RULES OF EVIDENCE
Kevin F. Brady and France M. Jaffe provide early analysis of the latest Commentary from The Sedona Conference®, with an emphasis on the practical approaches the Commentary suggests for avoiding the pitfalls associated with the inadvertent production of privileged information.

The Sedona Conference® Provides Practical Guidance for Preventing Inadvertent Privilege Waiver Under Federal Rule of Evidence 502(b)

Kevin F. Brady and France M. Jaffe

Kevin F. Brady is Of Counsel at Redgrave LLP and France M. Jaffe is a Senior Attorney at Redgrave LLP.

The Sedona Conference®, Working Group 1 published a new Commentary on Protection of Privileged ESI on Dec. 11. The Commentary addresses principally the critically important use of non-waiver orders that parties should request and that courts can—and should—enter pursuant to Federal Rule of Evidence 502(d).

The Commentary provides an excellent analysis of Rule 502 (with references to state law analogues) based on the seven years of judicial and practical experience gained since Rule 502 was enacted. Notably, the Commentary sets out practical approaches that corporate parties can incorporate into their privilege review processes to enable them to demonstrate “reasonable steps” under Rule 502(b), thereby avoiding the pitfalls associated with the inadvertent production of privileged information.

Some History
Since the enactment of Rule 502(d) in September 2008, commentators have attempted to convince practitioners and jurists to harness Rule 502(d) to lower the risks and costs of privilege review and streamline production by using "clawbacks," "quick peeks" and "make available productions."

This effort has met with qualified success: some courts have opined that the failure to at least attempt to secure a Rule 502(d) order amounts to malpractice ¹, while other courts have not fully grasped the efficiencies such orders offer ².

¹ Monica Bay, On Stage, Law Tech. News (April 1, 2013) (quoting U.S. Magistrate Judge Andrew J. Peck) ("I'll give you a fairly straight takeaway on 502(d). In my opinion it is malpractice to not seek a 502(d) order from the court before you seek documents.").

Despite the advantages afforded by Rule 502(d) orders, including the ability to avoid any hindsight assessment or adjudication of “reasonable steps,” parties are not always able to agree upon the parameters of such an order, and not all courts are willing to enter such an order over the objections of the parties.

In those cases where a Rule 502(d) order has not been entered, it is Rule 502(b) that will delineate the contours of the waiver of the attorney client privilege (or work-product protection) where there has been an inadvertent disclosure. For this reason, The Sedona Conference® also explores Rule 502(b), and in Principle 3 to the Commentary, it provides creative and practical guidelines parties can implement to reduce the risk of waiver of
privilege through inadvertent disclosure. This article only provides a high-level summary of Principle 3, and the authors strongly recommend readers review the Commentary in full at their earliest convenience.

Provisions

In relevant part, Rule 502(b) provides that a disclosure made "in a federal proceeding ... does not operate as a waiver in a federal proceeding or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal rule of Civil Procedure 26 (b)(5)(B)."

While the Commentary fleshes out each of the elements of Rule 502(b), this article focuses principally on the Commentary's analysis of "reasonable steps to prevent disclosure." Such "reasonable steps" include, at a minimum, (1) training employees on what communications and activities can be protected under a claim of privilege or work product; (2) identifying privileged communications; and (3) utilizing tools to appropriately manage privileged information.

The Commentary posits that—consistent with judicial analysis of any discovery effort—courts should take care not to use perfection as the yardstick when evaluating whether a party promptly took reasonable steps to prevent inadvertent disclosure. 3

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3 See P. Grimm, supra at n.2 ("The analytical methods are reasonable, even though operators cannot guarantee the methods will identify and withhold from production every privileged or protected document. Reviewing courts must remember that the bellwether test under Rule 502(b)(2) is reasonableness, not perfection.") (emphasis in original).

Indeed, the Advisory Committee Note on Rule 502(b) emphasizes that there is no set criteria to define "reasonableness" under the Rule, and that courts should take a flexible approach to evaluate those steps the disclosing party did take.

Importantly, parties will need to take reasonable steps both during the course of regular business operations, and when litigation arises.

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Best Practices

In Comment 3(c), the Commentary identifies a number of best practices that corporate parties can take in the regular course of business to facilitate the identification and protection of privileged information so as to reduce the risk of inadvertent waiver of privilege. These practices can be grouped into three categories:

- **Label.** First, parties can facilitate identification of privileged communications by requiring that their attorneys identify themselves as such in written communications by using legal titles; indicate clearly when they are providing legal advice as opposed to providing business advice; and, label their communications (as appropriate) with "Privileged Communications" and/or "Attorney Work Product" designations.

- **Educate.** Second, entities can educate their employees about privilege and waiver generally; instruct their employees and educate their clients to specifically request legal advice when engaging in initial communications; and, educate their employees about avoiding the commingling of legal and business communications.

- **Limit.** Third, entities can limit the distribution of privileged materials to those persons who actually need to receive the information: circulating privileged materials to persons who are not acting upon legal advice, and who are not assisting in providing information to lawyers for the purpose of providing legal advice, can result in a finding of waiver.

The best practices listed by the Commentary should aid corporate parties to identify privileged information when getting ready to produce documents or information:

- **Requiring attorneys to identify themselves as such and to indicate when they are providing legal advice will allow the entity to apply keyword searches (e.g., "privileged communication" or "attorney work-product"; attorney; counsel; "legal advice") or other tools as a first automated step for identifying potentially privileged communications, and will allow a human document reviewer to more easily identify the provision of legal advice. Although courts have rightly criticized parties for withholding documents as privileged simply on the basis that the documents were authored by an attorney or contained a "privileged and confidential" designation, using these types of labels consistently pursuant to a corporate policy or procedure can allow entities to cull down a large universe of documents in order to conduct a more efficient eyes-on review of the potentially privileged documents.**
• Educating employees and clients about the proper way to request, provide and receive legal advice likely will allow corporate parties to more effectively segregate legal advice from business or other communications. This will preserve privilege by preventing the commingling of business advice that could lead to waiver of legitimately privileged legal advice, should a court determine that the document at issue does not predominantly or primarily contain legal advice. This also can prevent inadvertent waiver during production by creating clearer lines for parties producing documents and reviewing those documents for privilege. Document reviewers more easily can recognize a potentially privileged communication if a document strictly contains legal advice than if the legal advice is embedded in a broader business discussion.

• By limiting distribution, parties can diminish the likelihood that information will be distributed to someone outside the circle of privilege, thereby waiving the privilege. Limiting distribution also can limit the number of copies of the advice that must be recognized and withheld: sending a privileged e-mail to 10 recipients who each forward the e-mail to several others increases the likelihood that one copy of the privileged document will not be caught by reviewers and may be inadvertently produced. And by limiting distribution to persons providing or requesting legal advice, parties can diminish the likelihood that a court will find the inclusion of non-legal personnel on a distribution list indicates that the communication was not intended to be privileged in the first instance.

Defining 'Reasonable' Efforts

In Comment 3(d), the Commentary identifies steps parties can take to increase the likelihood that a reviewing court will conclude their efforts were "reasonable." The Commentary recommends that entities evaluate the following factors when creating a reasonable and auditable plan to withhold privilege information:

- Include steps to identify privileged documents in the collection process;
- Use a written document review protocol to manage privileged documents;
- Educate and train the review team in privilege law applicable to the case;
- Include an escalation process in the review procedure to address privilege calls;
- Segregate privileged documents to avoid unnecessary commingling;
- Perform quality control and sampling processes to ensure that privileged documents are being appropriately identified;
- Consider the use of software applications and tools to screen for privilege and work-product documents;
- Document the privilege review process contemporaneously; and,
- Disclose the steps the party is taking to prevent inadvertent disclosure to the opposing party, whether during Rule 26(f) conferences or otherwise.

Consequences of Not Objecting to Protocols

The Commentary also notes that if the party discloses its proposed protocol to the opposing party, and the opposing party fails to timely object to the protocol, there should be a rebuttable presumption that the producing party took "reasonable steps" if it follows the proposed protocol in good faith.

The non-producing party has the ability to rebut the presumption with evidence demonstrating that the procedure used could not have been "reasonable" given the facts surrounding the production of the inadvertently produced privileged information. If the requesting party objects in a timely fashion and the parties cannot reach a compromise, the issue should be raised with the court.

The reasonableness analysis will, by its nature, be multi-factorial and will depend on the factual circumstances of each case. In certain cases, depending on how a party has implemented the practices described above; searching for certain keywords might satisfy the reasonableness standard; in other cases, parties may need to retain an expert to meet their burden. See Comments 3(c)-(e).

As stated at the outset, a properly-framed and entered 502(d) Order can obviate the extended analysis of reasonable steps discussed above. But if parties cannot agree to the entry of an order under Rule 502(d), they will need to rely on Rule 502(b) to prevent a finding of waiver in the event they inadvertently disclose privileged documents to the requesting party.

Conclusion

By following the practical guidelines set forth in The Sedona Conference® Commentary on Protection of Privileged ESI, parties can significantly reduce the risk of waiver of privilege in federal court cases under Rule 502(b).
While the *Commentary* does not address what impact, if any, the implementation of such "reasonable steps" by a producing party would have in a state court action, given the stated purpose of Rule 502 to reduce the risk of waiver in federal and state courts, those steps should carry significant weight in the state court's analysis about whether the producing entity attempted to protect privileged information from being inadvertently disclosed to the opposing party.