Protecting Privilege Without Breaking the Bank

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Privilege issues continue to drive escalating eDiscovery costs in complex litigation and no doubt will for the foreseeable future. But litigants, with help from Congress and the courts, are finding effective ways to manage and even reduce these costs.

Source of the Costs. Privilege-related costs generally arise from the many hours of manual labor traditionally needed to review documents for privilege and then to log—with specific details—the hundreds or thousands of documents identified as privileged.

The continuing proliferation of electronically-stored information (ESI) collected and produced in modern litigation has resulted in a correspondingly large increase in the volume of ESI manually reviewed and documented on privilege logs. In 2008, Congress sought to provide relief, at least at the federal level, through the adoption of Rule 502 of the Federal Rules of Evidence. Although Rule 502 has been in effect for more than five years, it seems many practitioners still are not familiar with the rule.

Importance of FRE 502. Perhaps the two most significant aspects of Rule 502 are the substantial limitation on subject matter waiver and the availability of non-waiver orders. Both aspects can be used to dramatically reduce privilege-related costs.

Historically, fear of subject matter waiver has led parties to spend considerable time and resources on tedious manual review and extensive privilege logs. Typically, many—if not all—of the documents appearing on a privilege log are of little importance to the case at hand, much less pose any harm to the producing party. But they appear to be privileged and arguably relevant, and so they get logged. Otherwise, the party risks broad waiver of the subject matter of those documents, which could yield many more documents, including some that would be harmful. Or so it was before Rule 502.

Rule 502(a) effectively eliminates subject matter waiver except where a party intentionally waives privilege through disclosure of privileged information in a selective, misleading and unfair manner. It is a valuable complement to Rule 502(b), which limits privilege waiver for inadvertent production and thus effectively encourages parties to scale back efforts to preserve privilege while nonetheless remaining reasonable.

Rule 502(a) provides a safe harbor for those parties that take advantage of aggressive cost-saving approaches to identifying privileged documents—even if a court were to find those efforts inadequate under 502(b), any waiver should be limited to those documents already produced where the waiver was not intentional.

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What the Courts Have Said. A number of courts have interpreted and applied Rule 502(a) in the context of claims of privilege waiver, including broad subject matter waiver. The overwhelming trend among these decisions has been to deny subject matter waiver except where the courts found a party selectively disclosed privileged material for an unfair tactical advantage in the litigation.

Even in those cases where the courts found subject matter waiver, the courts generally cabined the scope of the waiver to limited information that the court con-
inclined was required “in fairness” to provide context for the information intentionally disclosed.

In short, parties in federal proceedings generally need not fear subject matter waiver even where privilege waiver is found if the disclosure of privileged material was inadvertent rather than for an intentional, tactical advantage. As lawyers and litigators increasingly appreciate the broad protection of Rule 502(a), they are likely to test the limits of 502(b) through novel cost-cutting measures.

**Finding Additional Protection.** Rule 502(d) provides even greater protection, and parties increasingly are taking advantage of those broad protections. It allows federal courts to enter an order establishing that a party’s disclosure of privileged information—even intentionally—cannot result in waiver in that proceeding as well as all other federal and state proceedings.

Rule 502(d) affords parties tremendous flexibility to design creative mechanisms for streamlining the traditional resource-intensive process of protecting privilege. Some of the creative solutions that parties can fashion through a 502(d) order include “quick-peek” productions, where an opposing party gets to review documents—including potentially privileged documents—and select those they want produced.

Parties can even produce documents in litigation without any privilege review at all and yet with no risk of waiver, if a court condones that through a 502(d) order. The producing party can “claw back” any privileged documents that later come to light in the litigation, pursuant to the terms of the order.

This aggressive, cost-cutting approach is appropriate in circumstances where the documents at issue are unlikely to be privileged or harmful. This approach enables the client to focus resources on those documents that matter most—namely, the relative few that are likely to be privileged based on targeted searches or custodian responsibilities, or that pose meaningful litigation risk. Rarely do all—or even most—documents need to be manually reviewed in any given case.

**Benefits.** By protecting parties from waiver-related risks, Rule 502(d) can significantly expedite discovery and minimize disputes that otherwise would increase cost and delay. As a result, some courts have expressed a preference for these orders even where parties are unable, or refuse, to reach an agreement on such an order.

**A Measure of Uncertainty.** In the absence of a Rule 502(d) order, courts in federal proceedings will continue to look to Rule 502(b) to determine whether inadvertent disclosure results in privilege waiver. There is no clear consensus among the courts yet on what constitutes “reasonable steps” to protect privilege under the rule. Like any reasonableness standard, this is a very fact-specific assessment that can vary according to the views of individual judges. This uncertainty under Rule 502(b) provides a compelling incentive for parties to negotiate non-waiver orders in their cases under 502(d).

**Forecast**

Privilege logs are a significant driver of privilege-related costs in discovery. Parties traditionally create these logs through tedious manual review and data entry into lengthy spreadsheets. Parties are increasingly turning to technology to reduce these costs—and courts will increasingly endorse this approach over time, including over objection from an opposing party.

**Metadata Becomes More Useful.** Much of the information included in privilege logs can be captured electronically rather than through manually reviewing documents and typing details into a spreadsheet. Parties can electronically generate privilege logs using metadata associated with privileged documents. Details such as the sender of an e-mail, the recipients, the date sent, and the subject, which are typically logged, can be imported into an electronic privilege log with little more than the push of a button.

Rule 502(d) can help reduce the costs of privilege logs. For example, parties can limit the details required in privilege logs beyond that typically required by the courts under the Federal Rules. They can even agree to log certain documents without any review at all, just based on the metadata. For example, documents containing certain legal terms—such as attorney-client or “deposition”—and that were authored or received by a lawyer may be treated as presumptively privileged and electronically logged using just the metadata.

**Manual Review Loses Importance.** Parties can even identify many privileged documents without manual review. Technology-assisted review tools can be very effective at capturing privileged documents within a large set of documents. The tool can be trained to spot privileged information just as it can be trained to spot responsive information. Combined with a Rule 502(d) order that allows the producing party to claw back any privileged documents inadvertently produced, this process can reap substantial cost-savings by avoiding manual review for privilege, especially for documents collected from custodians who are unlikely to have many privileged documents. Parties likely still will be
well served to manually review certain categories of
documents—such as those collected from custodians
who regularly correspond with counsel. But these cat-
egories tend to be few and small relative to the larger
universe of documents often collected, and of course
any reduction in manual review and logging saves
costs.

Judicial Support Grows. These types of cost-saving so-
lutions are increasingly encouraged by courts. The
Southern District of New York, for example, recently
launched a pilot program providing management tech-
niques that would govern in complex civil cases, includ-
ing privilege-related guidance. The program’s rules in-
clude a section describing categories of documents pre-
sumptively not to be logged on a privilege log. Similarly, the Delaware Court of Chancery recently
published guidelines for practitioners that include a
section on how to manage a privilege review and pre-
pare a privilege log. Courts, bar associations, and gov-
ernment agencies will continue to issue guidance re-
garding processes and strategies for streamlining the
privilege logging process—and wise litigants will in-
creasingly make use of those solutions.