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#### **SPECIAL FEATURE**

### **Spotlight on E-Discovery: The Cutting Edge**

*by Gareth T. Evans and  
Farrah Pepper*

**C**ONGRESS ENACTED FEDERAL RULE of Evidence 502, which addresses the mechanics of privilege waiver for documents subject to attorney-client privilege and work product protection, in September 2008. Surprisingly, relatively few attorneys are familiar with Rule 502, even though it was expressly designed to protect their clients. Rule 502's purpose was to give producing parties tools and protections that could save them substantial costs and avoid waiver of the attorney-client privilege and work product protection for inadvertent or even knowing productions of privileged information. Critics of the rule say that the protections are illusory, and that prudent parties ought not count on it to protect their disclosures of privileged information in all situations.

It is too soon to tell whether Rule 502 will ultimately be considered a success or a failure, given that only a handful of cases applying Rule 502 have been decided in the past year. As a result of this dearth of case law, there is still some hesitancy among counsel and their clients to dispense with the classic page-by-page document review model. This landscape is starting to change, however, as courts have begun to order parties to incorporate Rule 502 agreements into their discovery plans. (See, e.g., *Spieker v. Quest Cherokee, LLC*,

2009 WL 2168892, at \*2 (D. Kan. July 21, 2009) (revisiting court's earlier instruction to parties to discuss "utilizing Rule 502 to minimize the expense of a detailed privilege review").)

It remains to be seen if the upcoming year will usher in a new era of privilege review that achieves the dual intent of Rule 502's drafters—namely, to create consistency in the realm of privilege waiver and to contain the rising tide of discovery costs.

### **Rule 502 in a Nutshell**

Although attorneys usually look to the Federal Rules of Civil Procedure for guidance regarding discovery, Rule 502 is part of the Federal Rules of Evidence. Rule 502 is designed to be read in tandem with Federal Rule of Civil Procedure ("FRCP") 26(b)(5)(B), which addresses procedurally how to seek a "claw-back" of inadvertently disclosed privileged documents, but does not discuss whether the inadver-

tent disclosure results in a privilege waiver. FRCP 26(b)(5)(B) was enacted in December 2006, so there was a considerable time lag between then and the enactment of Rule 502 last September, during which the precise state of play regarding waiver was left a bit murky.

Whether an inadvertent disclosure acted as a waiver was left to the substantive law of the controlling jurisdiction and, even if the privileged information was protected within that particular litigation, there might still be waiver *vis à vis* third parties in other actions. In fact, one judge went so far to warn litigants that "[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures in the [then-] proposed rule." (*Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005).) Rule 502 was designed to be the "definitive ruling" on the waiver issue. The following is an overview of Rule 502's key provisions.

# Federal Rule of Evidence 502: Getting to Know an Important E-Discovery Tool



### **Rule 502(a): No More Subject-Matter Waiver**

Rule 502(a) does away with subject-matter waiver. It therefore frees parties from having to identify, segregate and log massive numbers of technically privileged, yet innocuous, communications simply to avoid a subject-matter waiver. Rule 502(a) provides that in a federal proceeding or in a production to a federal agency (for example, the SEC or DOJ) the waiver is limited to the actual communications or information produced.

Importantly, this protection extends to all subsequent proceedings, including state court litigation. Subject-matter waiver is reserved for the classic “sword and shield” scenario—where a party would gain an unfair advantage by intentionally and selectively producing favorable privileged documents while simultaneously seeking to protect damaging documents on the same subject.

### **Rule 502(b): Worry Less About Waiver If You Take “Reasonable” Steps**

It appears to be a law of nature that no matter how careful a party is, and no matter how much it spends on document review, inevitably it inadvertently produces some privileged information. Before Rule 502, some jurisdictions held that *any* disclosure—even where inadvertent—constituted a waiver. (See, e.g., *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (cited in Rule 502 Advisory Committee’s Notes).) Now, Rule 502(b) provides that an inadvertent disclosure in a federal proceeding or to a federal agency is not a waiver if the producing party took “reasonable steps” to prevent disclosure and “promptly” took reasonable steps to rectify the error.

Because of the inherent subjectivity of the term “reasonable,” however, Rule 502(b) is not a panacea. Even if the threshold for “reasonableness” was meant to be relatively low—for example filtering with search terms and applying analytic software programs—at least one court has applied more stringent requirements, such as requiring not just reasonable steps but “*all*” reasonable steps available. (*ReliOn Inc. v. Hydra Fuel Cell Corp.*, No. 06-607-HU, 2008 WL 5122828, at \*3 (D. Or. Dec. 4, 2008).) One of the dangers of the latter approach is that it can lead to peripheral litigation, including expert testimony in evidentiary hearings, over whether the producing party did everything possible, including taking the most state-of-the-art methods to prevent dis-

closure. This so-called “discovery about discovery” can be a costly and perilous detour for any party to take away from the substantive issues of the case.

### **Rule 502(c): Prior Disclosure in a State Court Proceeding**

Rule 502(c) provides a potential solution if privileged information was previously produced in a state court proceeding. If the disclosure was not the subject of a state court order regarding waiver and would not have been a waiver if made in a federal proceeding (for example, an inadvertent disclosure despite reasonable steps) *or* was not a waiver under the law of the state where the disclosure occurred, then it does not operate as a waiver in the federal proceeding.

### **Rule 502(d): No Fault Privilege Protection**

Rule 502(d) provides that if a federal court enters a protective order that a disclosure of privileged or protected information will not constitute a waiver, that order is enforceable against *all* persons and entities in *any* federal or state proceeding. Rule 502(d) thus provides a mechanism to claw back protected information without worrying about a fight over whether the producing party took “reasonable steps,” as required under Rule 502(b). It also provides a mechanism for avoiding the costs of reviewing a large set of electronically stored information for privilege and allowing the other side a “sneak peek” to narrow the scope of production.

As a practical matter, most producing parties will not want to rely solely on a Rule 502(d) protective order to prevent waivers, as disclosure of certain privileged materials can be highly detrimental even if subsequently returned. Instead, in most cases having any degree of complexity and risk, the producing party will want to use at least some safeguards. Rule 502(d) is still important in these cases, however, as it provides predictability—*i.e.*, that there *will not* be a waiver if privileged information is disclosed—in contrast with the potential lack of predictability under the “reasonable steps” standard of Rule 502(b).

### **Rule 502(e): Effect of Agreements without an Order**

Emphasizing the desirability of a Rule 502(d) protective order, Rule 502(e) provides that an agreement between the parties on the effect of

disclosure in a federal proceeding is binding only on the parties to the agreement. A Rule 502(d) protective order, by contrast, is enforceable against all persons in any federal or state proceeding.

## **Potential Pitfalls of the Rule 502(b) Reasonableness Standard**

If the parties have not agreed to a Rule 502(d) protective order, then Rule 502(b) governs whether a disclosure of privileged or protected information constitutes a waiver. Rule 502(b) has three requirements for a non-waiver finding: (1) that the disclosure was inadvertent—*i.e.*, the producing party did not mean to disclose it; (2) that the producing party took “reasonable steps” to prevent disclosure; and (3) that upon discovering the disclosure, the producing party was prompt in rectifying it.

The key issue under Rule 502(b) in most cases will be whether the disclosing party took reasonable steps to prevent disclosure. The Rule itself does not set forth criteria for what is reasonable, opting instead for a “flexible” approach, according to the Rule’s Advisory Committee Note.

The Advisory Committee Note refers to the five-factor test previously used by a majority of courts to determine whether an inadvertent disclosure is a waiver: (1) the reasonableness of the precautions taken; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the “overriding issue” of fairness. (See Rule 502 Advisory Committee’s Note (citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985)).) Although the Rule did not codify this test, the Note states that it is flexible enough to accommodate any of these factors. The Note adds that the number of documents to be reviewed and the time constraints for production are also factors that should be considered. Finally, it states that a party that uses “advanced analytical software applications and linguistic tools” in screening for privilege and work product may be found to have taken reasonable steps to prevent inadvertent disclosure.

Although Rule 502(b) was intended to provide a uniform standard for determining inadvertent waiver, because of its “flexible” approach this has not been the result in practice. Courts have selected the factors upon which to judge reasonableness and chosen which factors to weigh heaviest.

Cases applying Rule 502(b) illustrate the

resulting lack of predictability. In *Rhoads Industries, Inc. v. Building Materials Corp.* (254 F.R.D. 216 (E.D. Pa. 2008)), for example, the judge acknowledged that Rule 502 was recently enacted and established the standard for determining if waiver of inadvertently produced privileged documents applies. (*Id.* at 226.) In the course of applying the “reasonable steps” standard of Rule 502, however, the court also applied the traditional five-factor test listed in the Advisory Committee’s Notes. It found that four of the five factors weighed in favor of waiver, but nevertheless held there was no waiver based solely on the fifth factor, the interests of justice. The court explained that factor “strongly favor[ed]” the producing party because the requesting party had no right to expect to obtain privileged information and waiver is a significant sanction. (*Id.* at 227.) Although *Rhoads* ultimately favored the producing party, it should be troublesome for all litigants because of its apparent arbitrariness.

In *ReliOn Inc. v. Hydra Fuel Cell Corp.* (No. 06-607-HU, 2008 WL 5122828, at \*3 (D. Or. Dec. 4, 2008)), the court held that the producing party’s production of two privileged e-mails constituted a waiver because the producing party did not pursue “all reasonable means” of protecting against disclosure of privileged information. *ReliOn* is arguably incorrect, as Rule 502(b) requires “reasonable steps” rather than “all reasonable steps.” Even though the producing party’s counsel claimed that the first time they became aware of the inadvertent production was when the documents were raised in a letter from the requesting party (four months after production), the court was not sympathetic. (*Id.* at \*3.) Rather, the court observed that the producing party had a total of three opportunities to review the documents in question—before they were provided to requesting party for inspection, and then subsequently once the requesting party provided both hard copies and electronic versions of the documents they selected back to the producing party. (*Id.*)

*ReliOn* illustrates the danger that under Rule 502(b) courts will require the producing party to show that it took the *best* precautions available, inviting time-consuming and expensive evidentiary hearings involving expert testimony. Consequently, producing parties may wish to obtain a 502(d) protective order that does not require that reasonable steps must have been taken to preserve privilege.

Despite these varying approaches, it is apparent that the test for “reasonable steps”

requires at least some affirmative action to protect privileged documents. For example, Rule 502(b) does not relieve the producing party from conducting *any* type of privilege review. (See *Spieker v. Quest Cherokee, LLC*, 2009 WL 2168892, at \*3 n. 6 (D. Kan. July 21, 2009) (“simply turning over *all* ESI . . . without some effort to protect privileged material does not rise to the level of ‘reasonable steps’ set forth in Rule 502(b).”) (emphasis in original).) In *Spieker*, the court rejected the requesting party’s “flawed” proposal that the producing party simply hand over all their documents in native form and rely on Rule 502’s protection against waiver. (*Id.* at \*3.) Even though the intent of Rule 502(b) was to cut down on costs related to privilege review, courts may not be sympathetic to those who go too far in the name of cost-cutting. (*Rhoads*, 254 F.R.D. at 227 (“An understandable desire to minimize costs of litigation and to be frugal in spending a client’s money cannot be an after the fact excuse for a failed screening of privileged documents . . .”).)

Courts generally have been inclined to protect inadvertently disclosed privileged materials from waiver of the privilege when the producing parties have developed some form of processes and procedures to weed out privileged information before a production is made. (See, e.g., *Heriot v. Byrne*, No. 08-C-2272, 2009 WL 742769, at \*14 (N.D. Ill. Mar. 20, 2009) (holding that there was no waiver and that producing party took reasonable steps to protect inadvertent disclosure of privileged documents by using a multi-step process to identify responsive information, even though vendor processing the data made an error that led to disclosure of privileged information); *B-Y Water Dist. v. City of Yankton*, No. 07-4142, 2008 WL 5188837, at \*2 (D.S.D. Dec. 10, 2008) (granting the producing party’s request to bar use of inadvertently produced privileged documents by opposition at trial and noting that producing party took reasonable steps to prevent their disclosure by redacting the privileged portions of documents, even though they ultimately produced the unredacted versions); *Laethem Equip. Co. v. Deere & Co.*, No. 05-10113, 2008 WL 4997932, at \*9 (E.D. Mich. Nov. 21, 2008) (holding that there was no waiver of privilege and noting that the producing party took reasonable steps to prevent inadvertent disclosure of privileged documents by using an “inspect and copy” procedure to

review documents after a vendor copied them but before they were produced). Accordingly, counsel would be well advised to develop sound and repeatable processes to protect their clients’ privileged information, in the event that they are called upon to explain the “reasonable steps” they took.

## Potential Issues With a Rule 502(d) Protective Order.

The rule’s drafters intended Rule 502(d) to make an agreement between the parties regarding waiver binding on third parties by means of a court order, and to allow the court to enter such an order even where the parties cannot or will not agree. Additionally, the drafters intended Rule 502(d) to allow the parties and the court to protect against waiver not just for inadvertent (*i.e.*, unintended) disclosures, but also for knowing disclosures of privileged information. For example, it was meant to facilitate “quick peek” and “claw-back” arrangements.

Although Rule 502(d) provides substantial benefits, it is not without potential problems. Some have expressed a concern that courts might unilaterally compel parties to produce all their documents—both non-privileged and privileged—because either the parties have agreed to or the court has unilaterally imposed a Rule 502(d) protective order. There are no known real-life examples of such “compelled quick peeks,” however, and nothing in the Rule says that a court can (or cannot) do it.

Additionally, some have expressed a concern that the existence of a Rule 502(d) protective order will encourage producing parties to “dump” documents on their opponents, shifting the burden of relevance and privilege review onto the receiving party. Courts could attempt to remedy and deter such conduct through their powers to control discovery under the Federal Rules of Civil Procedure. There is also the inherent problem that you cannot “unring the bell” after producing privileged and potentially sensitive documents to the other side, even if you get them back. The information learned by the receiving party could inform its strategy in the litigation and make its work much easier.

## The Privilege Log After Rule 502

Because of the sheer volume of electronically stored information, privilege logs have become increasingly burdensome for producing parties to

create and for receiving parties and courts to evaluate. Rule 502, however, allows for more efficient privilege log creation. For example, parties used to commonly put transmittal letters and other innocuous documents on privilege logs due to the fear of subject-matter waiver if they did not do so. Due to Rule 502(a), which ends subject-matter waiver, that is no longer a concern, and over-designation can be reduced. Parties also can agree that certain categories of documents whose privilege cannot reasonably be questioned need not be logged, for example, the client's communications with litigation counsel. Similarly, parties can agree to log certain types of documents by category to avoid document-by-document log entries.

In sum, Rule 502 provides important tools with the potential to dramatically reduce the burdens and costs of electronic discovery with which all litigators in federal proceedings should be familiar.

## Frequently Asked Questions About Rule 502

Sorting through Rule 502's provisions and parsing out where its protections begin and end is no simple task. Below is a practitioner's guide to some of the nuances to keep in mind.

### **Q: Does Rule 502 Apply to Other Evidentiary Privileges? A: No.**

Rule 502 applies only to attorney-client privileged and attorney work product communications and information. As applied to other evidentiary privileges, waiver due to disclosure remains the subject of federal common law.

### **Q: Can I Produce and Use Privileged Documents that Help Me, But Withhold Those that Don't? A: No.**

Rule 502 applies to disclosure rather than use, and you cannot use the privilege as both a sword and a shield.

### **Q: Does Rule 502(b) Require the Producing Party to Review Its Productions Afterwards to Determine Whether Privileged Information Has Been Produced? A: No.**

The Explanatory Note accompanying the rule makes clear that Rule 502(b) does not require the producing party to engage in a post-production review to determine whether any protected information has been produced by mistake. However, upon discovering an inadvertent production, the producing party must act promptly.

### **Q: Do Rule 502 Protections Apply to Productions to the SEC Or DOJ? A: Yes, for the most part.**

Both the Rule 502(a) limitation of the scope of waiver to information actually disclosed and the Rule 502(b) protection for inadvertent disclosures where the producing party took reasonable steps expressly apply to productions to federal agencies. The Rule 502(d) protective order is trickier, however, as it requires litigation in a federal court and that the disclosure be connected to the litigation. One possible way for a producing party to trigger this protection might be to initiate a proceeding in federal court to quash an SEC or DOJ subpoena solely for the purpose of obtaining a Rule 502(d) protective order.

### **Q: Does Rule 502 Apply to Productions to State Law Enforcement Agencies? A: No.**

Although Rule 502 provides protections for inadvertent disclosure of privileged information to a federal agency, it does not do so for productions to state agencies outside of litigation.

### **Q: Does Rule 502 Allow "Selective Waiver"? A: No.**

Rule 502 does not provide for selective waiver—*i.e.*, disclosing privileged information in an effort to cooperate with governmental enforcement agencies while seeking to keep the information protected from all others. A selective waiver rule was proposed as part of Rule 502, but ultimately was not adopted.

### **Q: Do You Need the Other Side's Agreement to a Rule 502(d) Protective Order? A: No.**

While it is generally best to present an agreed upon proposed protective order to the court, the other side's agreement is not required under Rule 502(d). Parties can unilaterally seek to have the court enter the protective order. The court could also enter such an order *sua sponte*.

### **Q: Am I Really Protected in State Court from a Disclosure in Federal Litigation? A: The Rule Says So, But We Don't Know for Sure.**

The protections of Rule 502(a), (b) and (d) by their terms extend to state court proceedings. Whether they actually do so depends on the willingness of state court judges to enforce a federal rule and federal court orders. At least one law review article argues that Rule 502's application

to state court proceedings is unconstitutional, an as-yet-untested argument that has both supporters and detractors. (See Noyes, Henry S., "Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick," 66 Wash. & Lee L. Rev. 673 (2009).) For that reason, it is still a good idea to conduct some privilege review even if a 502(d) protective order is in place.



*Gareth T. Evans is a litigation partner in the Orange County and Los Angeles offices of Gibson, Dunn & Crutcher LLP. He is a member of the firm's Electronic Data Discovery Initiative, a task force devoted to issues of electronic discovery and records management. Mr. Evans can be reached at [gevans@gibsondunn.com](mailto:gevans@gibsondunn.com).*

*Farrab Pepper is a senior litigation associate in the New York office of Gibson Dunn. Ms. Pepper is a founder and chairperson of the firm's Electronic Data Discovery Initiative. Ms. Pepper can be reached at [fpepper@gibsondunn.com](mailto:fpepper@gibsondunn.com).*