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Patrick L. Oot

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THE PROTECTIVE ORDER TOOLKIT: PROTECTING PRIVILEGE WITH FEDERAL RULE OF EVIDENCE 502[1]

Patrick L. Oot[2]
Verizon Communications
Washington, DC

Introduction

In *The Associate*, bestselling novelist John Grisham describes a law firm document review room as a "long dungeon-like room with no windows, a concrete floor, poor lighting, and neat stacks of white cardboard boxes."[3] A senior associate informs the first year associates entering the room that, "someday in court, it will be crucial for our litigators to tell the judge that we have examined *every* document in this case."[4] In the days of paper discovery, such reaching declarations to the bench might have been possible, but in today's computerized world of electronic discovery, such statements might seem outlandish, perhaps even unethical.[5]

When young staffers on Capitol Hill heard that The Judicial Conference was developing policies to reduce the efforts required to protect attorney-client privilege, there was a common sigh of relief. As former law firm associates, many legislative aides remembered the doldrums of document review. Gaining non-partisan support for Federal Rule of Evidence (FRE) 502 from this group was just the start.

This article summarizes the rules reform efforts of hundreds of attorneys, academics, jurists, policy leaders, legislative aides, think tank members, and legislators; many of whom are also members of The Sedona Conference®. Federal Rules policy reform would be impossible without the commitment of these participants. Thanks to their efforts we now have FRE 502, which "reaffirms and reinforces the attorney-client privilege and work product protection by clarifying how they are affected by, and withstand, inadvertent disclosure in discovery."[6]

I have four main goals in writing this article:

1. To discuss the problem that FRE 502 sought to correct.

2. To correlate that problem to a real-life case in an historical narrative of FRE 502.

3. To provide an overview of the common law surrounding FRE 502.

4. To identify relevant considerations when drafting Protective Orders.

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2 Patrick Oot is Director of Electronic Discovery and Senior Litigation Counsel at Verizon, and provides legal guidance to the international telecommunications provider on issues involving electronic discovery and disclosure. See http://www.thesedonaconference.org/people/profiles/OotPatrick.

3 John Grisham, *The Associate,* 152 (Doubleday) (2009).

4 *Id*.

5 A simple dispute can involve millions of electronic documents. The likelihood that a litigant can actually review *every* document decreases with increasing data volumes. A party signing such an implausible affirmation might face sanctions under Fed. R. Civ. P. 26(g). Similarly, a party making overbroad requests might also confront sanctions. *See Mancia v. Mayflower Textile Servs. Co*., 253 F.R.D. 354 (D. Md. 2008). ("Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection").

6 154 Cong. Rec. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson-Lee).

If you take only one thing from this article, remember this: ***The strongest privilege protections and waiver avoidance is granted to those who not only follow the guidance of FRE 502 but also mutually agree upon an adequately drafted Protective Order.***[7] The two devices are not exclusive.

The Growing Problem of Privilege Review: Volume and Cost

The attorney-client privilege and work product protections act as vital organs to criminal and civil litigation in the United States. By protecting the confidentiality of communications between clients and their attorneys, our legal system encourages free-flowing, candid inquiry in the attorney-client relationship and protects documents prepared by attorneys to assist their clients in litigation.[8]

Prior to the advent of the personal computer, courts struck down blanket privilege protections and required litigants to zealously protect privileged communications by thoroughly reviewing and analyzing document collections prior to producing a final set to an opponent.[9] Document review became the traditional hazing of first-year associates as they protected their client's claim of privilege by mind-numbingly pulling and logging privileged documents from a discreet production set of banker's boxes.[10]

However, as *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* theorizes, "traditional approaches to searching for relevant [or privileged] evidence are no longer practical or financially feasible" in today's electronic universe where we consider it more appropriate to send an e-mail, post a twitter, or clack out a text message rather than make a phone call or (dare I say) meet in person.[11]

We can blame technology for the data deluge. Cheap storage, web applications, and electronic mailboxes that can store a person's lifetime discourse all *Kindle* the fire endangering privilege protection.[12] However, it is not just data. The traditional pre-FRE 502 approach dictates that attorneys screen vast quantities of documents to guarantee that document collections in response to a discovery request do not include a privileged document for fear that a disclosure would waive the privilege for all documents on that subject matter.[13] Fear of waiver forces clients to pay stratospheric litigation data management fees from vendors, steadily increasing hourly rates at law firms compound the problem.[14]

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7 The Sedona Conference has undertaken a mission to promote collaboration between parties in discovery. *See The Sedona Conference® Cooperation Proclamation: The Sedona Conference® Working Group Series* (July 2008). *Available at* http://www.thesedonaconference.org/. The Federal Rules of Civil Procedure also provide a vehicle for collaboration, see Rule 26(f).

8 The purpose of the attorney-client privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

9 "The party claiming that the privilege exists bears the burden of proving that it applies to the communication at issue." *Rhodes citing Sampson v. Sch. Dist. of Lancaster*, 2008 WL 4822023, at *3 (E.D. Pa. 2008) (*citing* In re Grand Jury Empanelled Feb. 14, 1978, 603 F.2d 469, 474 (3d Cir. 1979)). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." *Relion, Inc. v. Hydra Fuel Cell Corp.*, 2008 U.S. Dist. LEXIS 98400 (D. Or. Dec. 4, 2008) citing *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 (1980). (Interestingly, even after FRE 502 was signed into law, many courts recite privilege protection precedent from an era when secretaries used typewriters [i.e. computers were not a primary communications device]. Arguably, the common law will gradually move as parties fine-tune clawback agreements, Protective Orders, and exploit the benefits of FRE 502. The appendix of this commentary includes guidance that litigants can use to help protect privilege while saving costs).

10 *See* Fed. R. Civ. P. 26(b)(5)(B), (2009).

11 Jason Baron, *et.el.*, *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery.* The Sedona Conference® Journal, 8 Sedona Conf. J. 189, *(Fall, 2007). See also,* Steve Lorh, *Is Information Overload a $650 Billion Drag on the Economy?, December 20, 2007, available at http://bits.blogs.nytimes.com/2007/12/20/is-information-overload-a-650-billion-drag-on-the-economy/.* (Not only attorneys have trouble managing client data. The phenomenon of "e-mail bankruptcy" is another indicator that users are buried by the data avalanche).

12 The probability for missing a privileged document in a data set increases proportionally as data volumes increase. On March 8, 2009 Google's free "gmail" service permits a user to store up to 7.3 Gb free of charge. Google Terms of Service, http://www.google.com/accounts/TOS?hl=en. *The Sedona Conference® Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery (August 2007)* n.2. ("One gigabyte of electronic information can generate approximately 70,000-80,000 of text pages, or 35 to 40 banker's boxes of documents"). Coincidentally, the "Kindle" is a portable electronic book reader, for a description of the device see Amazon Kindle - Wikipedia, http://en.wikipedia.org/wiki/Amazon_Kindle.

13 Baron at 199, n. 13, ("Compare $1 to store a gigabyte of data with $32,000 to review it (i.e., assuming one gigabyte equals 80,000 pages, and assuming that an associate billing $200 per hour can review 50 documents per hour at 10 pages in length, such a review would take 160 hours at $200/hr, or approximately $32,000)." For a discussion on subject matter waiver, see Ashish Prasad and Vazantha Meyers "The Practical Implications of Proposed Rule 502." *The Sedona Conference Journal*, 8 Sedona Conf. J. 133, (Fall 2007).

14 Although thwarted by the recent economic downturn, history indicates most law firms have increased their rates year-over-year. *See* Sandhya J. Bathija, *Law Firms' Rates Edge Up Again: Firms are steadily increasing hourly billing rates across the board*. The National Law Journal. December 11, 2006, http://www.law.com/jsp/article.jsp?id=1165582065881. (stating perpetual increases) *Distinguished from* Kathy Robertson, "Usual increase in law firm billing rates not happening this year." San Francisco Business Journal Friday, January 23, 2009 (citing a poor economy that affects firms' ability to increase fees) http://sanfrancisco.bizjournals.com/sacramento/stories/2009/01/26/focus2.html.

In short, privilege protection, a fundamental building block of our legal system, is in danger because the cost of protecting it is becoming too great. The increasing expense of privilege review stems from both growing data volumes and escalating attorney fees. As our litigation process becomes more electronic, policy leaders must adapt antiquated rules to address new concerns.

Rulemaking History: Advisory Committee on the Federal Rules of Evidence

On April 24, 2006, The United States Judiciary Advisory Committee on the Federal Rules of Evidence held a mini-conference inviting a broad-based coalition of judges, academics, and practitioners to discuss the state of privilege protection in litigation and the need for rules reform.[15] After the hearings, the committee approved the proposed new Rule 502 for publication to the general public and scheduled two hearing dates where the committee would consider public testimony.

On January 29, 2007, Anne Kershaw and I joined 22 other speakers in courtroom 24A at 500 Pearl Street in New York to testify before The Advisory Committee about the benefits of Proposed Federal Rule of Evidence 502.[16] We sought to persuade the Advisory Committee to approve the expansion of privilege protection for all parties in litigation and regulatory filings by providing hard data about the true cost of protecting privilege for a single matter.

In the Kershaw-Oot testimony, we described the laborious and tedious process of multi-tier document review that litigants wade-through in an effort to locate relevant documents and to prevent privileged information from disclosure. We stated that both plaintiffs and defendants (like Verizon) use this expensive and time-consuming process in hopes to avoid the (pre-FRE 502) perils that occur when a party inadvertently produces a privileged document. Most importantly, we informed the advisory committee on the true cost of responding to document requests and protecting privilege for a single real-life matter.[17] Verizon spent over $13.5 million reviewing and logging documents for relevancy and privilege in a single matter.[18]

The "gold-standard" of attorney document analysis does not necessarily amount to a high level of precision when attempting to protect privilege or even review for relevancy.[19] For example, in the *Blair and Maron* study, attorneys over-estimated their ability to create and develop queries to assess the relevancy of 40,000 documents relevant to a transit accident.[20] "Lawyers estimated that their refined search methodology would find 75% of relevant documents, when in fact the research showed only 20% or so had been found."[21] Additionally, anyone conducting a simple keyword search of the Enron data can find privileged e-mails that attorneys should have withheld from the production.[22]

Not only is manual document review the least efficient method to search for data, it may provide inferior results compared to other available methods.[23] In the preliminary results of its premier study, *The Electronic Discovery Institute* announced that two computer-assisted document review systems had a higher rate of agreement with an original three tier manual attorney review than a second manual attorney review of the same data set.[24] Moreover, the study also concluded that the two

15 The materials for the April 24, 2006 meeting can be found at http://www.uscourts.gov/rules/Agenda_Books.htm The Sedona Conference® Advisory Board was represented at the meeting by several members and observers.

16 Anne Kershaw is an attorney, expert, scholar on electronic discovery and processes. See http://www.akershaw.com.

17 For a transcript of the testimony, *see* http://www.uscourts.gov/rules/2007-01-29-Evidence-Minutes-Transcript.pdf. For a copy of the PowerPoint presentation presented to the Rules Committee, *see* http://ediscoveryinstitute.org/pubs/The_Real_Cost_of_Privilege_05.pdf. The 2005 matter discussed at the hearing required Verizon to collect both electronic and paper documents from 83 employees in ten states. The extracted data set hosted on the e-discovery vendor's servers equaled 1.3 terabytes and yielded 2.4 million documents.

18 *See* Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, 1D# G00148170, (April 20, 2007), at http://www.akershaw.com/Documents/cost_of_ediscovery_threatens_148170.pdf. (Coincidentally, this 2005 statistic is often often-cited as one of the few data-points available regarding the cost of document review in complex litigation and regulatory filings in the United States). *See also* Adreas Kluth, *The Big Data Dump*, The Economist, August 28, 2008, at http://www.economist.com/business/displaystory.cfm?story_id=12010377. *See also*, Daniel Fisher, "The Data Explosion." Forbes, October 1, 2007 at http://www.forbes.com/forbes/2007/1001/072.html.

19 For a full, well informed discussion about problems with assessing large data volumes for litigation see Baron, *Supra.*

20 David C. Blair and M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System.* Communications of the ACM, Volume 28 Number 3, p. 289 (March 1985).

21 For a discussion of the Blair and Maron study, *See* Baron, *Supra* at 206.

22 See *Enron Broadband Servs., L.P. v. Travelers Cas. & Sur. Co. of Am. (In re Enron Corp.)*, 349 B.R. 115, 125 (Bankr. S.D.N.Y. 2006). (Although litigants waived attorney-client privilege on those documents in furtherance of fraud, attorneys should have withheld other non-fraudulent attorney-client communications). A searchable database of produced documents in the Enron matter are *available at* http://www.enronexplorer.com.

23 For more information on the analysis of data retrieval systems see The National Institute of Standards and Technology TREC Legal Track (TREC) at http://trec-legal.umiacs.umd.edu/.

24 *See Electronic Discovery Institute Study: Effectiveness of Document Review and Analysis Systems for Litigation and Regulatory Response*. (Preliminary Study Results at http://ediscoveryinstitute.org/pubs/EDI___LegalTech_2008.pdf).

computer-assisted methods could have completed the project in one-third of the time at a savings on cost of over 60%.[25] It's not difficult to conclude that computers can replicate query instructions on large data sets more succinctly than fatigued contract attorneys and associates staring at computer monitor for twelve hours per day.

The second half of the Kershaw-Oot testimony discussed alternate less-expensive techniques to protect privilege that would be possible if FRE 502 was enacted. We presented an example of how a litigant could "bucket" or "set-aside" documents that contain law-firm domain names and documents that advanced search engines can flag as potentially privileged.[26] If a producing party had a multi-jurisdictionally enforceable Protective Order under FRE 502 with a claw-back, that party could feel more comfortable rapidly producing or even providing an initial quick-peek to the remaining corpus of data. The parties could also exchange electronically exported logs of the "potentially privileged" withheld bucket. Subsequently, the requesting party could develop better targeted search methods and requests for the set-aside data sets. Allowing litigants to conduct a real initial investigation furthers both a better understanding of the case and the goals of Federal Civil Procedure Rule 1.[27]

Rulemaking History: Advisory Committee Report

After the public hearings, the Advisory Committee issued a *Report of the Advisory Committee of Evidence Rules* on May 15, 2007 modifying the previously published proposed rule.[28] The report dropped the selective waiver provision, stretched the jurisdiction of the rule (and Protective Orders) to state forums (for disclosures made in federal court) and productions to federal agencies, almost eliminated subject-matter waiver, and instituted guidelines of reasonableness to avoid waiver for inadvertent disclosure.[29]

The report cited precedent that "set out multi-factor tests for determining whether the inadvertent disclosure is a waiver."[30] Although the report did not codify the inquiry, it included a pentad test drawn from the case law. In determining whether waiver applies for inadvertent disclosures, courts should consider:

1. The reasonableness of the precautions taken;

2. The time taken to rectify the error;

3. The scope of discovery;

4. The extent of discovery; and

5. The over-ridding issue of fairness.[31]

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

1. The number of documents to be reviewed;

2. The time constraints for production;

3. The use of software applications and linguistic tools in screening for privilege; or

4. The implementation of an efficient records management system before litigation.[32]

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25 *Id.*
26 http://www.uscourts.gov/rules/2007-01-29-Evidence-Minutes-Transcript.pdf.
27 F.R.C.P. 1.
28 *See Report of the Advisory Committee on Evidence Rules* at http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf.
29 *Id.*
30 *Id. citing Lois Sportswear, U.S.A., Inc. 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).
31 *Id.*
32 *Id.*

Finally, the committee expressly stated that FRE 502 does not require a post production review, but litigants should follow up on any obivous indicaitons of inadvertent production.[33]

Rulemaking History: "I'm Just a Bill"

Both The Committee on Rules of Practice and Procedure and The Judicial Conference approved the proposed rule for transmittal to Congress.[34] On September 26 2007, Hon. Lee Rosenthal, Chair of The United States Judicial Conference transmitted the resulting proposed FRE 502; developed from over 70 public comments, the testimony of over 20 witnesses, the views of the Subcommitte on Style, and the Advisory Committe's own judgement.[35] The transmittal letter also included a proposed Committee Note that the Judicial Conference sought to include in the legislative history of FRE 502.[36]

Senator Leahy introduced the proposed rule in the Senate on December 11, 2007. On January 31, 2008, the Senate Judiciary Committee approved the bill unanimously without amendment and published its findings to the full Senate with a written report.[37] After incorporating the Advisory Committee Notes, the bill passed in the Senate on February 27, 2008 and The House of Representatives on September 8, 2008. The bill was enacted asPublic Law 110-322 on September 18, 2008 to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.[38]

FRE 502: At a Glance

The Appendix of this Article contains an official version of Federal Rule of Evidence 502. The table below summarizes its contents:

Federal Rule	Description
502(a)	Limits subject matter waiver of undisclosed documents to instances of intentional disclosure where similar subject communications ought [in fairness] to be considered together.
502(b)	Mandates non-waiver for unintentionally disclosed documents when reasonable steps were taken to prevent disclosure and the producing party took reasonable steps to correct the error.
502(c)	Limits the instances when a litigant can carry a disclosure in a state court proceeding to a federal proceeding.
502(d)	Prescribes the use of Protective Orders and mandates court ordered non-waiver for any other federal or state proceeding.
502(e)	Prescribes the use of Protective Orders by suggesting that confidentiality agreements only bind the parties to the agreement, unless it is incorporated into a court order.
502(f)	Binds state courts to a federal court's determination of non-waiver.
502(g)	Defines attorney-client privilege and attorney work product.

33 *Id.*
34 Because the draft rule involved an evidentiary privilege, congressional action was required before the rule could be adopted. See 28 U.S.C. Section 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").
35 Letter from Hon. Lee H. Rosenthal to Hon. Patrick Leahy, Hon. Arlen Specter, Hon John Conyers, Jr., and Hon. Lamar Smith, transmitting Proposed New Federal Rule of Evidence 502 to Judiciary Committee, (September 26, 2007).
36 *Id.*
37 S. Rep. No.110-264, (February 25, 2008) ("The rule proposed by the Standing Committee is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens associated with the conduct of diligent electronic discovery.").
38 *See* 154 Con. Rec. S1317 (Feb. 27, 2008) (remarks of Sen. Leahy) ("I ask unanimous consent to have printed in the Record the Judicial Conference's Committee Note to illuminate the purpose of the new Federal Rule of Evidence and how it should be applied."); 154 Cong. Rec. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson- Lee) ("In order to more fully explain how the new rule is to be interpreted and applied, the Advisory Committee also prepared an explanatory note, as is customary, for publication alongside the text of the rule. The text of the explanatory note appears in the Record in the Senate debate."). Administration of George W. Bush, Acts Approved by the President, 1234 (2008).

In short, FRE 502 creates a national standard governing the effect of inadvertent disclosures on the attorney-client privilege.

FRE 502: The Cases

Coincidentally, judicial interpretations of FRE 502's reasonableness standards have stirred significant response from the legal community.[39] Citing recent decisions, critics of FRE 502 argue that the rule provides little solace to the burden of mounting privilege review costs. However, naysayers forget that the true benefit of FRE 502 derives from the portability of non-waiver rights that a party maintains through a Protective Order. FRE 502 orders grant litigants the ability to better cooperate on the terms of discovery and pave the path for parties to create solid terms to prevent waiver from inadvertent disclosure. A litigant is in the best position if he maps out a response plan to inadvertent disclosures in a fully-vetted Protective Order before documents even change hands.[40] Courts have already ordered litigants to collaborate with one another to address the problematic costs of a privilege review using FRE 502.[41]

Unfortunately, most of the litigants involved in current FRE 502 rulings failed to seek court sanctioned protection early in the discovery process. Thus, the cases to-date rely on disparate interpretations of reasonableness. Below is a sample of the case law invoking FRE 502:

Cases Where Courts Protected the Privilege of Inadvertently Disclosed Privileged Communication

Alcon Mfg. v. Apotex, Inc.

Some courts have set a reasonable standard for protecting privilege by using FRE 502 to empower Protective Orders to find non-waiver. For example, in a patent dispute before the U.S. District Court for the Southern District of Indiana, the court found non-waiver when the plaintiff inadvertently disclosed a privileged document electronically and later complied with the Protective Order by making a good-faith representation that the disclosure was inadvertent and by taking prompt remedial action when they discovered the disclosure.[42] Judge Baker paralleled his ruling of non-waiver to the purpose statement of the FRE 502 Advisory Committee Note.[43] He concluded, "perhaps the situation at hand could have been avoided had plaintiffs' counsel meticulously double or triple-checked all disclosures against the privilege log prior to any disclosures. However, this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the Protective Order in this case were designed to avoid."

Rhoads Industries, Inc. v. Building Materials Corp.

Other courts tend to rule in favor of protecting privilege under FRE 502 by heavily weighing common law factors after completing a FRE 502 analysis. For instance, in *Rhoads Industries, Inc. v. Building Materials Corp*, plaintiff (Rhodes) produced over 800 privileged documents and asserted that the production was inadvertent.[44] Although Judge Baylson ruled in favor of waiver for 120 inadvertently produced privileged documents that plaintiff neglected to timely log under FRCP 26(b)(5), the court resisted a ruling of waiver for the inadvertently produced documents that plaintiff included on a privilege log.[45] In his ruling, Judge Baylson applied FRE 502 in conjunction with a

39 Leonard Deutchman, *First Take on Federal Rule of Evidence 502*, Pennsylvania Law Weekly (December 11, 2008).
40 Model Protective Order language is available in the Appendix of this article.
41 *Spieker v. Quest Cherokee, LLC,* 2008 U.S. Dist. LEXIS 88103 at 13 (D. Kan. Oct. 30, 2008) (Magistrate Judge Humphreys recently addressed both collaboration and FRE 502 in *Spieker v. Quest Cherokee*. The court ruled, "Defendant estimates that a "privilege and relevance" review by counsel will cost approximately $ 250,000. However, Federal Rule of Evidence 502 was recently enacted to reduce the costs of exhaustive privilege reviews of ESI. The parties need to address Rule 502 in any future production and cost discussions.").
42 *Alcon Mfg. v. Apotex*, Inc., 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008).
43 "Concluding otherwise would undermine one of the main purposes of new Evidence Rule 502, which codifies the primary purpose of the provisions …of the Protective Order in this case: to address 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" which is "especially troubling in electronic discovery." *Id.* at 18 *citing* Fed. R. Evid. 502 Advisory Committee's note.
44 *Rhoads Industries, Inc. v. Building Materials Corp*, 254 F.R.D. 216 (E.D. Pa. 2008).
45 Fed. R. Civ. P 26(b)(5) requires the logging of documents withheld for privilege. Plaintiff first received notice of its 5/13/2008 inadvertent disclosure from Defendant on 6/5/2008. Plaintiff did not submit its final privilege log until 11/12/2008, some 6 months after initial notice. The court called Rhodes' failure to submit a complete privilege log by 6/30/2008 "too long and inexcusable." Judge Baylson cited two cases that might define a reasonable time period to provide an amended privilege log. A court will likely find a two month delay untimely, whereas a court may determine a response of less than a month is prompt. *See Rhodes*, 8-9, *comparing Get-A-Grip, II, Inc. v. Hornell Brewing Co., Inc.*, 2000 WL 1201385 (E.D. Pa. 2000) to In re Total Containment, *Inc.*, 2007 WL 1775364, at *8 (Bankr. E.D. Pa. 2007).

multi-part test detailed in *Fidelity & Deposit Co. of Md. v. McCulloch*.[46] Under the five-part *Fidelity* test, Judge Baylson ruled that although four of *Fidelity* factors favored waiver, the final factor, "Whether the overriding interests of justice would or would not be served by relieving the party of its errors," should be heavily weighted to favor *Rhodes*.[47] The court ruled against waiver concluding, "loss of the attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice."[48]

Of equal importance to those seeking to protect privilege, twelve days after the court's ruling of non-waiver of privilege for logged documents under FRE 502, plaintiff sought clarification from the court on how it should qualify *e-mail strings*[49] to determine if the communication appeared on a privilege log prior to June 30.[50] The court ruled that each privileged message within the string must be separately logged in order to claim privilege; a litigant could not merely log the top tier (most recent) message and expect privilege protection for the entire string.[51] However, the plaintiff was not required to indicate that the e-mail was part of a string, as this disclosure could form a "breach of attorney-client privilege because the act of itemization might force parties, by disclosing what was sent to the attorney, also to disclose the nature of the privileged information."[52] The court supported its ruling with precedent on privilege logging methodology.[53] However, parties seeking the protection of FRE 502 should consider an alternate approach.

The drafters of FRE 502 sought to reduce the costs of litigation by reducing the burden on litigants to protect privilege. Judge Baylson's ruling on e-mail strings is important to the FRE 502 discussion for several reasons. Privilege review is expensive.[54] Similarly, accounting for privilege by manually logging individual parts of a string is a core component of the *Rhodes* privilege review methodology.[55] Privilege logging is expensive and time consuming because logging individual parts of e-mail strings is programmatically difficult and often technically impossible to provide an accurate representation of who actually received a lower part of the e-mail string.[56]

As a solution to the logging dilemma, parties could collaborate and negotiate for a jointly favorable production and logging methodology in a court approved Protective Order.[57] Under FRE 502, the parties may enforce the Protective Order in federal and state court; thereby avoiding waiver and protecting privilege if the parties followed an agreed upon logging methodology.[58] For example, if the parties agree to a Protective Order using the bucketing and logging methodology outlined in the previously discussed Kershaw-Oot testimony (perhaps agreeing to top-tier logging), the parties could avoid significant expense, share data with greater speed, all while protecting privilege. In the end, Rhodes could have shielded against mistakes with a fully vetted Protective Order.

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46 *Rhoads supra citing Fidelity & Deposit Co. of Md. v. McCulloch,* 168 F.R.D. 516 (E.D. Pa. 1996). (The *Fidelity test is* substantially similar to the test that appeared in the Federal Rules of Evidence Advisory Committee Note.).

47 *Rhoads supra note 44, at 10.*

48 *Rhoads supra note 44, at 10.*

49 An e-mail string is "a series of e-mails linked together by e-mail responses or forwards. The series of e-mail messages created through multiple responses and answers to an originating message. Also referred to as an e-mail thread. Comments, revisions, and attachments are all part of an e-mail string." *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* 2d ed., *available at* http://www.sedonaconference.org.

50 *Rhoads Industries, Inc. v. Building Materials Corp*, (Memorandum Re: Clarification of Memorandum Dated November 14, 2008 RE: Privilege Logs of Emails) (November 26, 2008) (As a sanction for failure to timely log documents [as ordered] for six months, the court ordered plaintiff to produce any privileged document not logged prior to June 30, 2008). Fed. R. Civ. P. 26(b)(5) requires a withholding party to log documents withheld for privilege.

51 *Rhoads Industries, Inc. v. Building Materials Corp*, (Memorandum Re: Clarification of Memorandum Dated November 14, 2008 RE: Privilege Logs of Emails) (November 26, 2008).

52 *Id.* citing generally Paul R. Rice, Attorney Client Privilege in the United States Section 11:6.1 (2d ed. 2008) (providing a general discussion of this issue and citing cases).

53 *Muro v. Target Corp.,* 250 F.R.D. 350 (N.D. Ill. 2007).

54 *See* n. 24 and Kershaw-Oot testimony *supra.*

55 Fed. R. Civ. P 26(b)(5). In *Rhodes*, the court found waiver where the producing party failed to log individual parts of an e-mail string. See *Rhodes* (November 26, 2008) *supra.*

56 Logging older messages in a string is difficult. Many e-mail clients (such as RIM's pervasive Blackberry Enterprise Server) convert parsed data fields (to, from, cc, bcc, etc.) to ASCII text. This conversion of structured data to unstructured text causes the inability to programmatically capture metadata fields for all but the top-tier, most recent message. For instance, when a user forwards an e-mail, the e-mail client converts fielded metadata to ASCII text. The forwarded message will not programmatically capture the metadata from lower-tier messages metadata and will lose the "bcc" field from sent messages that are later forwarded. Another example of this problematic conversion is how fielded names and e-mail addresses change to ASCII aliases in lower-tier older messages. For example, "john.smith@legal.company.com" might convert to merely "John Smith" in the ASCII string. Determining the identity of authors in lower-tier older parts of a string is difficult for litigants analyzing e-mail collections at large companies that have more than one employee with the same name.

57 *See* Sedona Collaboration Proclamation, *Supra.*

58 In *Rhodes*, Judge Baylson did not preclude alternate court ordered logging options stating, "I have some hesitancy in adopting a broad, black-letter rule." *Rhodes (November 26, 2008)*, supra at 6.

Koch Foods of Alabama, LLC v. General Electric Capital Corp.

Courts confronting the issue of inadvertent disclosure for the first time or with little state law guidance tend to adopt the balancing test when assessing waiver. For example, in the poultry equipment ownership dispute *Koch Foods of Alabama, LLC v. General Electric Capital Corp*., District Court Judge Thompson upheld an order of non-waiver that applied the 5-factor test.[59] The court ruled that "if the Alabama Supreme Court were to confront the issue of inadvertent waiver, it would likely adopt the more comprehensive and sensitive totality-of-the-circumstances analysis…But, more importantly, the totality-of-the-circumstances approach allows for a more comprehensive and sensitive assessment of the often complex and sensitive concerns presented in inadvertent waivers."[60] Judge Thompson's ruling upheld the magistrate judge's order of non-waiver where a privileged e-mail was found tucked in middle of 37-page lease agreement contained in a 3,758 page production, the document was included in Koch's privilege log, and Koch immediately objected and asserted privilege when document presented at deposition of its CFO.[61]

Laethem Equip. Co. v. Deere & Co.

Courts may also find non-waiver through a strict FRE 502(b) examination without turning to a five-factor federal common law analysis. In *Laethem Equip. Co. v. Deere & Co*., the U.S. District Court for the Eastern District of Michigan found non-waiver when plaintiff inadvertently produced two "M&M" disks to defendant that contained privileged attorney-client communication. As neither party argued that the disclosure was anything but inadvertent, the court turned to the additional factors of FRE 502(b) that "sets forth explicit factors for the court to consider" in its analysis.[62]

The court found that plaintiff took reasonable precautions to protect its privilege due to the relatively small inadvertent disclosure in relation to the voluminous discovery produced.[63] Further, "the materials were copied by defense counsel outside of the "inspect and copy" procedure established by the parties, which would have given counsel for plaintiffs the opportunity to conduct a privilege review of the data on the disks prior to turning that data over to defendants."[64] Finally, the court determined that plaintiff promptly took reasonable steps to rectify the error, as plaintiff's counsel objected to Defendant's use of the disclosed materials and demanded their return on multiple occasions in writing starting on the very first day of their disclosure while obtaining an order for their return three weeks after initial knowledge of the inadvertent disclosure.[65] Accordingly, the court found reasonable precautions were taken under FRE 502(b) and ruled that plaintiff did not waive its privilege.

Heriot v. Byrne

Courts have also considered vendor error when weighing the factors of an inadvertent disclosure. In the copyright dispute *Heriot v. Byrne*, defendant sought sequestered documents that had been inadvertently produced as a result of a vendor mistake.[66] Defendant argued that plaintiffs' counsel was "asleep at the switch" by not re-examining the documents received from the vendor.[67] The court ruled against waiver stating that FRE 502, "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."[68] In its analysis, the court further ruled that the disclosing party undertook reasonable precautions to protect privilege when that party enlisted non-lawyers to manually "review the documents prior to production, assigned them codes, and provided them to the Vendor to properly disclose."[69] In addition, Judge Ashman ruled that plaintiff's counsel

59 *Koch Foods of Alabama, LLC v. General Electric Capital Corp*., 2008 U.S. Dist. LEXIS 3738 (M.D. Ala. Jan. 17, 2008).
60 *Id.* at 18.
61 *Id.*
62 *Laethem Equip. Co. v. Deere & Co*., 2008 U.S. Dist. LEXIS 107635 at 107728 (E.D. Mich. Nov. 21, 2008).
63 *Id.* at 28.
64 *Id.*
65 *Id.* at 29.
66 *Heriot v. Byrne*, 2009 U.S. Dist. LEXIS 22552 (N.D. Ill. Mar. 20, 2009).
67 *Id.*at 38.
68 *Id. (*"Plaintiffs had no duty to re-review the documents after providing them to the Vendor. That would be duplicative, wasteful, and against the spirit of FRE 502. Additionally, imposing on disclosing parties a duty to re-review would chill the use of e-vendors, which parties commonly employ to comply with onerous electronic discovery. Against this grain the Court cannot cut.").
69 *Id.* at 43.

took prompt steps to rectify the error when plaintiff's counsel notified defendant's counsel within twenty-four hours of noticing the error and demanded that the defendants destroy those documents; all prior to depositions.[70] Finally, after an *in camera* review, the court reserved its ruling on privilege protection pending a resubmission of the privileged documents and privilege log because defendant's submission was a "befuddling assemblage of documents."[71] The court ordered the defendants to submit an amended privilege log and a revised compilation of documents after they are organized chronologically.[72]

Preferred Care Partners Holding Corp. v. Humana, Inc.

Other courts have ruled against waiver for inadvertent disclosure, abandoning a multi-part case law analysis in favor of the direct statutory FRE 502(b) analysis by simply ruling that the two tests are substantially similar; finding non-waiver even when a party failed to meet its discovery obligations pursuant to a scheduling order.[73] In the breach of confidentiality dispute *Preferred Care Partners Holding Corp. v. Humana, Inc.,* Magistrate Judge Simonton conducted an *in camera* review and concluded that four inadvertently produced documents did not constitute waiver.[74] Again, the court found Humana took reasonable precautions to protect its privilege because some of the emails contained a header **"PRIVILEGED ATTORNEY/CLIENT COMMUNICATION"** and Humana's counsel undertook approximately thirty-three hours of privilege review over a three day period.[75] Interestingly, the court conducted a FRE 502(b) analysis, avoiding the common law "overriding interests of justice" test.[76] In doing so, the court evaded an analysis of Humana's sluggish discovery conduct in the case; a factor that might have caused Judge Simonton to order waiver because other courts have weighed the overriding interests of justice heavily.[77] Even so, those courts seem to use this test to rule against waiver of privilege.[78]

Am. Coal Sales Co. v. N.S. Power Inc.

Other courts have also ruled in favor or protecting privilege by comparing common law to FRE 502 analysis. For example, in a breach of contract case before the U.S. District Court for the Southern District of Ohio, *Am. Coal Sales Co. v. N.S. Power Inc.,* Defendant included in its Reply in Support of its Motion for Summary Judgment, an e-mail from plaintiff's employee to its in-house attorney.[79] Plaintiff states that the e-mail was a privileged attorney-client communication that was inadvertently disclosed, and plaintiffs sought to strike the e-mail from the record and to enter a Protective Order. Magistrate Judge Able applied the *Nilavar* test and ruled that plaintiff "took reasonable precautions to avoid inadvertent disclosures by having two attorneys review documents prior to production; that inadvertent production of one document out of over 2,000 documents produced does not weigh in favor of waiver; that the extent of the waiver was not great because the document had not worked its way into the fabric of the litigation; that plaintiff took prompt measures to rectify the disclosure; and that the overriding interests of justice and fairness did not conclusively counsel in favor of waiver."[80] The district court ruled that even though Magistrate Judge Abel should have applied FRE 502, his application of the *Nilavar* test was not contrary to law as the *Nilavar* factors were similar to those identified in FRE 502(b) and Advisory Committee Note.[81]

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70 *Id.* at 46.
71 *Id.* at 66.
72 *Id.* (Many of the documents contain multiple e-mails and forwarded e-mails, an incestuous intermingling of privileged and unprivileged documents. Some of these e-mails are entirely unprotected and can nowise be claimed as covered by the attorney-client privilege").
73 *Preferred Care Partners Holding Corp. v. Humana, Inc.*, Case No. 08-20424-CIV, "Order Regarding Documents for In Camera Review" (S.D. Fla., April 9, 2009) ("The undersigned…concludes that it is both just and practicable to apply Rule 502 to the case at bar, because PCP does not object to the application of Rule 502 and because there is no substantive difference between the two standards in light of the facts presented in this particular case") (On January 16, 2009, Humana produced 10,000 pages of documents, approximately two months after the expiration of the discovery deadline).
74 *Id.* (Although the court found non-waiver of four documents, the court ruled that Humana voluntary waived privilege on one document, as "Humana acknowledged at the April 3, 2009 hearing, it volunteered the details of its so-called "print and purge scheme" in light of the fact that it forms a central component of its defense to PCP's motion for sanctions; and, those details are now a matter of public record").
75 *Preferred Care Partners,* at 8-9.
76 *Preferred Care Partners.* at 7 ("Although the final element of the relevant circumstances test – whether the overriding interests of justice would be served by relieving a party of its error – is not incorporated into the Rule 502 test, the undersigned concludes that the application of this aspect of the test to the circumstances in the case at bar would not alter the result").
77 *See Rhodes, supra.*
78 *Id.*
79 *Am. Coal Sales Co. v. N.S. Power Inc.*, 2009 U.S. Dist. LEXIS 13550 (S.D. Ohio February 23, 2009).
80 *Id.* at 6-47.
81 See Advisory Committee Note, *supra.*

Reckley v. City of Springfield

Courts have ruled liberally when determining if reasonable precautions to protect privilege were taken by a disclosing party under FRE 502. For example, in *Reckley v. City of Springfield*, Defendant City of Springfield inadvertently produced five e-mails to plaintiff.[82] Plaintiff's counsel later presented the disclosed documents during deposition and sought to question plaintiff's former supervisor using the disclosed documents. Judge Merz cited FRE 502(b) and ruled that plaintiff took reasonable steps to prevent disclosure because, "at least some of the e-mails in Exhibit 49 have ATTORNEY-CLIENT PRIVILEGED endorsed on them and Defendants' counsel took prompt steps to claim the privilege and seek return of the e-mails after they were disclosed."[83] The Court concluded that the e-mails "retain[ed] their privileged status and plaintiff must deal with them as provided in Fed. R. Civ. P. 26(b)(5)."[84]

Kumar v. Hilton Hotels Corp.

Courts have continued to rule liberally against waiver when applying the multi-part test identified in the Explanatory Note of FRE 502(b); even finding non-waiver by interpreting the intent of the producing party's counsel when determining if that party undertook reasonable precautions to protect the privileged material. In the employment discrimination case, *Kumar v. Hilton Hotels Corp.*, Magistrate Judge Pham ruled against waiver of sixty-one inadvertently produced documents where the e-mails were marked "Attorney/Client Privileged Information" and Hilton's counsel attached a note instructing a legal assistant to redact some of the e-mails at issue.[85] Once more, the court weighed counsel's intent to redact and the mere marking of the documents heavily when determining if reasonable precautions were undertaken. The court also ruled that "Hilton promptly took steps to rectify the error and mitigate the damage of the disclosures, as Hilton's counsel immediately contacted Kumar's counsel to notify him of the inadvertent disclosure and to attempt to retrieve the documents. Hilton also took immediate steps to notify the court of this claim by filing the emergency motion. Finally, the number and magnitude of the disclosures in light of the overall document production weigh against waiver."[86]

Cases Where Courts Ruled in Favor of Waiver for Inadvertently Disclosed Privileged Communication

Sitterson v. Evergreen Sch. Dist. No. 114

Yet, courts require a disclosing party to at least take *some* reasonable precautions to protect its privilege. In *Sitterson v. Evergreen Sch. Dist. No. 114*, an appeal from a trial court decision over waiver of documents in an underlying contract dispute, the Court of Appeals of Washington found waiver after invoking FRE 502 to conduct the pervasive "balanced" common law analysis.[87] As neither party argued that the waiver was advertent, the *Sitterson* court moved on to balance five *Alldread* factors to decide if the disclosing Defendant waived its privilege on four advisory letters between the District and its attorney.[88] Using the five factored precedent, the court ruled that defendant waived its privilege. First, counsel for the disclosing party "offered no evidence of any precautions he or his office took to prevent the disclosures."[89] Second, the panel was troubled by the "disclosing party's failure to notice or remedy the error until three years after it was made."[90] Third, the court found such a small document production of 439 documents manageable and not the enormous quantity of documents

82 *Reckley v. City of Springfield*, 2008 U.S. Dist. LEXIS 103663 (S.D. Ohio Dec. 12, 2008).
83 *Id.*
84 *Id.*
85 *Kumar v. Hilton Hotels Corp.*, 2009 U.S. Dist. LEXIS 53387, 9-10 (W.D. Tenn. June 16, 2009). (Magistrate Judge Pham concluded, "the disclosure was inadvertent, as it is clear Hilton intended to redact these portions of the documents prior to production. Hilton took reasonable steps to prevent disclosure, as evidenced by the fact that the Barkley email begins with the words "Attorney/Client Privileged Information" in bold letters, and Hilton's trial counsel attached a note to D000010 and D000013 directing her legal assistant to redact the Barkley email and the numbering prior to producing the documents to Kumar).
86 *Id.*
87 *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576 (Wash. Ct. App. 2008).
88 The five factors enumerated in *Alldread* are" "(1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Id.* at 588 citing *Alldread v. Gren.*, 988 F.2d 1425, 1433 (5th Cir. Miss. 1993).
89 *Id.*
90 *Id.* at 588-589. *See also In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (1979) (where documents were turned over one year prior to the assertion of privilege, and they had already been copied, digested, and analyzed by the time of the motion, the court found that "the disclosure cannot be cured simply by a return of the documents. The privilege has been permanently destroyed.").

that FRE 502 intended to correct by excusing an inadvertent production of privileged documents.[91] Finally, the Court of Appeals ruled that the issue of fairness favored neither party. Defendant's inadvertent disclosures dealt with its counsel's interpretation of plaintiff's contract claim. Because the jury based its award in quantum meruit, the panel concurred that the disclosures did not unjustly prejudice either party.

SEC v. Badian

Not only do courts require a disclosing party to at least take *some* reasonable precautions to protect its privilege, courts require the disclosing party to attempt to rectify the error in a reasonable amount of time. For example in *SEC v. Badian,* Magistrate Judge Eaton applied common law FRE 502 factors to conclude that non-party Rhino waived any claim of privilege for documents inadvertently produced.[92] First, the court stated that it has "been shown no evidence that Rhino or Bryan Cave LLP took any precautions to weed out any possibly privileged documents."[93] Second, the court found the next factor –the extent of disclosures problematic. Rhino originally stated that that as much as 5% (or 3400 documents) of its production contained inadvertently produced privileged material. Even though Rhino later reduced that number to just 260 documents, the court found that "this is still a significant number of documents."[94] Third, the court turned to the amount of time Rhino took to rectify the error. The court determined that Rhino's failure to make any attempt at rectifying the error for five years was an unreasonable time under the *Lois Sportswear* standard.[95] Finally, in analyzing the overarching issue of fairness standard, the court determined there was "no fairness" in precluding the SEC from using the documents produced by Rhino's counsel, but declined to extend waiver beyond those actually produced.[96]

Clarke v. J.P. Morgan Chase & Co.

Some courts have conducted a waiver analysis even after ruling the disclosure was not privileged using an essential element test.[97] In the employment case *Clarke v. J.P. Morgan Chase & Co.,* the court ruled an e-mail was not privileged after conducting a three-factor test as enumerated in *United States v. Construction Prods. Research.*[98] In *Clark*, the produced e-mail lacked any indication of attorney-client communication on its face.[99] The e-mail did not state that any of the contents were privileged or confidential.[100] Thirdly, the e-mail most likely was beginning an effectuation of a corporate policy change rather than obtaining or providing legal advice.[101] Because of these three factors the court ruled that the e-mail was not privileged.

Coincidentally, even though the court determined the produced e-mail was not privileged, Judge Freeman conducted a further analysis for waiver as if the e-mail was actually afforded the protection of privilege.[102] The court looked to FRE 502(b) and enumerated four common law factors from *Business Integration Services, Inc. v. AT&T Corp.*, that parallel a 502(b) analysis.[103] In applying the *Business Integration Services* test, Judge Freeman ruled that defendant did "not appear to have taken

91 *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576 (Wash. Ct. App. 2008).
92 *SEC v. Badian*, 2009 U.S. Dist. LEXIS 9204 (S.D.N.Y. Jan. 26, 2009) (The parties agree that a claim of inadvertence is governed by the four factors set forth in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (Sweet, J.), and its progeny such as *Business Integration Services, Inc. v. AT&T Corp.,* 251 F.R.D. 121, 129 (S.D.N.Y. 2008)").
93 *Id.* at 8.
94 *Id.* at 11.
95 *Id.* at 16 ("Rhino chose to turn over its email files without stating that it was withholding any portions on the basis of privilege [nor did Rhino] provide any internal list in 2003 of any documents that they were withholding from the SEC on the basis of privilege").
96 *Id.* at 17.
97 *Clarke v. J.P. Morgan Chase & Co.*, 2009 U.S. Dist. LEXIS 30719 (S.D.N.Y. Apr. 10, 2009) citing *United States v. Construction Prods. Research*, 73 F.3d 464, 473 (2d Cir. 1996) ("The essential elements that must be shown by a party asserting the attorney-client privilege are: "(1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) [was] made for the purpose of obtaining or providing legal advice").
98 *Id.* at 6.
99 *Id. (*the sender was neither an attorney nor his agent; the e-mail did not state that it contained privileged information; the e-mail did not state that any of the information incorporated therein had been obtained from counsel or was based on communications from counsel or even that counsel had been consulted; nor did it state that the policy change reflected in the e-mail was intended to implement a recommendation of counsel).
100 *Id.* at 10 ("the e-mail did not flag that any of its contents, in particular, were privileged and should not be communicated").
101 *Id.* (The court declined a final determination regarding whether the e-mail was drafted for the purpose of conveying or obtaining legal advice because the producing party failed to meet the first two factors) ("Defendant failed to satisfy its burden to show that the recipients of the e-mail would have reasonably understood that they were even receiving legal advice, which was intended to be held in confidence).
102 *Id.* at 13.
103 *Id.* at 14 *citing Business Integration Services, Inc. v. AT&T Corp.*, 251 F.R.D. 121, 129 (S.D.N.Y. 2008). ("These same factors are also generally weighed by the Court in the context of extrajudicial disclosures…More particularly, the Court should consider (1) the reasonableness of the precautions to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the extent of the disclosure, [and] (4) an over[arching] issue of fairness and the protection of an appropriate privilege which . . . must be judged against the care or negligence with which the privilege is guarded").

particular care to prevent the dissemination of the e-mail or the supposedly privileged portions of its contents to the reclassified employees."[104] Furthermore, the inadvertently disclosed e-mail was "on top of the stack" of a small production of 532 pages.[105] Judge Freeman stated that the defendant should have become aware and assessed the privileged status of the e-mail at the latest on the date of initial disclosures on September 15, 2008 and at the minimum started an investigation into the privileged nature of the e-mail on the date of production on December 11, 2009.[106] The defendant did neither. The court also ruled the defendant took too much time to rectify the error. "It was not until February 17, 2009, more than two months after the e-mail had been produced by Plaintiffs [and six days after the document was used in plaintiff's deposition]…that Defendant's counsel, for the first time, asserted a claim of privilege."[107] Third, the court determined that the extent of the disclosure was unreasonable given the volume of the document production and location of the e-mail in the collection.[108] Finally, the court weighed the issues of fairness heavily to favor plaintiff, because "plaintiffs should not have been forced to alter their deposition preparation at the last minute, so as to take account of Defendant's belatedly raised claim."[109]

Relion, Inc. v. Hydra Fuel Cell Corp.

Other courts have ruled in favor of waiver by unique interpretations of the FRE 502(b) reasonable precautions standard. In *Relion, Inc. v. Hydra Fuel Cell Corp*., the court ruled that disclosing counsel should have taken "all reasonable means" to protect privilege; a much greater burden than the reasonable precautions standard set out in FRE 502(b).[110] In *Relion*, plaintiff's counsel sought the return of its client's privileged documents by seeking enforcement a Protective Order. Plaintiffs inadvertently disclosed a three inch thick file of "question documents" in its production of documents that "occupied over 40 feet of shelf space."[111] The production was reviewed by counsel prior to production, but the question document folder was inadvertently left in the collection. Magistrate Judge Hubel ruled that because he found no surprise or deception on the part of the receiving party's counsel, and the disclosing party had several opportunities to inspect the documents in various formats, he "conclude[d] that Relion did not pursue all reasonable means of preserving the confidentiality of the documents produced to Hydra, and therefore that the privilege was waived."[112]

Coincidentally, the court might have arrived at a different result by applying the five-factor test included in the Legislative History of FRE 502 because four of five factors favored the plaintiff and non-waiver.[113] However, Judge Hubel could have still found waiver using the five factor test by heavily penalizing the plaintiff for "the time taken to rectify the error" and weighing that single factor with more force than the other four. As Judge Baylson's ruling in *Rhoads Industries, Inc. v. Building Materials Corp.* strongly weighed a single factor [the interest of justice] to conclude non-waiver, here Judge Hubel might be able to weigh a different factor to find waiver.[114] Even so, additional guidance from the courts is necessary to determine how the five factors interplay with one another. Again, litigants should consider negotiated threshold points for each of the five reasonableness factors and include language in the Protective Order to define when privilege is actually waived.

AHF Community Development v. City of Dallas

Some courts may look to the producing party's failure to act affirmatively on knowledge of inadvertent disclosure. For example, in a unlawful conduct case, *AHF Community Development v. City of Dallas,* plaintiff AFH moved for determination that defendant City of Dallas waived privilege as to emails inadvertently included on disc produced due to conversion to new litigation management software.[115] While the court declined to construe FRE 502 in its opinion, the court enlisted the factors

104 *Clarke* at 14.
105 *Id.* at 15.
106 *Id.*
107 *Id.* at 18.
108 *Id. at 21 ("*it should be noted that the volume of Plaintiff's discovery was not so large that the e-mail would have been difficult for Defendant to identify. On the contrary, the document's existence in that production would have been readily apparent").
109 *Id.*
110 *Relion, Inc. v. Hydra Fuel Cell Corp*., 2008 U.S. Dist. LEXIS 98400 at 9 (D. Or. Dec. 4, 2008).
111 *Id* at 7.
112 *Id* at 9.
113 The Standing Committee Report n. 29 *available at* http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf.
114 *See* Footnote 42, *supra*.
115 *AHF Cmty. Dev., LLC v. City of Dallas*, 2009 U.S. Dist. LEXIS 10603 (N.D. Tex. Feb. 12, 2009).

of *Alldread v. City of Grenada* to rule that the privilege was voluntarily waived.[116] Although the court determined that the disclosure was indeed inadvertent, the court stated that the failure of defendant to act when "emails clearly labeled as attorney-client privileged were marked as exhibits, shown to a witness at deposition, and the subject of substantive questioning – all without objection."[117] The court therefore ruled that the defendant failed to take reasonable precautions to protect its privilege and also failed to correct the error within a reasonable time.

Outlook: Effective Use of FRE 502 Protective Orders

In all of the cases stated where a litigant was subject to waiver, had the parties agreed upon a court ordered FRE 502 non-waiver order, the outcome would likely have been different. I have included a brief discussion of the cases where courts have either effectively suggested or entered Rule 502 protective orders to protect against waiver or privilege. These cases also provide evidence of an evolving trend of cooperation in discovery.[118]

Whitaker Chalk Swindle & Sawyer, L.L.P. v. Dart Oil & Gas Corp.

Federal courts can mandate the use of FRE 502 protective orders to protect privileged when discovery materials contain significant privileged information and there is a fear of disclosure in another court or forum. For example, in an attorney fee dispute, *Whitaker Chalk Swindle & Sawyer, L.L.P. v. Dart Oil & Gas Corp.,* district court Judge Means denied a stay, but evoked FRE 502 to mandate a protective order that would prevent against the disclosure of privileged information from his court in another state court forum.[119] The court ruled." Dart has not pointed to any reason why a Texas court would not recognize an order entered under Rule 502, nor is this Court aware of a basis for a Texas court to find privileges waived in state proceedings based on a Federal court's order requiring discovery in a federal case to proceed…Accordingly, it 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 in the Esperada suit."[120] Judge Means further assisted the parties by integrating the terms of the protective order into his opinion.[121] In addition to reviewing the Model Protective Order Terms in the appendix of this article, a litigant should consider reviewing Judge Means's guidance in this opinion when drafting a FRE 502 protective order.

Tremont LLC v. Halliburton Energy Servs.

Other courts have used FRE 502 to strengthen the effect of confidentiality orders. *In Tremont LLC v. Halliburton Energy Servs.*, Judge Lee Rosenthal entered a Rule 502 order that not only protected privileged information, but restricted the parties from producing a confidential index to "any other person."[122] Again, a review of Judge Rosenthal's October 29, 2008 order in this case will provide litigants with additional guidance when negotiating FRE 502 protective orders.[123]

D'Onofrio v. SFX Sports Group, Inc.

Other courts have used FRE 502 protective orders to aid in the effort for parties to cooperate.[124] For example, in *D'Onofrio v. SFX Sports Group, Inc.* a wrongful termination case, Magistrate Judge John M. Facciola suggested an order protecting defendant's privileged information even when the defendant agreed to provide the plaintiff's counsel with attorney notes taken by the defendants under certain conditions.[125] Taking exception to these conditions, the plaintiff's counsel

116 *Id. citing Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir.1993).
117 *Id.*at 16.
118 *See The Sedona Conference® Cooperation Proclamation*: The Sedona Conference Working Group Series (July 2008).
119 *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, 2009 U.S. Dist. LEXIS 15901 (N.D. Tex. Feb. 23, 2009)/
120 *Id.* at 10.
121 *Id.* at 12.
122 *Tremont LLC v. Halliburton Energy Servs.*, 2009 U.S. Dist. LEXIS 27389 (S.D. Tex. Mar. 31, 2009) ("In the present case—the "2008 Case"—this court entered an order under Federal Rule of Evidence 502 to apply to document production. The Rule 502 Order stated that "the Tremont Parties production of the Tremont Index to Halliburton will not constitute any waiver of any privilege of any kind and will not cause the Tremont Parties to be required to produce the Tremont Index to any other person, including but not limited to, Georgia-Pacific Corporation, Milwhite, Inc., or M-I, LLC").
123 *Tremont LLC v. Halliburton Energy Servs.*, No. 08-1063 at 35 (S.D. Tex. Mar. 31, 2009) (Judge Rosenthal's FRE 502 protective order is available for download via PACER at https://ecf.txsd.uscourts.gov/).
124 *See The Sedona Conference® Cooperation Proclamation*: The Sedona Conference® Working Group Series (July 2008).
125 *D'Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277, (D.D.C. 2009).

argued the plaintiff should be granted access to the attorney notes for relevancy determinations. Judge Facciola granted the motion in part, finding the defendants were allowing access to these documents for efficiency's sake not because the plaintiff was entitled to the documents. Of equal importance in this was the use of statistical sampling to indentify privilege logging errors.[126] Yet again there emerging problem of search and retrieval touches the privilege issue.

Conclusion: From Courts to Effective Protective Orders

In review, although most courts analyze FRE 502 to rule in favor of non-waiver, the sample cases above interpret the rule differently. Some invoke common law, while others interpret FRE 502 strictly. One court ruled that a disclosing party merely affixing "Attorney-Client Privilege" to a document took reasonable precautions to protect its privilege, while another court ruled that a litigant deploying a thorough attorney review to locate privilege documents waived its privilege because it did not do enough to protect its privilege. Others cases have required a specific privilege logging methodology.

Litigants should avoid the hazardous variability of inadvertent disclosures protected under FRE 502(b). The most effective method to protect a client's privilege is to negotiate with your opponent for a Protective Order with a clawback provision that is now enforceable in both state and federal jurisdictions under FRE 502(d).

The cases in this article highlight a few of the variables that a litigant should consider when drafting a Protective Order. I include sample language in the appendix of this Article which addresses some (but not all) of the salient points a protective order should cover.

Appendix

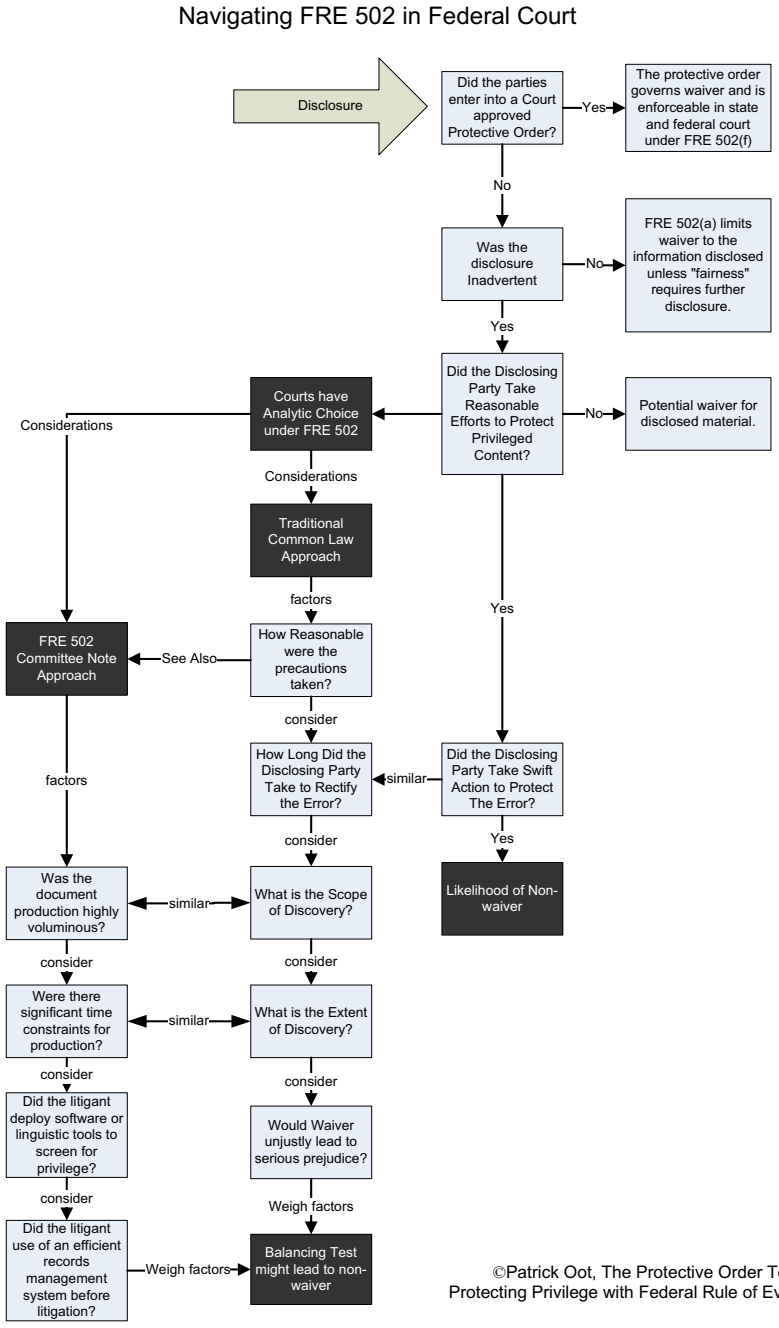
Model Protective Order Provisions
(as distributed at The 11th Annual Sedona Conference® on Complex Litigation)[127]

Pursuant to Rule 502 of the Federal Rules of Evidence, the inadvertent disclosure of protected communications or information shall not constitute a waiver of any privilege or other protection (including work product) if the Producing Party took reasonable steps to prevent disclosure and also took reasonable steps to rectify the error in the event of an inadvertent disclosure. The Producing Party will be deemed to have taken reasonable steps to prevent communications or information from inadvertent disclosure if that party utilized either attorney screening, keyword search term screening, advanced analytical software applications and/or linguistic tools in screening for privilege, work product or other protection. In the event of the inadvertent disclosure of protected materials, the Producing Party shall be deemed to have taken reasonable steps to rectify the error of the disclosure if, within thirty (30) days from the date that the inadvertent disclosure was discovered or brought to the attention of the producing party, the Producing Party notifies the Receiving Party of the inadvertent disclosure and instructs the Receiving Party to promptly sequester, return, delete, or destroy all copies of the inadvertently produced communications or information (including any and all work product containing such communications or information). Upon receiving such a request from the Producing Party, the Receiving Party shall promptly sequester, return, delete, or destroy all copies of such inadvertently produced communications or information (including any and all work product containing such communications or information), and shall make no further use of such communications or information (or work product containing such communications or information). Nothing herein shall prevent the Receiving Party from challenging the propriety of the attorney-client, work product or other designation of protection.

126 *D'Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277, 279 (D.D.C. 2009) ("Defendants also agreed at the hearing to permit plaintiff to test the validity of the privilege log using statistical sampling. Defendants offered to allow plaintiff's expert to select a representative sample, that would be made available to plaintiff's counsel for his review to determine whether the privileges asserted were in fact appropriate. Defendants' offer is conditioned on three criteria with which plaintiff takes issue: (1) the documents be designated "attorneys' eyes only," (2) the sample exclude documents that were created on or after March 17, 2006, and (3) plaintiff's expert tell defendants what method he uses to generate the statistical sample prior to doing so").

127 These model protective order provisions were drafted through the collaboration of several active Sedona Conference® members and their colleagues including Tom Allman (Former General Counsel, BASF), Maura Grossman (Wachtell, Lipton, Rosen & Katz), Patrick Oot (Verizon), John Rosenthal. & Charles Molster (Winston & Strawn), Jennifer Tomaino (Verizon), Ken Withers (The Sedona Conference®),and Anne Stukes.

Within 60 days of the production of documents, the parties will provide privilege logs for protected materials withheld for attorney-client privilege or pursuant to the work product doctrine (or other privileges or doctrines). The privilege logs shall contain names or e-mail addresses extracted from the topmost e-mail message or hard copy document (To, From, CC, BCC), the date of the topmost e-mail or document, and the basis for the assertion of a privilege or other protection. The Producing Party shall provide a privilege log for all withheld e-mail or hard-copy documents or other materials [including redacted materials]. The Producing Party shall produce e-mail chains and strings, and shall only redact those portions of the e-mail chain that are protected, leaving all other materials unredacted. The Producing Party shall log all protected content in e-mail chains and strings by logging the topmost e-mail of the e-mail chain or string, as well as sufficient information regarding the redacted material to allow the Receiving Party and the Court to make a cogent evaluation of the appropriateness of the assertion of a privilege or other protection. The Producing Party shall create a single log entry for each e-mail chain or string. A Producing Party's logging of the topmost e-mail shall be deemed to assert protection for all of the protected material in an e-mail string or chain, including multiple redactions or multiple segments. Nothing herein shall prevent the Receiving Party from challenging the propriety of the designation of attorney-client privilege, work product or other designation of protection.


Navigating FRE 502 in Federal Court
Disclosure
Did the parties enter into a Court approved Protective Order?
Yes
The protective order governs waiver and is enforceable in state and federal court under FRE 502(f)
No
Was the disclosure Inadvertent
No
FRE 502(a) limits waiver to the information disclosed unless "fairness" requires further disclosure.
Yes
Did the Disclosing Party Take Reasonable Efforts to Protect Privileged Content?
No
Potential waiver for disclosed material.
Courts have Analytic Choice under FRE 502
Considerations
Considerations
Traditional Common Law Approach
factors
FRE 502 Committee Note Approach
See Also
How Reasonable were the precautions taken?
consider
Yes
How Long Did the Disclosing Party Take to Rectify the Error?
similar
Did the Disclosing Party Take Swift Action to Protect The Error?
factors
consider
Yes
Was the document production highly voluminous?
similar
What is the Scope of Discovery?
Likelihood of Non-waiver
consider
consider
Were there significant time constraints for production?
similar
What is the Extent of Discovery?
consider
consider
Did the litigant deploy software or linguistic tools to screen for privilege?
Would Waiver unjustly lead to serious prejudice?
consider
Weigh factors
Did the litigant use of an efficient records management system before litigation?
Weigh factors
Balancing Test might lead to non-waiver
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Protecting Privilege with Federal Rule of Evidence 502