Protecting Against Waiver

# Reconciling Federal Rule of Evidence 502 with Model Rule 1.6

By Steven M. Puiszis

**Practice points to help you avoid not only professional embarrassment, but also loss of clients, a disciplinary complaint, or even a malpractice claim.**

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Federal Rule of Evidence 502 provides lawyers with several tools to protect against a waiver of attorney-client privilege or work product immunity. From a risk management perspective, using Federal Rule of Evidence 502(d) nonwaiver

orders and Rule 502(e) nonwaiver agreements makes sense for clients, lawyers, and their firms. However, ethical issues surround the use of Federal Rule 502's nonwaiver tools.

Judges and commentators have suggested, based on statements in the advisory committee note to Federal Rule of Evidence 502, that the rule's nonwaiver tools provide a vehicle to reduce discovery costs by eliminating the need to review information for privilege before producing it. Those suggestions, however, fail to consider the duty of confidentiality found in Rule 1.6(a) of the Model Rules of Professional Conduct. Model Rule 1.6 was amended in 2012 to add a new subsection (c), which specifically requires "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." *See* Model Rules of Prof'l Conduct R. 1.6(c) (2012).

This article explains that using Federal Rule of Evidence 502(d) nonwaiver orders and Federal Rule 502(e) nonwaiver agreements to avoid the cost of pre-production screening for privilege may run afoul of Model Rule 1.6's mandate and could trigger an ethical problem for the attorney who employs that strategy. An attorney always should obtain informed consent from a client before engaging in the type of strategy suggested in the advisory committee note to Federal Rule of Evidence 502.

## Federal Rule of Evidence 502 Combats Waiver in the E-discovery World

Federal Rule of Evidence 502 was enacted in response to the concern that protecting against waiver of attorney-client privilege or work product immunity in today's digital age had become cost prohibitive. As two respected authorities observed:

> The volume of information produced by electronic discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure.

Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 2009. Fed. Cts. L. Rev. 4, 19 (Nov. 2009), *available at* http://www.fclr.org/fclr/articles/. *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005), similarly noted that "insist[ing] in every case upon 'old world' record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation."

Federal Rule 502 attacks the problem in two ways. The advisory committee note to Federal Rule of Evidence 502 explains that subdivisions (a) and (b) first resolved several "longstanding disputes in the courts… involving inadvertent disclosure and subject-matter waiver." Federal Rule of Evidence 502(a) specifically limits subject-matter waiver to "intentional" disclosures when "the disclosed and undisclosed communications or information concern the same subject matter" and fairness dictates that they ought to be considered together. The advisory committee note explains that subject-matter waiver under Federal Rule of Evidence 502(a) "is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." The advisory committee note further elaborates: "It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."

Federal Rule of Evidence 502(b) provides that the inadvertent disclosure of information "in a federal proceeding or to a federal office or agency" does not constitute a waiver of attorney-client privilege or work product protection when the holder of the privilege "took reasonable steps to prevent disclosure" before it occurred and "promptly took reasonable steps to rectify the error" after it occurred, including when applicable, the use of Federal Rule of Civil Procedure 26(b)(5)(B). The advisory committee note indicates that Federal Rule of Evidence 502(b) "does not require the producing party to engage in a post-production review" to determine if any privileged or protected information "has been produced by mistake," but the note states that the producing party is required "to follow up on any obvious indications" that protected information was inadvertently produced.

Second, Federal Rule of Evidence 502 provides attorneys with several nonwaiver tools. Subdivisions (d) and (e) of Federal Rule 502 authorize the use of court orders and party agreements to protect against waivers of attorney-client privilege or work product immunity resulting from the disclosure of privileged or protected information in discovery. Federal Rule of Evidence 502(d) empowers a federal court to enter a "nonwaiver" order and provides that following the entry of such an order, any disclosure of privileged or protected information in that proceeding will not constitute a waiver of attorney-client privilege or work product in that matter or in any other state or federal proceeding.

While Federal Rule of Evidence 502(e) recognizes the enforceability of nonwaiver agreements, it provides that an agreement binds only the parties to the agreement. One of the benefits of a Federal Rule of Evidence 502(d) nonwaiver order is that it does not require agreement of the parties. *See Rajala v. McGuire Woods, LLP*, 2010 WL 2949582, at *4 (D. Kan. July 22, 2010) (quoting Fed. R. Evid. 502(d)'s advisory committee note). Another benefit is that a court can enforce a nonwaiver order against third parties. Federal Rule 502's advisory committee note to subdivision (e) clarifies that "if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order."

### Federal Rules of Evidence 502(d) and (e) Do Not Require Taking "Reasonable Precaution"

The advisory committee note to Federal

Rule of Evidence 502 suggests that a non-waiver order under Federal Rule 502(d) "may provide for return of documents without waiver irrespective of the care taken by the disclosing party." The note cites *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D. N.Y. 2003), in which the court observed that parties could enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents." Additionally, a member of the Federal Advisory Committee on Civil Rules has written:

> [N]othing in the text of either Rule 502(e) or Rule 16(b) or 26(f) requires parties to undertake 'reasonable' precautions to avoid disclosure of privileged or protected information as part of a claw-back, quick peek or other non-waiver agreement. To the contrary, these rules would permit the parties to agree that discovery material could be produced without any pre-production screening at all, but be 'clawed' back upon demand after production.

Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived UP to Its Potential?* 17 Rich. J.L. & Tech. 8, 62–3 (2011).

**The advisory committee** note… states that the producing party is required "to follow up on any obvious indications" that protected information was inadvertently produced.

Some commentators have suggested that Federal Rule of Evidence 502 has "not lived up to its promise" of reducing the cost associated with protecting against privilege waivers. *Id.* at 2. They have advanced two reasons for that conclusion. One is "that a disappointingly small number of lawyers seem to be aware of the rule and its potential." The other is that "courts have not interpreted Rule 502 with sufficient consistency… to enable practitioners and their clients to predict how they will fare if they attempt to take advantage of the rule." *Id.*

While those suggestions certainly have merit, there is a third more likely reason why lawyers have not used Federal Rule of Evidence 502 as frequently or enthusiastically as its drafters had envisioned. It is the duty of confidentiality imposed by Model Rule 1.6(a), which potentially encompasses any information relating to a lawyer's representation of a client unless an exception recognized in the Model Rules can be invoked. *See* Geoffrey C. Hazard Jr., W. William Hodes, & Peter R. Jarvis, *The Law of Lawyering* 9–64 (3d ed. 2012) ("Model Rule 1.6(a) expresses the basic principle of professional ethics that all information 'relating to' a lawyer's professional relationship with a client is presumptively confidential and therefore must not be disclosed unless an exception applies").

While the Model Rule 1.6(a) duty of confidentiality is closely related to the attorney-client privilege, it is broader in scope than the attorney-client privilege, "which is a rule of evidence," or "the work product immunity, which is a rule of procedure." Thus, one treatise has noted: "Confusion over the relationship between these doctrines is not limited to lay persons; it frequently confounds lawyers and judges as well." *Id.* at 9–6.

### Model Rule 1.6 Limits the Use of Federal Rule of Evidence 502

Rule 1.6(a) of the Model Rules of Professional Conduct imposes an ethical duty to maintain the confidentiality of all information relating to the representation of a client. Unless the client provides informed consent to its release, the disclosure is "impliedly authorized" because it is necessary to carry out the representation, or an exception found in Model Rule 1.6(b) applies. While in most instances an attorney should have a client's implied authorization to produce relevant, nonprivileged information in discovery under Model Rule 1.6, producing privileged or confidential information is another matter.

The duty of confidentiality imposed by Model Rule 1.6 reaches far beyond the written or oral communications protected by the attorney-client privilege. Hazard, Hodes, & Jarvis, *supra*, at 9–7 (observing that "the ethical rule of confidentiality is more protective than the attorney-client privilege, because the latter only protects against compelled disclosure, and only against disclosure of information communicated between client and lawyer"). Comment 3 to Model Rule 1.6 explains that the duty of confidentiality generally extends to any information in an attorney's possession relating to the representation of a client, irrespective of its source, its format, or how the attorney came into its possession. For years, comment 16 to Model Rule 1.6 has explained that an attorney's ethical responsibility to provide competent representation includes the obligation to protect against the inadvertent or unauthorized disclosure of client information.

In August 2012, the ABA amended several provisions of the Model Rules "to provide guidance regarding lawyers' use of technology and confidentiality." *See* A.B.A. Resolution 105A Revised. Model Rule 1.6 was amended to add a new paragraph (c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Comment 16 was also expanded and now explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision…. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty imple-

> menting the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making the device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by the Rule.

Model Rules of Prof'l Conduct R. 1.6(c) (2012).

Thus, while Federal Rules of Evidence 502(d) and (e) may not require an attorney to take reasonable precautions before producing a client's information covered by a Federal Rule 502(d) nonwaiver order or a Federal Rule 502(e) nonwaiver agreement, Model Rule 1.6(c) requires "reasonable efforts" to prevent an unauthorized or inadvertent disclosure from occurring. Even before the 2012 amendment to Model Rule 1.6, comment 16 explained that an attorney had an ethical obligation to act competently to safeguard a client's information.

While the entry of a Federal Rule of Evidence 502(d) nonwaiver order or a Federal Rule 502(e) nonwaiver agreement may allow an attorney to recover privileged or protected information produced in discovery, an unauthorized disclosure has nonetheless occurred. Model Rule 1.6(c) requires an attorney to make reasonable efforts to prevent an unauthorized or inadvertent disclosure of a client's information. Accordingly, a disciplinary tribunal could conclude that the mere entry of a nonwaiver order does not qualify as a reasonable attempt to prevent disclosure as required by Model Rule 1.6(c). *See Spieker v. Quest Cherokee, LLC*, 2009 WL 2168892, at *3 (D. Kan. July 21, 2009) ("Simply turning over all the ESI materials does not show that a party has taken 'the reasonable steps' to prevent disclosure of its privileged materials"); Grimm, Bergstrom, & Kraeuter, *supra*, at 69 (observing that while parties could enter into a nonwaiver agreement permitting production without any pre-production review for privilege, "[t]his procedure would not pass muster under Rule 502(b)(2) because it cannot be seriously argued that doing no pre-production review at all meets the requirement of Rule 502(b) to take 'reasonable steps to prevent disclosure'").

Model Rule 1.6 and Federal Rule of Evidence 502 operate in different playing fields, one legal and the other disciplinary. The problem for practitioners is that permissible strategies in the legal arena could potentially trigger an ethical complaint in the disciplinary arena. The aims of Model Rule 1.6 and Federal Rule of Evidence 502 are different. Model Rule 1.6 seeks to prevent an inadvertent or unauthorized disclosure from occurring, whereas Federal Rules of Evidence 502(d) and (e) permit the disclosure of client information and only protect against a waiver of privilege resulting from the disclosure.

The protection of attorney-client privilege is obviously encompassed by Model Rule 1.6, but the scope of the obligation imposed by Model Rule 1.6 is not limited to merely protecting against waivers of privileged communications. *See* Hazard, Hodes, & Jarvis, *supra*, at 9–6 ("Rule 1.6 applies most insistently to prevent lawyers from volunteering information about a client (to anyone)"). As a result, the ethical duty imposed by Model Rule 1.6 appears to diverge from what Federal Rules of Evidence 502(d) and (e) will permit. Thus, the obligation imposed by Model Rule 1.6 may constrict the ability to use Federal Rule of Evidence 502 to limit the cost of privilege reviews.

### Obtain Informed Consent Before Using 502(d) and (e) to Reduce Review Costs

An attorney can ethically accomplish avoiding the costs associated with the preproduction review of e-mails, electronic information, and paper documents for privilege, as contemplated by the advisory committee note to Federal Rule of Evidence 502, by obtaining a client's "informed consent" to that strategy. Comment 16 to Model Rule 1.6(c) recognizes that a client can forego security measures that the Model Rule would otherwise require. However, it requires that an attorney first obtain a client's informed consent. While the communication necessary to obtain a client's informed consent will vary depending on the client, the issue, and the circumstances presented, a lawyer is obliged to explain a matter to the extent reasonably necessary to permit the client to make an informed decision on the issue.

Obviously, an attorney should discuss these types of strategy issues with a client. Informed consent, however, requires more than merely discussing how the attorney can use Federal Rule of Evidence 502(d) or (e) strategically. Informed consent requires explaining the circumstances that underlie using one of these evidentiary tools and explaining the material risks of the proposed strategy and reasonable alternatives. *See* Mode Rules of Prof'l Conduct R. 1.0(e) (2012). In other words, an attorney should discuss the pros and cons of the proposed strategy and the available alternatives with a client. In this setting, that would include discussing the costs associated with alternative approaches to screening a client's information for privilege.

**While the Model Rule 1.6(a) duty of confidentiality is closely related to the attorney-client privilege, it is broader in scope than the attorney-client privilege, "which is a rule of evidence," or "the work product immunity, which is a rule of procedure."**

In some instances, protecting the substance of privileged or protected communications may not be of much concern to a client, or reducing the costs associated with e-discovery privilege reviews may outweigh that concern. Some clients may be more risk tolerant than others. A client's record-keeping system may provide an adequate internal screening mechanism for privileged communications and confidential information. However, producing electronic information or paper documents without completing any review at all after a court enters a Federal Rule 502(d) nonwaiver order or the parties reach a clawback or quick peek agreement may result in

the disclosure of information that the client would prefer to keep confidential. Moreover, because a Federal Rule 502(e) nonwaiver agreement binds only the parties to the agreement, a stranger to the agreement who may have a similar claim against a client could claim entitlement to the inadvertently produced documents by arguing the privilege was waived by the failure to take "reasonable steps" to prevent the disclosure from occurring.

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While a Federal Rule of Evidence 502(d) nonwaiver order may preserve a claim of privilege or work product and reduce the cost of privilege reviews, opposing counsel may learn the substance of a client's privileged or protected communications before returning the information. Even if an opponent returns a privileged or a confidential document, the knowledge gained from its review will provide the opponent with an opportunity to formulate discovery and trial strategies based on the disclosed information. Additionally, an opponent can more easily challenge whether a document is in fact privileged after reviewing it.

Once a disclosure has occurred, "confidentiality cannot be restored." *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125, 136 (S.D. W.Va. 2010). A court order requiring the return of confidential documents "at best, can only attempt to restrain further erosion." *MSP Real Estate Inc. v. City of New Berlin*, 2011 WL 3047687, at *5 (E.D. Wis. July 22, 2011). An attorney should explain these issues and risks, preferably in writing, when seeking the client's informed consent to use a Federal Rule 502(d) nonwaiver order or a 502(e) nonwaiver agreement to strategically reduce the cost of pre-production privilege reviews.

## Deliberate Production Without Review May Eliminate the Model Rule 4.4(b) Notification Obligation

Model Rule 4.4(b) provides: "A lawyer who receives a document relating to the representation of the lawyer's client and knows the document was inadvertently sent shall promptly notify the sender." By its express terms, Model Rule 4.4(b) only applies to information that someone inadvertently produces.

The ABA Committee on Ethics and Professional Responsibility has taken the position in a formal ethics opinion that Model Rule 4.4(b) "does not require refraining from reviewing the materials or abiding by instructions of the sender." Additionally, that ethics opinion indicates that when the provision of documents:

> is not the result of the sender's inadvertence, Rule 4.4(b) does not apply… [and]… [the] lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules.

*See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440 (2006).

As a result, when a lawyer makes a conscious decision to produce a client's information with a nonwaiver agreement or nonwaiver order under Federal Rules of Evidence 502(d) or (e) without any review for privilege or work product and opposing counsel knows of that strategy, the opponent arguably does not need to observe the Model Rule 4.4(b) obligation to notify the producing party about the production of privileged or protected information. *See Mt. Hawley*, 271 F.R.D. at 131 (refusing to rule that the defendants misused an allegedly privileged email by failing to notify the opposing party about its production before using it). An attorney can preserve the obligation by including a notification requirement similar to Model Rule 4.4(b) in a Federal Rule 502 nonwaiver order or agreement.

## Might Inadvertent Waivers of Attorney-Client Privilege Breach Model Rule 1.6(c)?

The 2012 amendment to Model Rule 1.6(c), has raised another potential consequence that could result from the inadvertent waiver of attorney-client privilege. The advisory committee note to Federal Rule of Evidence 502(b) explains that the rule applies an intermediate balancing approach to claims of inadvertent waiver of privilege or work product under the rule. *See also United States v. Sensient Colors, Inc.*, 2009 WL 2905474, at *3 (D.N.J. Sept. 9, 2009) (explaining that "FRE 502(b) opts for a middle ground approach to determine if an inadvertent disclosure operates as a waiver"). Many states employ a similar balancing approach to the issue of inadvertent waiver.

One of the factors that courts consider under an intermediate balancing approach and under Federal Rule of Evidence 502(b)(2) is whether "reasonable steps were taken to prevent disclosure" of privileged information. Model Rule 1.6(c) asks whether an attorney took "reasonable efforts" to prevent an inadvertent or unauthorized disclosure. These standards are substantially similar. Accordingly, when a court finds that a client has waived the attorney-client privilege because the client's attorney failed to take reasonable steps to prevent the inadvertent disclosure of protected information, the client may complain that the attorney failed to meet the Model Rule 1.6(c) reasonable efforts standard.

## What Constitutes Reasonable Steps to Prevent an Inadvertent Disclosure?

The advisory committee note to Federal Rule of Evidence 502(b) recognizes that before the rule was enacted federal decisions addressing the inadvertent waiver of attorney-client privilege employed a multifactor test for determining when an inadvertent disclosure resulted in a waiver of privilege. These factors, none of which were individually dispositive, addressed "the reasonableness of [the] precautions taken, the time to rectify the error, the scope of the discovery, the extent of the disclosure and the overriding issue of fairness." The advisory committee note further explains that Federal Rule of Evidence 502(b):

> does not explicitly codify that [multifactor] 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. Other considerations bearing on the reasonableness of a producing party's efforts include the num-

ber of documents to be reviewed and the time constraints for production.

Echoing this point, Judge Paul Grimm observed that the:

> pre-502 case law that adopted a multi-factor test for determining whether inadvertent production of privileged or protected information constituted a waiver is not automatically incorporated into Rule 502(b). Rather, the rule is intended to allow additional factors to be considered. Thus, the prior case law is relevant, but not dispositive, and courts should feel free to adopt a flexible approach that considers all facts relevant to determining the reasonableness of the producing party's efforts to avoid disclosure of privileged or work product protected information.

Grimm, Bergstrom, & Kraeuter, *supra*, at 35.

The scope of a discovery request "is a logical starting point" for a court's analysis under Federal Rule of Evidence 502(b)(2). *Coburn Group LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1039 (N.D. Ill. 2009). The Seventh Circuit has recognized that "[w]here discovery is extensive, mistakes are inevitable and claims of inadvertence are properly honored so long as appropriate precautions are taken." *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008); *Sensient Colors*, 2009 WL 2905474, at *4 (addressing production of 45,000 documents and observing that "[g]iven this volume mistakes were bound to occur").

Conversely, the smaller the scope of the required discovery response, the more likely a court will find a waiver. *Sidney I v. Focused Retail Property I, LLC*, 274 F.R.D. 212, 217 (N.D. Ill. 2011) (addressing the production of 588 documents and concluding that "this small size weighs in favor of waiver"). In other words, "the broader the scope of discovery, the more extensive a party's disclosure of confidential materials may be without waiving the privilege and vice versa." *Kmart Corp. v. Footstar, Inc.*, 2010 WL 4512337, at *4 (N.D. Ill. Nov. 2, 2010). As one court wrote, "This approach reflects the undeniable truth that the greater the possibility of errors, the more likely errors will occur." *Heriot v. Byrne*, 257 F.R.D. 645, 659 (N.D. Ill. 2009).

When evaluating waiver of attorney-client privilege courts consider how many privileged documents an attorney mistakenly produced relative to both how many total documents he or she produced in discovery and the overall number of privileged documents. *Kmart Corp.*, 2010 WL 4512337, at *4 (characterizing the disclosure of 130 pages of privileged documents, which constituted less than three percent of the total production, as not a "significant mistake"); *Heriot*, 257 F.R.D. at 660 (noting that while 13 percent of the privileged documents were mistakenly produced "the weight of the factors tips the balance in favor of inadvertent disclosure").

Courts will also consider the "obviousness" of the privileged nature of the documents. *Sidney I*, 274 F.R.D. at 217 (observing "the number of privileged documents disclosed suggests waiver, especially since they were obviously privileged"); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263 (D. Md. 2008) (observing that many inadvertently produced documents were communications between defendants and their counsel).

Courts will also consider the time constraints placed on a party when evaluating the process used to screen a production for privilege. *Kmart Corp.*, 2010 WL 4512337, at *4. When a time constraint is self-imposed, however, a court will assign little weight to that argument. *Id.* at *5; *Rhoads Industries, Inc. v. Building Materials Corp. of America*. 254 F.R.D. 216, 225 (E.D. Pa. 2008) (noting the time crunch resulted from the "plaintiff not providing adequate resources to the privileged communication issue"). Additionally, "the relevant time constraints are those relating to [the] discovery, not an attorney's schedule." *Sidney I*, 274 F.R.D. at 217.

The nature and extent of procedures that an attorney uses to screen for privilege will play a critical part in any court's analysis. Failing to use either "an organized screening procedure" when an attorney initially reviewed the documents, or failing to review the production before sending it to an opposing counsel suggests that the attorney did not take reasonable steps to protect against inadvertently producing privileged information. *Id.* Developing protocols for reviewing and screening for privilege has received favorable reviews from courts. *See Coburn Group*, 640 F. Supp. 2d at 1039 (addressing a six-step document review protocol to identify responsive documents and segregate for attorney review potentially privileged documents); *Heriot*, 257 F.R.D. at 651, 661 (concluding that a multistep process of reviewing and coding documents in a database "entailed reasonable precautions").

A court will carefully consider whether or not an attorney was involved in the review process, or supervised trained reviewers. *Compare MSP Real Estate*, 2011 WL 3047687, at *7 (noting that "the absence of attorney involvement and supervision in the initial review process supports a finding the precautions were not reasonable"), *with Coburn Group*, 640 F. Supp. 2d at 1039 (concluding that "use of experienced paralegals who were given specific direction and supervision" by the lead counsel was reasonable).

**Developing protocols** for reviewing and screening for privilege has received favorable reviews from courts.

Equally important, however, is providing a court with a clear and detailed explanation of the procedures used and how an inadvertent production occurred. *Amobi v. District of Columbia Dept. of Corrections*, 262 F.R.D. 45, 54–55 (D.D.C. 2009) (ruling that privilege was waived because there was "no indication of what specific efforts were taken to prevent disclosure, let alone any explanation of why these efforts were… reasonable in the context of the demands made"). *Victor Stanley*, 250 F.R.D. at 259–60 (noting that the defendants failed to identify the keywords used, the rationale for their selection, the qualifications of the person who designed the keyword search, whether Boolean proximity operators were used, and whether the results were analyzed to assess the reliability of the keywords for that task).

Courts have found a waiver occurred when the party claiming privilege either

failed to provide a detailed description of how the process used to screen for privilege was supposed to work or how the mistake occurred. *Kmart Corp.*, 2010 WL 4512337, at *4 (finding an explanation that an attorney reviewed documents "'with an eye toward identifying any 'attorney-client' or 'work product' privilege issues'" provided "insufficient facts" to conclude the steps taken "were reasonable") (quoting attorney affidavit); *Thorncreek Apartments III, LLC v. Village of Park Forest*, 2011 WL 3489828, at *7 (N.D. Ill. Aug. 9, 2011) (ruling a description that "countless hours" were spent reviewing documents marking them responsive, nonresponsive, or privileged fell "well short of what we expect for an adequate account of the review procedure").

**Courts have found** a waiver occurred when the party claiming privilege either failed to provide a detailed description of how the process used to screen for privilege was supposed to work or how the mistake occurred.

Several decisions suggest that the simple use of keyword searches to screen for privilege, without more, will not meet Federal Rule 502(b)(2)'s "reasonable steps" threshold. *See Mt. Hawley*, 271 F.R.D. at 136 (concluding that "the failure to test the reliability of keyword searches [for privilege] by appropriate sampling is imprudent"); *Victor Stanley*, 250 F.R.D. at 257 (observing that "[t]he only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive").

Addressing the use of technology to screen for privilege, the advisory committee note to Federal Rule of Evidence 502 attempts to provide some guidance:

> Depending on the circumstances, a party that uses advance 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. The implementation of an efficient system of records management may also be relevant.

While a court may be willing to forgive a mistake that results from using technology to screen for privilege in light of the advisory committee note, an attorney will want to consider using quality assurance sampling to convince a court, if necessary, that the attorney took reasonable measures to prevent the disclosure of privileged information.

## Does Model Rule 1.6(c) Take "Proportionality" into Account?

The recently amended comment 16 to Model Rule 1.6(c) includes a nonexclusive list of factors for disciplinary bodies to consider when assessing if attorneys took reasonable measures to prevent the inadvertent disclosure of information. Because comment 16 indicates that the potentially relevant factors are not limited to those outlined in the comment, disciplinary tribunals addressing purported Model Rule 1.6(c) violations likely will consider the factors that courts have considered when assessing if attorneys took reasonable steps to prevent inadvertent disclosures under Federal Rule of Evidence 502(b)(2).

The factors listed in comment 16 as relevant considerations to a Model Rule 1.6(c) analysis include the sensitivity of the information, the cost of additional safeguards, the likelihood that an inadvertent disclosure might occur without additional safeguards, the difficulty of implementing those safeguards, and the impact those safeguards have on a lawyer's ability to represent his or her clients. In other words, the duty of confidentiality under the Model Rule 1.6(c) reasonable effort standard includes a cost-benefit analysis of procedures used to screen for privilege. This disciplinary approach is similar to the proportionality analysis applicable to discovery issues under Federal Rule of Civil Procedure 26(b)(2)(C)(iii), which mandates limiting discovery when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."

This point underscores the importance of discussing with a client the various options available to screen for privilege and providing a reasonable estimate of the cost of those options so that the client can decide the appropriate option to select. And, it affirms that obtaining the informed consent of a client is key to harmonizing the Model Rule 1.6(c) requirements with the nonwaiver tools of Federal Rule of Evidence 502.

## Practice Points

Inadvertently waiving privilege can have disastrous results for lawyers and their firms. Not only is it professionally embarrassing, it can lead to the loss of a valued client, a disciplinary complaint, and even a malpractice claim. Accordingly, bear in mind seven practice points.

### Point 1: Seek a Nonwaiver Order or Agreement

Seek a Federal Rule of Evidence 502(d) nonwaiver order or a 502(e) nonwaiver agreement whenever possible to minimize the risk of waiving the attorney-client privilege or work product immunity. From a law firm risk management perspective, they are indispensable. A Federal Rule of 502(d) nonwaiver order is preferable to a 502(e) nonwaiver agreement due to the additional protection it provides.

### Point 2: Carefully Draft the Order or Agreement

Use care in drafting a nonwaiver order or a nonwaiver agreement. Some courts have strictly construed a nonwaiver agreement and applied Federal Rule of Evidence 502(b) rather than the terms of an agreement when a dispute between the parties arose because the agreement was ambiguous, failed to address what pre-production review parties would undertake, or did not include what steps would be taken if a disclosure of privileged information occurred. *See* Grim, Bergstrom, & Kraeuter, *supra*, at

63–79 (discussing cases); *Maxtena, Inc. v. Marks*, 2012 WL 6190298, at *14 n.16 (D. Md. Dec. 11. 2012) (noting that "the Confidentiality Order does not define 'inadvertence' and is silent as to either the parties precautionary or post-production responsibilities to avoid waiver. Hence, all three prongs of Rule 502(b) govern this dispute").

**Point 3: Seek a Nonwaiver Agreement Over an Opponent's Objection**

Seek to incorporate any nonwaiver agreement into a court order even when opposing counsel does not agree to it. Agreement of the parties is not a prerequisite to the entry of a nonwaiver order according to Federal Rule 502's advisory committee note. If an agreement is incorporated into an order, it will strengthen a client's protection against waiver. Even if a court rejects the motion for an order, a client may benefit because the court will have an opportunity to review the agreement and flag concerns that it has with the terms.

**Point 4: Remember the Ethical Obligation to Protect Client Information**

Never forget the ethical obligation to safeguard a client's information competently when reviewing it for privilege and producing it in discovery. The options can range between doing an "old-fashioned" review of every document to using advanced analytical software with mathematical algorithms or linguistic tools that screen for privilege. The size of the production, as well as a client's records management and information systems will affect the method selection, so it is important to learn the client's systems.

**Point 5: Discuss the Available Options with a Client**

Discuss with a client available options for reviewing, screening, and producing information in discovery and attempt to provide a reasonable estimate of the costs and benefits of those options. Then obtain the client's informed consent on the selected methods.

**Point 6: Document a Client's Options in Writing**

Whenever possible, document a client's options and confirm the client's choice in writing. Memories fade and personnel may change over time. Having the agreed upon approach and the supporting reasons documented will help to prevent a messy disagreement over why a particular option was selected and minimize the potential of a conflict of interest developing between an attorney and the client if an opponent claims that a waiver occurred or moves for sanctions months or years later.

**Point 7: Seek Legal Advice When a Vendor or a Client Reviews Discovery Documents**

Some clients now do the document review "in house" or employ a third-party vendor to review information for responsiveness and privilege in an attempt to reduce the cost of e-discovery. The disaggregation of legal services complicates the ability of outside counsel to sign a discovery response and ethically certify under Federal Rule of Civil Procedure 26(g) that the response is complete. When this situation occurs, the attorney should consult with his or her firm's general counsel or ethics counsel about how to proceed. There are options to consider, all of which will require discussion with a client. FD