle is for humor only and in no way is meant to imply that the parties involved in the litigation (or anyone else for that matter) were using any combustible materials in the course of the litigation.

[14]2008 WL 2221841 (D. Md. May 29, 2008) (Grimm, magistrate judge).

[15]*See* 154 Cong. Rec. H7819 (daily ed. Sept. 8, 2008): "The system is broken and must be fixed. … [This] legislation improves the efficiency and the discovery process, while it still promotes accountability. It alters neither [f]ederal nor [s]tate law on whether the attorney-client privilege or the work product doctrine protects specific information. The bill only modifies the consequences of an inadvertent disclosure once a privilege exists."

[16]Fed. R. Evid. 502, 2008 advisory committee's note.

[17]Fed. R. Evid. 502(a).

[18]"[S]ubject 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." Fed. R. Evid. 502(a), 2008 advisory committee's note.

[19]Fed. R. Evid. 502(a), 2008 Advisory Committee Note.

[20]*See Hopson*, 232 F.R.D. at 235–236 (discussing approaches taken by various courts regarding privilege waiver).

[21]*See, e.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) ("The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost 'even if the disclosure is inadvertent.'") (internal citations omitted).

[22]*See Gray v. Bicknell*, 86 F.3d 1472, 1483 (8th Cir. 1996) ("Under the lenient approach, attorney-client privilege must be knowingly waived. Here, the determination of inadvertence is the end of the analysis. The attorney-client privilege exists for the benefit of the client and cannot be waived except by an intentional and knowing relinquishment.").

[23]The Advisory Committee Note adds that the rule "does not explicitly codify" the waiver test, because "it is really a set of non-determinative guidelines that vary from case to case." Fed. R. Evid. 502(b), 2008 advisory committee's note.

[24]*Id.*

[25]Fed. R. Evid. 502(d), 2008 advisory committee's note (emphasis added).

[26]*Hopson*, 232 F.R.D. at 244, n.39, 246.

[27]Fed. R. Evid. 502(d), 2008 advisory committee's note.

[28]Fed. R. Evid. 502(e), 2008 advisory committee's note (The subdivision codifies "the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure.").