

Discovery

The Reasonable Problem With FRE 502(b)

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Commentary

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The proliferation of e-mail and other sources of electronically stored information (ESI) has caused immense increases in litigation discovery costs. Directly tied to the increase in costs is the growing burden on litigants and their attorneys to review masses of ESI to ensure that privileged material is not produced, and thereby avoid a subject-matter waiver that allows an opponent and third parties access to a broad range of privileged material. The recently enacted Federal Rule of Evidence 502 (FRE 502) is supposed to help relieve this burden by putting in place protections that prevent inadvertently disclosed privileged material from automatically constituting waiver. According to the Senate Judiciary Committee, the new rule “provid[es] a predictable and consistent standard to govern the waiver of privileged information . . . while preserving accountability.”¹

These protections, however, rest on a reasonable standard that is undefined. As a result, FRE 502's

reach and application are far from “predictable and consistent.” In the few cases where FRE 502 has been employed so far, the rule's reasonable standard has been applied with little discussion. Moreover, there have been no challenges yet to the presumptions underlying the standard. If history is any guide, however, FRE 502's reasonableness standard will be the focus of much debate and litigation in the future. In the end, the rule may end up increasing litigants' discovery costs and burdens, rather than decreasing them.

History Of FRE 502

The seeds of FRE 502 were planted in 2006 when the House Judiciary Committee suggested that the Judicial Conference of the United States consider proposing a rule addressing the rising costs associated with discovery and waiver of the attorney-client and work product privileges.² Specifically, the Judicial Conference was urged to draft a rule that would serve two broad purposes: (1) “protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake;” and (2) “permit parties, and courts, to protect against the consequences of waiver by permitting the disclosures of privileged information between the parties to litigation.”³

In response, the Advisory Committee on Evidence Rules prepared a draft FRE 502.⁴ The draft was reviewed by a select group of judges, lawyers and academics.⁵ Afterward, the Committee on Rules of Practice and Procedure authorized the Advisory Committee to release the draft rule for public comment.⁶ Over the course of the comment period that

lasted from August 2006 through February 2007, the Advisory Committee received more than 70 public comments, and heard testimony from more than 20 witnesses during two hearings.⁷ In April 2007, the Advisory Committee issued a revised proposed rule.⁸ The revised proposed FRE 502 was approved by the Committee on Rules and Practice and Procedure, and submitted to Congress on September 26, 2007.⁹

A bill to enact the proposed rule was introduced in the Senate on December 11, 2007. The Senate passed the bill without amendment and by unanimous consent on February 27, 2008. The companion bill in the House was passed on September 8, 2008. The bill was presented to President George W. Bush on September 11, 2008, and he signed it into law nine days later.

Overview Of FRE 502

FRE 502 consists of six main sections — (a) through (f). For privileged material that is disclosed in a “Federal proceeding or to a Federal office or agency,” section (a) limits subject matter waiver to the circumstances where “the waiver is intentional,” the “disclosed and undisclosed [material] concern the same subject matter,” and the disclosed and undisclosed material “ought in fairness to be considered together.”¹⁰ Section (c) extends the rule’s protection to disclosures made in state proceedings. Section (d) authorizes a court to issue an order to protect privileged material disclosed in a case before the court. Section (e) limits the enforcement reach of a confidentiality agreement that is not endorsed by a court. Section (f) establishes the preemptive authority of the rule.

Section (b) is the focus here and reads:

Inadvertent Disclosure — When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal 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).¹¹

On its face, FRE 502(b) twice imposes a reasonable standard for determining whether an inadvertent disclosure of privileged material constitutes waiver: once to measure the disclosing party’s pre-disclosure activities to protect the privileged material; and again to ascertain the disclosing party’s post-disclosure efforts to rectify the disclosure. However, the rule is completely silent as to what constitutes “reasonable” in either instance. The purpose here is to address this silence by forecasting how courts may interpret the standard in both instances based on recent history, and to provide guidance on how to diminish the odds that an inadvertent disclosure will lead to a finding of waiver under FRE 502.

Reasonableness And Inadvertent Disclosure: A Historical Perspective

Prior to FRE 502(b) there were three schools of thought among federal courts regarding when an inadvertent disclosure constituted waiver.¹² On one end of the spectrum was the “zero tolerance” or “strict” school that insisted that the inadvertent disclosure of a privileged document vitiates any applicable privilege without exception.¹³ At the opposite end of the spectrum was the “no waiver” protective school that maintained that an attorney’s negligence could never waive the attorney-client privilege because the client holds the privilege.¹⁴

The third and more popular approach took the middle road between the two extremes.¹⁵ Commonly referred to as the “totality of circumstances test,” the third approach “focus[ed] upon the reasonableness of the steps taken to preserve the confidentiality of privileged documents.”¹⁶ The foundation of this approach was that a waiver must be knowing and intentional, and therefore, an inadvertent disclosure must be the result of gross negligence to rise to the level of an intentional waiver of privilege.¹⁷ Courts that embraced this approach applied the following five-factor test to determine whether an inadvertent disclosure of privileged material constituted waiver:

- (1) the reasonableness of the precautions taken to prevent the inadvertent disclosure in view of the extent of the document production;
- (2) the number of inadvertent disclosures;
- (3) the extent of the disclosure;

- (4) any delay and measures to rectify the disclosure;
- (5) whether overriding interests of justice would or would not be served by relieving the party of its error.¹⁸

The drafters of FRE 502 modeled section (b) after the totality of circumstances approach.¹⁹ In the recent cases where the FRE 502(b) has been applied (discussed later), most of the courts have not addressed in any direct or detailed manner the subsection's double reliance on a reasonableness standard. It is inevitable, however, that courts will soon have to address what exactly constitutes "reasonable" under FRE 502(b) (in the pre- and post-disclosure contexts) as litigants will certainly challenge the presumptions underlying the standard. With FRE 502 still in its infancy, how courts have applied the reasonableness of precautions prong and the rectifying measures prong of the totality of circumstances test provides insight into how courts will likely apply FRE 502(b).

Reasonableness Of Pre-Disclosure Precautions Pre-FRE 502

Under the first prong of the five-factor test, "the party resisting a waiver argument must demonstrate that it undertook reasonable precautions to avoid inadvertent disclosures of privileged documents."²⁰ As one can imagine, courts did not hesitate to find waiver where the disclosing party took little to no precautions to protect privileged materials.²¹ It is also no surprise that courts found the use of multiple layers of reviewers to be reasonable.²² It is how courts viewed the reasonableness of the activity that fell between the two extremes that offers guidance as to the future application of FRE 502(b).

For the cases between the extremes, the reasonableness determination often turned on the court's consideration of the time constraints imposed by the discovery schedule and the volume of the materials that had to be reviewed.²³ The volume of materials was the determinative factor in many cases.²⁴ When considering the volume of materials, courts necessarily encroached into the test's third factor (extent of the disclosure) to balance the volume of the materials reviewed with the number of privileged documents inadvertently produced.²⁵ A predictable trend developed — the more that the volume of materials reviewed outweighed the number of

privileged documents inadvertently produced, the more likely a court found that the disclosing party's precautions were reasonable.²⁶ In some cases courts were willing to overlook very lax precautions where the volume of the disclosure was greatly outweighed by an overwhelming volume of documents reviewed and produced.²⁷

One category of pre-FRE 502 cases that may have a profound impact on FRE 502(b) adjudications, is where privileged material was disclosed as a result of document inspection and designation. Typically under document inspection agreements, a party makes its documents that are responsive to an opponent's requests available for the opponent's attorneys to review and designate. The designated documents are then copied (via hard copy or electronically) and sent to the opponent's attorney. Ordinarily, the producing party's attorney will review the documents for privilege prior to inspection by the opposition's attorney. One would expect that prior to FRE 502, the reasonableness of a disclosing party's pre-inspection procedures would come under scrutiny. However, in a number of pre-FRE 502 cases, the question of reasonable precautions turned not on the disclosing party's *pre-inspection* review procedures, but rather whether any review was conducted *between designation and production*. Some courts took the hard line and held that the failure to conduct a post-designation privilege review prior to production weighed in favor of waiver,²⁸ especially where the disclosing party had ample time to conduct a post-designation review.²⁹ Some courts went even further and declared that the need for a post-designation review grew as the volume of documents to be produced increased.³⁰

Another practice that will come under increased scrutiny under FRE 502(b) is that of relying on keyword searches to screen out privileged materials among masses of ESI. On this issue, one pre-FRE 502 case — *Victor Stanley, Inc. v. Creative Pipe, Inc.* — may become a seminal case.³¹ In that case the parties agreed to a joint protocol for searching and retrieving ESI relevant to Victor Stanley's document requests.³² Creative Pipe, Inc. (CPI) followed the protocol, and prior to production, CPI reviewed the located ESI for privileged material.³³ This privilege review consisted of two parts: (1) conducting a keyword search using 70 terms to locate and screen privileged material; and (2) a manual review of the

files that were not searchable by text.³⁴ Despite these efforts, CPI produced 165 pages of ESI that CPI later claimed were privileged and inadvertently produced.

The court's analysis focused on whether the search terms were comprehensive and the rationale behind the selection of the terms.³⁵ Yet, according to the court, the analysis could not stop there because "while it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all key word searches are not created equal."³⁶ Therefore, to determine reasonableness, the court had to look below the surface of the actual search terms to examine the methodology of the search, as well as the qualifications of those who developed the methodology and conducted the search.³⁷

As for the reasonableness of the methodology, the court focused on two factors. The first was "whether the search was a simple keyword search, or something more sophisticated such as one employing Boolean proximity operators."³⁸ Without explicitly stating it, the court suggested that the more sophisticated was the search term methodology, the more likely that the methodology would be deemed reasonable.³⁹ The second factor was whether the disclosing party "analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation."⁴⁰ According to the court, "sampling" the documents determined to be privileged and non-privileged was necessary because it was the "only prudent way to test the reliability of the key word search" and to "arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive."⁴¹ The court found that CPI's inability to sufficiently articulate its methodology and the lack of sampling both indicated waiver.

The court maintained that it also needed to weigh the qualifications of the developers and implementers of CPI's search methodology because "there are well-known limitations and risks associated with [keyword searches of ESI], and proper selection and implementation obviously involves technical, if not scientific knowledge."⁴² The court acknowledged that considering the qualifications of the search designers and implementers seemed to "engraft" the federal rules on experts and expert opinion into document discovery.⁴³ Nonetheless, the court stated,

the qualifications of the developers and implementers of search methodologies were relevant because "challenges to the sufficiency of keyword search methodology unavoidably involve scientific, technical and scientific subjects, and [unsupported] *ipse dixit* pronouncements from lawyers"⁴⁴ were of little value to courts.⁴⁵

Delay In Rectifying

The Disclosure Pre-FRE 502

On its face the "any delay and measures to rectify the disclosure" prong of the totality of circumstances test left an important factor unspecified — when did the clock for determining "delay" begin? The lack of specificity resulted in two competing approaches. The minority approach was that the clock began at the moment of disclosure.⁴⁶ For the few courts that adopted this approach, the keys were whether the disclosing party had time to review its production,⁴⁷ and whether the receiving party had come to rely on the disclosed privileged material.⁴⁸ Under the majority approach the "period after the producing party realizes that privileged information has been disclosed [was] the relevant period for measuring whether the privilege ha[d] been waived."⁴⁹ The central difference between the two approaches was that the "clock starts at discovery" approach did not share the presumption underlying the alternative approach that litigants re-review productions after providing them to opponents.⁵⁰

FRE 502 Applied

A few district courts have already applied FRE 502(b). As explained earlier, these courts (save one) have done little to explain their application of the new rule, and litigants have done little to challenge the presumptions underlying the rule that many courts have blindly adopted.

Laethem Equipment Co. v. Deere And Co.⁵¹

In *Laethem Equipment Co. v. Deere and Co.*, Laethem produced to Deere two disks containing volumes of electronically stored data (although Deere disputed the date the disks were produced). Laethem learned that the two disks contained privileged materials when Deere's counsel tried to use privileged material from the disks during a deposition.⁵² Laethem's counsel objected to the use of the privileged material during the deposition, followed up with a letter demanding the return of the privileged material, re-

peated the objection and demand during subsequent depositions, and, within three weeks, secured a court order compelling the return of the privileged material.⁵³ In a motion for waiver, Deere argued that by producing the two disks, Laethem had waived the attorney-client privilege protecting any privileged material on the disks.

The court relied on FRE 502(b) to reject Deere's call for waiver.⁵⁴ According to the court, because it was clear that the disclosure was inadvertent, the waiver issue turned on whether: (i) Laethem took reasonable steps to prevent disclosure; and (ii) Laethem took reasonable steps to rectify the erroneous disclosure after discovering it. As to the first question, the court did not provide much explanation. Laethem seemed to receive some leniency because the two disks were disclosed outside of the "inspect and copy" procedure agreed to by the parties which prevented Laethem from conducting a privilege review prior to producing the disks.⁵⁵ The court also took notice that the volume of disclosed privileged material was greatly outweighed by the volume of data produced in the case.⁵⁶ Finally, the court found the steps taken by Laethem's counsel after learning of the inadvertent disclosure to be a diligent attempt to rectify the disclosure.⁵⁷

Relion, Inc. v. Hydra Fuel Cell Corp.

This past November, in *Relion, Inc. v. Hydra Fuel Cell Corp.*, the District Court of Oregon followed in the path of pre-FRE 502 cases to hold that a privilege review conducted between designation and production was necessary under certain circumstances.⁵⁸

To prepare for an inspection and copying session at Relion's offices by Hydra's attorneys, Relion's attorneys conducted a privilege review of documents occupying over 40 feet of shelf space.⁵⁹ Following the inspection, Hydra's counsel provided Relion with a complete hard copy set of the documents that Hydra had designated and copied off-site. Hydra also provided Relion's outside counsel with electronic, text-searchable copies of the selected documents.⁶⁰

Four months after the inspection, Relion's counsel received a letter from Hydra's counsel that discussed two privileged e-mails that Hydra had copied during the document inspection at Relion's offices.⁶¹ In response to the letter, Relion's counsel asserted

privilege over the two e-mails.⁶² A subsequent review by Relion's counsel of Relion's files determined that the e-mails had been inadvertently left among the documents that Hydra had inspected.⁶³ Relion filed a motion to have the e-mails returned pursuant to the protective order in place in the case.

The district court relied on FRE 502(b)(2) to hold that Relion had waived the attorney-client privilege protecting the two e-mails. According to the court, Relion had three opportunities to identify, remove, and protect the two privileged e-mails: the privilege review prior to Hydra's inspection, when Hydra's counsel provided Relion with hard copies of the documents it selected and copied, and finally, when Hydra's counsel provided Relion's outside counsel with electronic, searchable copies of the selected documents.⁶⁴ Due to Relion's failure to identify the two privileged e-mails during these three opportunities, the court held that Relion "did not pursue all reasonable means of preserving the confidentiality of the documents produced to Hydra."⁶⁵

Misguided Intent: Rhoads Industries, Inc. Case

District Court Judge Michael M. Baylson's detailed opinion in *Rhoads Industries, Inc. v. Building Materials Corp. of America*⁶⁶ stands in stark contrast to the FRE 502 cases discussed previously. Certainly, the opinion should be applauded for its meticulous application of FRE 502's reasonable standard. However, in applying the rule, Judge Baylson made a pivotal determination that is in direct conflict with the intent of FRE 502 — particularly the drafter's intent of streamlining and simplifying the analysis associated with inadvertent disclosure cases.

In anticipation of litigation Rhoads Industries, Inc. (Rhoads) retained an IT consulting expert in February 2007.⁶⁷ In June 2007, at the direction of the company, the IT consultant purchased electronic search software (after testing other options) to help identify electronic data relevant to the imminent lawsuit and to identify privileged data.⁶⁸ The consultant, Rhoads's outside counsel, and a Rhoads's junior associate identified mailboxes and e-mail addresses that likely held relevant data and materials.⁶⁹ After settlement talks collapsed and the lawsuit commenced in November 2007, Rhoads retained litigation counsel. Rhoads's regular outside counsel met separately with

the IT consultant and the junior associate to monitor the effectiveness of the search software, review search terms, and generally discuss electronic discovery in the case.⁷⁰

Rhoads's litigation counsel identified 210,635 e-mails responsive to the defendants' requests after running the search terms compiled by the company's regular outside counsel through the purchased software.⁷¹ A follow-up search conducted by the litigation counsel identified 2,000 additional privileged e-mails. The 2,000 e-mails were segregated but not identified on a privilege log at the time.⁷² Next, Rhoads's litigation counsel revised the search term list and re-ran the search. This search reduced the world of responsive e-mails from 210,635 to 78,000 e-mails.⁷³ The junior associate then conducted a manual privilege review of some of the pre-identified mailboxes, and logged any e-mails she identified as privileged.⁷⁴ Rhoads's litigation counsel also reviewed 22 boxes of hard copy documents for privilege.⁷⁵ On May 13, 2008, Rhoads produced to the defendants three hard drives of responsive electronic documents (containing the 78,000 e-mails), but no privilege logs.⁷⁶ In response to a court order, on June 6, 2008, Rhoads produced two privilege logs: (1) one pertaining to the electronic privileged documents identified by the manual review of the junior associate; and (2) one concerning non-electronic privileged documents.⁷⁷

On June 5, 2008, one of the defendants notified Rhoads's counsel that it appeared that Rhoads had produced some privileged documents.⁷⁸ Rhoads's counsel immediately responded that the production was inadvertent and that no applicable privileges had been waived.⁷⁹ Two and half weeks later, the same junior associate that had conducted the limited manual search, conducted a privilege review of all 78,000 produced e-mails.⁸⁰ She located 812 privileged e-mails that were identified on a subsequent privilege log that Rhoads provided to the defendants on June 30, 2008.⁸¹ A little over a month later the defendants filed a motion to have the privileges attached to the 812 e-mails deemed waived.

The court held two hearings on the motion. During the first, Rhoads admitted that the 2,000 e-mails originally identified as privileged had not been listed on a separate privilege log, but that the company believed that the junior associate's limited manual

review of the mailboxes would have identified duplicative e-mails (and thereby would have been reflected on the June 6, 2008 privilege log).⁸² After the hearing Rhoads inspected the 2,000 e-mails and identified a number of privileged documents that had not been identified on any of the previously provided privilege logs.⁸³ Rhoads subsequently provided defendants with a fourth privilege log identifying these e-mails.⁸⁴

Before turning to the issue of inadvertent waiver, Judge Baylson confirmed a ruling that he made during one of the hearings — a ruling that had significant implications for the waiver issue. The judge ordered Rhoads to produce any privileged document that was not listed on any of the privilege logs served as of June 30, 2008.⁸⁵ The court found Rhoads's delay in logging all of its inadvertently produced documents to be "too long and inexcusable."⁸⁶ According to the court, this ruling did "not entail any analysis of F.R.E. 502, because of the clear mandate of Federal Rule of Civil Procedure 26(b)(5)."⁸⁷ This ruling would prove critical when the court addressed the issue of the inadvertently produced documents that had been identified on privilege logs provided as of June 30, 2008.

To resolve the issue of the disclosed documents logged as of June 30, 2008, the court applied FRE 502(b). The court defined the issue as not whether the documents were inadvertently produced, but whether Rhoads's screening procedures were "reasonable."⁸⁸ At the outset of the analysis, Judge Baylson made a critical determination that exceeds the bounds of FRE 502(b). Judge Baylson "conclude[d] that once the producing party has shown at least minimal compliance with the three factors in Rule 502, but 'reasonableness' is in dispute, the court should proceed to the traditional five-factor test."⁸⁹ In other words, meeting the standards posed by FRE 502 may not be enough — a party's screening procedures may still be deemed unreasonable under the five-factor test widely employed prior to FRE 502's adoption.

After an exacting analysis applying the five-factor test, the court found that the first four factors favored the defendants.⁹⁰ "The most significant factor . . . [was] that Rhoads failed to prepare for the segregation and review of privileged documents sufficiently

far in advance of the inevitable production of a large volume of documents.”⁹¹ In short, Rhoads retention of an IT consultant and the purchase and use of sophisticated search software *prior to the filing of the complaint* were not “adequate resources to the task of preparing the documents, which was completely within Rhoads’s control.”⁹² According to the court, “[a]n 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.”⁹³

Despite four factors weighing in favor of the defendants, the court held, however, that the fifth factor — the interest of justice — favored Rhoads so strongly that the court found no waiver. Without explicitly stating it, the court took the position that waiver of attorney-client privilege is a sanction that should be imposed sparingly where “high-stakes, hard-fought litigation” is involved.⁹⁴ Moreover, the court held that the defendants were not prejudiced by the no waiver ruling because they had “no right or expectation” to Rhoads’s privileged communications and because they were to receive “a significant” number of privileged documents due to the court’s earlier ruling on the privilege log issue.⁹⁵

As it stands, *Rhoads* has two key take-aways. First, the contemporaneousness of a privilege log is a separate and perhaps antecedent issue to whether inadvertently produced documents retain applicable privileges. The second, and more problematic take-away is that FRE 502(b) is merely a first step, and not a dispositive step, in determining whether privileges attached to inadvertently produced materials have been waived. Under Judge Baylson’s approach, even if the producing party’s efforts satisfy FRE 502(b), those efforts may still be challenged and found unreasonable under the five-factor test. Such an approach is inconsistent with the stated aims of FRE 502, namely, to limit waivers associated with inadvertently produced privileged material by “providing a predictable and consistent standard to govern the waiver of privileged information.”⁹⁶ Indeed, where prior to FRE 502 the inadvertent disclosure analysis involved only one step (for example, applying the five-factor test of the majority rule), the *Rhoads* approach imposes two-steps: (1) do the party’s efforts meet the minimal requirements of FRE 502, and (2) are the efforts reasonable under

the five-factor test. There is nothing in the rule or its history that suggests that FRE 502(b) is meant to be a preliminary analysis to be followed by the five-factor test. To the contrary, it is clear that FRE 502 was designed to replace the five-factor test by incorporating its elements.⁹⁷

FRE 502(b)’s Impending Unintended Consequences

If, as stated by Congress, FRE 502 is supposed to be a panacea to the “[o]utdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials [that] has led to dramatic litigation cost increases,”⁹⁸ then Congress needs to return to the drafting board. Due to the absence of directions, definitions, and guidance as to what constitutes “reasonable” for the purposes of FRE 502(b), three outcomes are unavoidable. First, the standards for what constitutes “reasonable steps to prevent disclosure,” will vary among courts and jurisdictions resulting in a patchwork of inconsistent and conflicting benchmarks. The rule simply leaves too many questions unanswered. For instance: Are the use of contract attorneys to conduct privilege reviews a reasonable precaution? Are reviewing attorneys required to know of every e-mail address a client and their attorneys may use to send privileged communications? What is the threshold volume of ESI required to make keyword searches a reasonable alternative? Does the rule adjust the scale that balances the number of disclosures against the volume of materials searched and produced?

The second unavoidable outcome is that FRE 502(b) will cause an increase in discovery costs as litigants, faced with inconsistent and varying standards of reasonableness, will be forced to increase ESI review expenditures out of an abundance of caution. *Rhoads* is a case in point with the court’s suggestion that the retention of an IT expert and the purchase of review software prior to the filing of the complaint may not be enough. Moreover, if courts, such as the court in *Relion*, follow pre-FRE 502 precedents that require litigants to conduct a post-designation review, the review costs associated with a designation production will nearly double. There are also hidden costs associated with the review of privileged materials that will certainly rise as well, such as the costs of converting documents and ESI into formats that will facilitate sophisticated text searches.

Finally, FRE 502(b) is silent as to when the clock starts for the purpose of determining whether “the holder promptly took reasonable steps to rectify the error.” There is no reason to believe that the pre-FRE 502 majority view will not dominate. Undoubtedly, however, litigants seeking to retain disclosed privileged material will argue the minority approach, and a few courts may agree. So the third unavoidable outcome will be that the pre-FRE 502 split on this issue will survive.

Without Congressional action to put further meat on the “reasonable” bones of FRE 502(b), the outcomes discussed here, as well others yet unknown, will not only undermine the very purpose of the rule, but will drastically increase the costs and burdens of discovery.

Lessons

From the cases and trends discussed here, there are a number of lessons litigants should apply to their discovery review and productions efforts in today's FRE 502 world:

1. Conduct post-designation reviews if time permits: Where parties have agreed to a document inspection procedure, the disclosing party should review designated documents *before* the documents are produced to ensure that no privileged documents slipped through an initial review.⁹⁹ In today's world of ESI, document inspections are rare. Instead, what happens more often is that attorneys review a database of ESI, and after the privileged material has been screened out, the database (or the raw electronic data) is provided to the opposing party. In these circumstances, a second privilege review should be conducted.¹⁰⁰
2. Do not cut corners when using keyword searches: Take the time to develop the list of terms (and/or search formulas) that will yield the most comprehensive (yet not over- or under-inclusive) production of non-privileged, relevant ESI. Be prepared to defend your search term choices. The more sophisticated the search methodology, the better. Have someone at hand (in-house or retained) who is qualified to develop search methodologies and can explain to a court why your methodology was sound.
3. Double-check productions compiled by outside vendors: Today it is common for law firms and clients to outsource to vendors the task of compiling ESI into databases or Bates numbering ESI materials for production. Before producing a database or hard copies provided by an outside vendor, take the time to confirm that the vendor's work product contains only non-privileged materials and data.¹⁰¹
4. Ask for more time if needed: If a litigant fails to ask to extend the discovery schedule a court will not look kindly on the litigant later claiming that time constraints encumbered their ability to conduct a thorough privilege review.¹⁰²
5. If you have extra time, use it: Courts do not look favorably on litigants who were not under a time pressure but nonetheless produce privileged documents.¹⁰³ If you have time between when a review is completed and the production deadline, conduct a subsequent review, even if it is only a sampling review.
6. Take prompt and vigorous measures to rectify disclosures: As discussed earlier, the question as to when the clock for rectifying an inadvertent disclosure starts has not been settled. Based on the trend of the pre-502 cases, one thing is clear: the least amount of time between one's discovery of an inadvertent disclosure and the steps one takes to rectify the disclosure, the better. This also holds true when you are in a joint defense arrangement, and a joint defendant discloses a privileged communication to which you are a party.¹⁰⁴ The first step should be to send a letter to any party that received the privileged material that demands the return of the privileged material. The letter should identify with specificity the privileged material and set a deadline for a response.¹⁰⁵ If the receiving party refuses to return the material (or fails to respond to the letter), do not hesitate to file a motion to compel and/or motion for

- a protective order. If you first learn of the disclosed material during a deposition, it is important that you make an on-the-record objection to the use of the material, request on the record that the material be returned, and promptly follow up with a letter reiterating your objection and request.¹⁰⁶
7. Provide a privilege log contemporaneously with a production: The longer the gap between the document production and when a corresponding privilege log is provided, the more likely a court will find that the disclosing party's production procedures were not reasonable,¹⁰⁷ or that privileges were otherwise waived.¹⁰⁸
 8. Document your review procedures and instructions: Courts find it persuasive when the disclosing party can demonstrate with specificity their review procedures; conversely the inability to articulate your review procedures can be detrimental.¹⁰⁹ If you choose to document the procedures and instructions, take the time to make them as explicit and comprehensive as possible. Included among the instructions should be: the names of attorneys that would indicate that a document is privileged, steps to segregate potential privileged material, the name of the individual who will field questions and make close-call determinations, and procedures for tracking what material has been reviewed and what has not.
 9. Production cover letters are important: Courts look favorably on cover letters accompanying productions that explicitly iterate that the inadvertent disclosure of privileged material will not waive any applicable privileges.¹¹⁰
 10. Consider a claw-back agreement: Entering into an agreement under which you and the opposing party are permitted to "claw back" inadvertently produced privileged documents adds weight that you took precautions to protect privileged material.¹¹¹ Claw-back agreements are especially helpful when you are producing large volumes of documents, or where you are producing large amounts of ESI where keyword searches were used to screen out privileged data.
 11. Change in legal representation is not an excuse: If you are taking over the case from another attorney, it is imperative that you obtain a clear understanding as to the contents of any document database or productions that you receive from the previous attorney.¹¹² In the abundance of caution, you may want to conduct your own privilege review of the adopted materials, especially if materials have yet to be produced.

Endnotes

1. S. Rep. No. 110-264, at 3 (2008).
2. See Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to Senator Patrick J. Leahy, Chairman, Committee on the Judiciary and Senator Arlen Specter, Ranking Member, Committee on the Judiciary, at 1-2 (Sept. 26, 2007).
3. *Id.* at 2.
4. *Id.* at 2.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Fed. R. Evid. 502(a).
11. Fed. R. Evid. 502(b).
12. *Koch v. Specialized Care Servs., Inc.*, 437 F. Supp. 2d 362, 388 (D. Md. 2005) ("Courts have interpreted waiver of the attorney-client privilege by inadvertent

- disclosure in three distinct lines of authority.”); *see also Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 410 (D.N.J. 1995); *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 75 (D. Md. 1998); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257-60 (D. Md. 2008) (discussing three approaches); *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 239 F.R.D. 572, 586 (D.S.D. 2006) (discussing three schools).
13. *Koch*, 437 F. Supp. 2d at 388; *Ciba-Geigy Corp.*, 916 F. Supp. at 410 (citing *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990)); *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989); *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 75.
 14. *Koch*, 437 F. Supp. 2d at 388; *Ciba-Geigy Corp.*, 916 F. Supp. at 410 (citing *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Helman v. Murry's Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990)); *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 75.
 15. *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 76; *Hartford Fire Insur. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D. Cal. 1985) (middle approach is the “majority rule”).
 16. *Ciba-Geigy Corp.*, 916 F. Supp. at 411; *see also Koch*, 437 F. Supp. 2d at 388-89; (citing *Rotelli v. 7-Up Bottling Co. of Phil.*, Civ. A. No. 93-6957, 1995 WL 234171, at *2 (E.D. Pa. Apr. 19, 1995); *United States v. Keystone Sanitation Co.*, 885 F. Supp. 672, 676 (M.D. Pa. 1994); *Advanced Med., Inc. v. Arden Med. Sys., Inc.*, Civ. A. No. 87-3059, 1988 WL 76128, at *2 (E.D. Pa. July 18, 1988)).
 17. *Ciba-Geigy Corp.*, 916 F. Supp. at 411; *see also Aramony v. United Way of Am.*, 969 F. Supp. 226, 235 (S.D.N.Y. 1997) (“inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel was so careless as to suggest that it was not concerned with the protection of the asserted privilege”).
 18. *See, e.g., Keystone Sanitation Co.*, 885 F. Supp. at 676; *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985); *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985); *Advanced Med., Inc.*, 1988 WL 76128, at *2; *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987); *In re Polypropylene Carpet Anti-trust Litig.*, 181 F.R.D. 680, 698 (N.D. Ga. 1998) (applying five-factor test to law enforcement investigatory privilege); *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 360 (M.D. Pa. 2001); *Aramony*, 969 F. Supp. at 235.
 19. *See* Explanatory Note on Evidence 502, Prepared By the Judicial Conference Advisory Committee on Evidence (Revised 11/28/2007), accompanying Letter of September 26, 2007 from L. Rosenthal (Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States) to Sen. P. Leahy and Sen. A. Specter, at 5 discussing the three approaches and stating that (“[t]he rule opts for the middle ground: inadvertent disclosure . . . does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error.”).
 20. *Ciba-Geigy Corp.*, 916 F. Supp. at 412.
 21. *See, e.g., Liggett Group Inc. v. Brown & Williamson Tobacco Corp.*, 116 F.R.D. 205 (M.D.N.C. 1986) (no review was conducted of a box of previously withheld documents before being turned over to the opposing party); *Int'l Brominated Solvents Ass'n v. Am. Conference of Governmental Indus. Hygienists, Inc.*, No. 5:04-cv-394 (HL), 2007 WL 1964062, at *5 (M.D. Ga. June 29, 2007) (holding that precautions were not reasonable where the privileged memo was produced five times, and the production contained no labels, no Bates numbers, and no privilege log).
 22. *See, e.g., In re Grand Jury Investigation*, 142 F.R.D. 276 (M.D.N.C. 1992) (three levels of reviewers used to screen documents prior to production was reasonable).
 23. *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 77 (“Some of the circumstances that courts often look to in making this [reasonableness of precautions] inquiry are the number of documents involved and the time constraints the producing party was under.”); *F.D.I.C. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 483 (E.D. Va. 1991) (“Perhaps the most important circumstance is the number of documents

- involved . . . Time constraints may also bear significantly on what precautionary efforts would be reasonable.”).
24. *F.D.I.C.*, 138 F.R.D. at 483 (“Perhaps the most important circumstance is the number of documents involved.”).
 25. *F.H. Chase, Inc. v. Clark/Gilford*, 341 F. Supp. 2d 562, 563 (D. Md. 2004) (“In this case, as in many inadvertent disclosure cases, the first, second and third factors are related.”).
 26. *Compare Aramony*, 969 F. Supp. at 235-36 (holding that precautions were reasonable where 99 pages of privileged material were inadvertently produced out of 630,00 pages of documents reviewed); *Lois Sportswear*, 104 F.R.D. at 105 (holding that disclosure was inadvertent where 22 privileged documents were disclosed out of 16,000 pages reviewed); *F.C. Cycles Int’l, Inc.*, 184 F.R.D. at 78 (disclosure of one three-page privileged document out of 64,000 pages reviewed suggested that the review precautions were reasonable) *with Bensel v. Air Line Pilots Ass’n*, 248 F.R.D. 177, 180 (D.N.J. 2008) (the disclosure of 155 privileged pages out of 6,000 pages produced leaned in favor of waiver); *Ciba-Geigy Corp.*, 916 F. Supp. at 414 (finding that the disclosure of seven privileged documents out of 681 produced documents weighed in favor of waiver). It is important to realize, however, that the scale used by courts is evolving and becoming less tolerant as courts are beginning to view voluminous document productions to be the normal course of business.
 27. *Koch*, 437 F. Supp. 2d at 389 (even though disclosing party had attached privileged documents to summary judgment brief that was electronically filed with the court, and therefore available to the public, the court held that there was no waiver in part because the four-page document was “not numerically significant in light of the over eight thousand pages produced during discovery”); *but see F.D.I.C.*, 138 F.R.D. at 483 (“As the number of documents grows, so too must the level of effort increase to avoid inadvertent disclosure. Failure to meet this level of effort invites the inference of waiver.”). *See, e.g., Figueras v. P.R. Elec. Power Auth.*, 250 F.R.D. 94, 98 (D.P.R. 2008) (“By today’s standards, reviewing three thousand four hundred pages of documents in a week, or a total of five thousand pages of documents altogether is not an unusually onerous task.”).
 28. *Rotelli*, 1995 WL 234171, at *2 (holding that post-designation review was a reasonable precaution); *Bud Antle, Inc. v. Grow-Tech Inc.*, 131 F.R.D. 179, 183 (N.D. Cal. 1990) (finding waiver, in part, because disclosing party failed to conduct a post-designation review); *Parkway Gallery Furniture*, 116 F.R.D. at 51. *But see Aramony*, 969 F. Supp. at 236-37 (precautions were reasonable despite the lack of a post-designation review).
 29. *F.C. Cycles Int’l, Inc.*, 184 F.R.D. at 77-78 (“The defendant, however, did not provide for a post designation review for the documents examined by an attorney. The additional safeguard of reviewing the documents after copying, but before production, was also not employed. Thus, while the procedures employed were not totally lacking, considering the lack of severe time constraints and the number of documents produced the procedures were not adequate to avoid the inference of waiver.”); *Advanced Med., Inc.*, 1988 WL 76128, at *3.
 30. *Id.* (“When large numbers of documents are involved, a post-designation review may likely be necessary.”); *Parkway Gallery Furniture*, 116 F.R.D. at 51.
 31. 250 F.R.D. 251 (D. Md. 2008).
 32. *Id.* at 254.
 33. *Id.* at 255-56.
 34. *Id.*
 35. *Id.* at 259.
 36. *Id.* at 256-57.
 37. *Id.* at 259 (qualifications of those who conducted the keyword search was a factor to be considered); *id.* at 262 (“Use of search and information retrieval methodology, for the purpose of identifying and withholding privileged or work-product protected information from production, requires the utmost care in selecting methodology that is appropriate

- for the task because the consequence of failing to do so . . . may be the disclosure of privileged/protected information to an adverse party, resulting in a determination by the court that the privilege/protection has been waived.”).
38. *Id.* at 259.
 39. *Id.* at 259 n.9 (“Using more advanced search techniques, such as Boolean proximity operators, can enhance the effectiveness of keyword searches.”).
 40. *Id.* at 259-60.
 41. *Id.* at 257.
 42. *Id.* at 260; *see id.* at 262 (“Selection of the appropriate search and retrieval technique requires careful advance planning by persons qualified to design effective search methodology.”).
 43. *Id.* at 260 n.10.
 44. *Id.*
 45. *Id.*
 46. *Figueras*, 250 F.R.D. at 97-98 (finding that the month and a half between the production of the privileged communication and the disclosing parties’ request for the return of the communication was a delay that weighed in favor of waiver); *Bud Antle*, 131 F.R.D. at 183 (six weeks between production and learning that a privileged letter had been produced learned in favor of finding waiver); *Victor Stanley*, 250 F.R.D. at 263 (although disclosing party asserted privilege promptly after learning that the privilege material had been disclosed, “the more important period of delay in this case is the one-week period between production by the Defendants and the time of the discovery by the Plaintiff of the disclosures — a period during which the Defendants failed to discover the disclosure”).
 47. *Figueras*, 250 F.R.D. at 98 (“The month and a half was more than enough time for [the disclosing party] to review its production and realize its error.”).
 48. *Id.* (“plaintiffs came to rely upon [the disclosed] document”); *Bud Antle*, 131 F.R.D. at 183 (by the time the disclosing party realized the privileged letter had been produced, “the letter had been thoroughly analyzed by defendant’s attorney, and the client had been informed of its contents”).
 49. *Aramony*, 969 F. Supp. at 237; *see also Kan. City Power & Light Co. v. Pittsburgh & Midway Coal Mining Co.*, 133 F.R.D. 171, 172 (D. Kan. 1989) (“In the court’s view the relevant time should begin when plaintiff discovered or with reasonable diligence should have discovered the inadvertent disclosure.”); *Pucket*, 239 F.R.D. at 587 (holding that disclosing party “acted promptly when it realized that it inadvertently disclosed” the privileged material); *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 361 (M.D. Pa. 2001); *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, No. 1:05-CV-2482-ODE, 2007 WL 5155945, at *12 (N.D. Ga. Mar. 27, 2007); *Bobbitt v. Acad. Of Court Reporting, Inc.*, No. 07-10742, 2008 WL 4056323, at *9 (E.D. Mich. Aug. 26, 2008).
 50. *Outside the Box Innovations*, 2007 WL 5155945, at *12 (disclosing party “should not be required to continuously inspect its own document production after it has already taken sufficient initial measures to prevent inadvertent disclosure”); *Sampson Fire Sales*, 201 F.R.D. at 361 (“By its very nature, an *inadvertent disclosure* means that the party is unaware that they have sent the privileged communication to an adversary If the adversary does not notify his opponent of the inadvertent disclosure, it becomes even more unlikely that he will be aware of it.”).
 51. No. 2:05-CV-10113, 2008 WL 4997932 (E.D. Mich. Nov. 21, 2008).
 52. *Id.* at *9.
 53. *Id.*
 54. *Id.* at *8-*10.
 55. *Id.* at *9.
 56. *Id.*
 57. *Id.* at *9-*10.

58. No. CV06-607-HU, 2008 WL 5122828 (D. Or. Dec. 4, 2008).
59. *Id.* at *3.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. 254 F.R.D. 216 (E.D. Pa. 2008).
67. *Id.* at 221.
68. *Id.*
69. *Id.* at 221-22.
70. *Id.* at 222.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 223.
83. *Id.*
84. *Id.*
85. *Id.* and *id.* at 226.
86. *Id.* at 226.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 226-27.
93. *Id.* at 227.
94. *Id.*
95. *Id.*
96. S. Rep. No. 110-264, at 3.
97. Fed. R. Evid. 502, Advisory Committee Notes (“The rule does not explicitly codify that [five-factor] test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors.”); Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, *available at* <http://federalevidence.com/print/9> (“The majority rule has simply been distilled here into a standard designed to be predictable in its application.”).
98. S. Rep. No. 110-264, at 1-2.
99. *Rotelli*, 1995 WL 234171, at *2 (“in cases involving voluminous discovery, post-designation review . . . would be useful in avoiding inadvertent disclosures”); *Advanced Med., Inc.*, 1988 WL 76128, at *3 (“When large numbers of documents are involved, a post-designation review may likely be necessary.”); *Parkway Gallery Furniture*, 116 F.R.D. at 51 (“When large numbers of documents are involved, a post-designation review may likely be necessary.”).

100. *In re Grand Jury Investigation*, 142 F.R.D. 276 (noting that a senior attorney made a final privilege review of a sample of the documents prior to production).
101. *F.H. Chase, Inc.*, 341 F. Supp. 2d at 563-64 (defendants mistakenly sent the wrong database containing privileged materials to an outside vendor for Bates numbering and printing).
102. *Keystone Sanitation Co.*, 885 F. Supp at 676 (finding that disclosing party's precautions were not reasonable because the party failed to ask the court for additional time to review a massive production).
103. *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 77-78.
104. *Bobbitt*, 2008 WL 4056323 (holding that the four-month delay between when the moving party learned of the joint defendant's disclosure and the party's motion to compel the return of disclosed privileged documents was unreasonable).
105. *Int'l Brominated Solvents*, 2007 WL 1964062, at *4 (holding that disclosing party's letter to opposing party was a "lackluster effort" because the letter failed to identify the privileged documents that had been inadvertently produced).
106. *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 78 (noting that disclosing party's failure to object to the use of the privileged material during depositions leaned in favor of finding waiver).
107. *Bud Antle*, 131 F.R.D. at 183 (providing a privilege log six weeks after production, "ensur[ed] that defendants would have no way of immediately identifying any privileged materials which might have inadvertently been produced").
108. *Rhoads Indus.*, 254 F.R.D. at 223, 226.
109. *Lois Sportswear*, 104 F.R.D. at 105 (noting that defendant's failure to have a "statement as to any general instructions given to reviewers" leaned in favor of waiver).
110. *Employers Insur. Co. of Wausau v. Skinner*, No. CV 07-735 (JS)(AKT), 2008 WL 4283346, at *8 (E.D.N.Y. Sept. 17, 2008).
111. *Victor Stanley*, 250 F.R.D. at 262 (noting that disclosing party had abandoned effort to enter a court-approved claw-back agreement that would have protected the disclosed material).
112. *Ciba-Geigy Corp.*, 916 F. Supp. at 412-13 ("It is incumbent upon counsel, when there is a change in legal personnel, to ascertain the procedures implemented by prior counsel to protect privileged documents."). ■

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