

**ENTER THE ORDER, PROTECT THE PRIVILEGE:
CONSIDERATIONS FOR COURTS ENTERING
PROTECTIVE ORDERS UNDER FEDERAL
RULE OF EVIDENCE 502(D)**

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INTRODUCTION

The model Rule 502(d)¹ order² resulting from the Symposium on Rule 502 hosted by the Committee on the Rules of Evidence should be implemented into courts' standard pretrial case management practice. Through this Essay, I hope to justify encouragement of its use. But I also hope to highlight potential points of friction with the attorney-client privilege that 502(d) orders may tempt. I will first briefly address the benefits of Rule 502(d). Then I will address some critiques that have been levied against courts entering 502(d) orders *sua sponte*, and explain why those critiques are meritless. Finally, I will walk through examples of courts that have properly utilized 502(d) orders, as well as some that have perhaps gone astray.

Courts must be mindful of stretching the enabled benefits of the model order too far. Certain decisions related to compelled disclosure, cost-shifting, and scheduling that are ostensibly justified by the protections of Rule 502(d) can implicate paternalistic concerns. Courts must be mindful of different concerns than litigants because courts' discovery rulings, when they would not otherwise be the same absent a 502(d) order,³ can make *de facto* choices that should be left to litigants.

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1. FED. R. EVID. 502(d).

2. *Model Draft of a Rule 502(d) Order*, 81 *FORDHAM L. REV.* 1587 (2013).

3. *See* *Adair v. EQT Prod. Co.*, Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, at *3–4 (W.D. Va. June 29, 2012) (holding that cost-shifting was not appropriate because the 502(d) order justified a less intensive review); *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, No. CIV 09-0885 JB/DJS, 2010 WL 4928866, at *8–9 (D.N.M. Oct. 22, 2010) (ordering production of documents without review because the party was protected by Rule 502(d)).

A Rule 502(d) order bestows many potential benefits on litigants.⁴ And the order, standing alone, poses no risk to parties because, once entered, the parties are free to tailor the privilege review necessary to protect attorney-client privilege and work product in a given case.⁵ Rule 502(d) only provides protection, from a litigant's perspective. It provides protection against the opposing party within the federal proceeding as well as protection against nonparties beyond the given proceeding.⁶ Because 502(d) orders confer these protections within the proceeding—internal protections—as well as beyond the given proceeding in which the order is entered—external protections—502(d) orders can also reduce the cost and time necessary to complete discovery by allowing parties to reduce or forego privilege review without fear of privilege waiver.⁷ Through the implementation of 502(d) orders into standard practice, litigants (and courts) can, by default, benefit from the Rule's protections and choose how and whether to take advantage of the efficiencies made possible by Rule 502(d).

But a court, by uncritically utilizing a “more is better” approach, can implicate justifiable complaints about 502(d) orders that would otherwise not be present. Courts must be mindful of the parties' freedom to choose for themselves the risk they are willing to endure regarding their privileged information and, consequently, the level of review they conduct. Otherwise, 502(d) orders could become a mechanism through which courts erode the attorney-client privilege due to courts' efforts to increase the speed and efficiency of modern litigation. In this short Essay, I provide a framework through which courts can be sure to enable the benefits of the model order without treading on the attorney-client privilege.

Courts can best take advantage of the benefits bestowed by Rule 502 without eroding a party's right to keep his adversary from learning privileged information by remaining cognizant of the distinction between internal and external benefits. A court should be wary of changing the status quo between parties on account of the model order's potential internal benefits. However, courts should freely embrace the external benefits conferred by a 502(d) order and reject parties' attempts to resist disclosure, delay proceedings, or justify costs based on the perceived risk of disclosure beyond the opposing party within the given litigation. A 502(d) order benefits parties far beyond its ability to reduce privilege review, and privilege review should not be a consideration or justification for a court's actions on motions to compel, deadlines, or cost-shifting during the discovery process.

4. See Edwin M. Buffmire, *The (Unappreciated) Multidimensional Benefits of Rule 502(d): Why and How Litigants Should Better Utilize the New Federal Rule of Evidence*, 79 TENN. L. REV. 141 (2011).

5. FED. R. EVID. 502 advisory committee's note.

6. FED. R. EVID. 502(d).

7. See *Radian Asset Assurance, Inc.*, 2010 WL 4928866, at *8–9 (ordering disclosure under a Rule 502(d) order so that the party could reduce the cost of production by conducting a limited privilege review).

I. BACKGROUND AND BENEFITS

Congress and the Judicial Conference Advisory Committee on Rules of Evidence sought to reduce the costs of litigation by reducing the investment of time and resources required to protect the attorney-client privilege.⁸ Congress enacted Federal Rule of Evidence 502 to accomplish this goal,⁹ and section (d) is the most significant tool the Rule provides to courts and litigants. Section (d) states: “CONTROLLING EFFECT OF A COURT ORDER.— A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.”¹⁰ Rule 502(d) orders eliminate the default provision of subsection (b), which directs courts to analyze the reasonableness of the steps taken to protect privilege in order to determine whether the privilege has been waived.¹¹ By eliminating the reasonableness analysis, 502(d) eliminates uncertainty.¹² This section discusses the different ways in which Rule 502(d) orders benefit litigants in order to frame how courts should consider, but not overextend, those benefits.

The Committee and Congress intended for Rule 502(d), in conjunction with the other provisions, to substantially assist in reducing the costs of litigation related to privilege review.¹³ One mechanism by which it achieves this goal is allowing parties to reduce the actual review undertaken prior to production.¹⁴ Indeed, the advisory committee’s notes specifically contemplate the idea Judge Scheindlin raised in *Zubulake v. UBS Warburg LLC*,¹⁵ that an order could “allow the parties to forego privilege review altogether.”¹⁶

8. See STAFF OF S. COMM. ON THE JUDICIARY, 109TH CONG., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22–23 (Comm. Print 2005) [hereinafter JUDICIAL SUMMARY], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf> (noting that the discovery of electronically stored information is “characterized by exponentially greater volume than hard-copy documents,” and that national rules are required to reduce the debilitating effect of inconsistency on large organizations and individual litigants alike); see also Anthony Francis Bruno, Note, *Preserving Attorney-Client Privilege in the Age of Electronic Discovery*, 54 N.Y.L. SCH. L. REV. 541, 543–44 (2009/10).

9. 154 CONG. REC. 18015 (2008).

10. FED. R. EVID. 502(d).

11. FED. R. EVID. 502(b).

12. Buffmire, *supra* note 4, at 162.

13. See Memorandum from the Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 13–14 (May 15, 2006) [hereinafter Memorandum from the Advisory Committee], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Excerpt_EV_Report_Pub.pdf.

14. FED. R. EVID. 502(d) advisory committee’s note.

15. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

16. FED. R. EVID. 502(d) advisory committee’s note (citing *Zubulake*, 216 F.R.D. at 290).

Party agreement is not required for a court to enter a Rule 502(d) order.¹⁷ This feature was necessary because individual plaintiffs, or even a class of individuals, may not possess large amounts of privileged information or have to produce documents at all.¹⁸ Gaining nothing from its protections, the parties might have incentive to reject a protective order.¹⁹ Courts can also enter the order *sua sponte*.²⁰

Prior to enactment of Rule 502, parties often could not justify saving money by reducing privilege review, because the risk of loss was too great.²¹ The risk was magnified because party agreements to not waive privilege in any given litigation had no effect in later proceedings.²² Now, Rule 502(d) ensures that the risk associated with the consequences of inadvertent disclosure is very limited, in part because of the protections in later or parallel proceedings.²³ Because risk is limited by Rule 502(d), parties can justify cost reductions.

But nothing in either Rule 502(d) or the model order inherently reduces the level of care taken in reviewing documents. Litigators should still undertake a thorough privilege review of documents that are likely to contain substantive communications between an attorney and client that a client wants to keep confidential. In fact, they are obligated to do so under state ethical rules.²⁴ Rule 502(d) merely allows a party to customize a privilege review pursuant to the demands of a particular case.²⁵ If discoverable documents are unlikely to contain any relevant privileged communications, then a party can skip review, save a substantial amount of money, and disclose those documents confident that a privileged email included therein cannot be the subject of a lengthy inquiry at a later deposition.²⁶ Rule 502(d) orders allow a party to make an individual cost-benefit analysis of privilege review for each document production.²⁷ Because of a Rule 502(d) order, a party can accurately analyze the costs and

17. *Id.*; *Hearing of the Advisory Comm. on Evidence Rules 250* (Jan. 29, 2007) [hereinafter *Advisory Comm. Hearing*], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2007-01-29-Evidence-Minutes-Transcript.pdf> (testimony of Peter Sullivan, Attorney, Hughes, Hubbard & Reed LLP).

18. *Advisory Comm. Hearing*, *supra* note 17, at 250.

19. *Id.*

20. 154 CONG. REC. 18,017 (2008).

21. *See Advisory Comm. Hearing*, *supra* note 17, at 83 (testimony of Patrick Oot, Director of Electronic Discovery & Senior Council, Verizon).

22. *Id.* at 89.

23. *Id.* at 89–90.

24. *See* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need To Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 196, 241–42 (2010) (discussing state ethical obligations and proposing revisions to the rules of professional conduct in order to provide increased guidance to practitioners faced with the possibility of inadvertent disclosures during discovery); *infra* Part II.B.

25. *See* 154 CONG. REC. 18,016–17 (2008).

26. *See id.* (noting that 502(d) allows “parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews”); Andrew J. Peck, *The Federal Rules Governing Electronic Discovery*, AM. BAR ASS’N, 11 (June 4, 2009), <http://apps.americanbar.org/labor/el-annualcle/09/materials/data/papers/138.pdf>.

27. *See* 154 CONG. REC. 18,016–17; Peck, *supra* note 26, at 11.

benefits internal to the litigation in which the document request is made. Without a Rule 502(d) order, the risks are difficult to quantify due to the virtually unknowable risk external to the litigation in which the disclosure is made.

A Rule 502(d) order also benefits a party by minimizing the damage when an inadvertent disclosure of privileged information occurs: “It may be damaging for an opposing party to learn such information, which, absent the mistaken disclosure, it would not have learned. On the other hand, it would be *more* damaging” if that document becomes admissible at trial due to the imperfect privilege review.²⁸ An opposing party may gain leverage in settlement negotiations upon learning information through a privileged document, but that leverage substantially increases if the opposing party possesses the additional threat of putting the particular document before a jury or in front of a witness.²⁹ Rule 502(d) eliminates the possibility of this happening.³⁰

Mistakes are made even when parties believe they are thoroughly reviewing documents for privilege.³¹ Rule 502(d) provides added assurance that the damage from such a mistake is mitigated.³² But it neither increases nor decreases the likelihood of that mistake. Therefore, it is no response to the potential benefits of Rule 502(d) that an opposing party cannot unlearn the information once it is disclosed. There is simply no relationship between that fear and the rule itself. Moreover, the critique ignores the benefits for a party from using the rule whether or not such a disclosure is made.³³

For repeat litigants, Rule 502(d) provides additional benefits.³⁴ In addition to the certainty that an order under Rule 502(d) provides in any single case by eliminating the reasonableness review of Rule 502(b), the rule provides that an order will have controlling effect in any other federal or state litigation as well.³⁵ Multiple ongoing lawsuits may require a large

28. Buffmire, *supra* note 4, at 185.

29. See Memorandum from the Advisory Committee, *supra* note 13, at 2–3.

30. See *id.*

31. See, e.g., *Datel Holdings, Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at *3 (N.D. Cal. Mar. 11, 2011) (discussing the mistake made in the case before the court as well as others); *Heriot v. Byrne*, 257 F.R.D. 645, 659 (N.D. Ill. 2009) (noting that the disclosure of privileged documents was “broad, and the error—regardless of the [percentage of documents containing privileged information]—not insignificant.”); see Schaefer, *supra* note 24, at 199–202 (discussing the exponential growth of clients’ production of discoverable information during the last decade, and the inevitable issues with inadvertent disclosure resulting from the sheer quantity of privileged information lawyers must now review).

32. See Memorandum from the Advisory Committee, *supra* note 13, at 10–11.

33. Compare Buffmire, *supra* note 4, at 167 (discussing the multiple benefits of Rule 502(d) and the lack of risk), with Jessica Wang, Comment, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1846–47 (2009) (arguing that once an adversary sees a privileged document the damage is already done, thus making the use of protective orders too risky).

34. See Buffmire, *supra* note 4, at 167.

35. See FED. R. EVID. 502(d) advisory committee’s note.

entity to conduct extensive privilege review in each case simply because a disclosure in one proceeding will result in a waiver in another jurisdiction.³⁶ Rule 502(d) cabins the disclosure to the litigation before the court and ensures that the document will not be admitted in that litigation or any other.³⁷ Thus, a large entity responding to broad discovery requests can conduct a privilege review tailored to the needs of a case and the batch of information requested. If the cost to cull privileged documents from a large production outweighs the cost of the other party obtaining the information, then a party may choose to conduct a limited review, or forego privilege review altogether.³⁸ Rule 502(d) orders enable these choices.

Rule 502(d) benefits courts too. To be sure, courts are beginning to make use of Rule 502(d) in order to limit the potential discovery disputes during litigation.³⁹ But parties are not using 502(d) orders,⁴⁰ despite their benefits. Entry of 502(d) orders avoids judicial resolution of 502(b) disputes, provides protections to the parties so that there is less incentive to litigate discovery disputes, and could potentially reduce the cost of litigation. Consequently, 502(d) orders reduce consumption of scarce judicial resources, which is what Congress had in mind when it enacted the Rule.⁴¹

The benefit that Rule 502(d) provides to repeat litigants clarifies the connection between increased certainty and reduced litigation costs—the increased certainty enables more significant and consistent litigation cost reduction. This benefit was one of the primary concerns raised in the hearings leading up to Rule 502's enactment.⁴² The discussion of repeat litigants also highlights how the benefits of Rule 502(d) are felt both within the litigation in which the order is entered and externally in other proceedings. Parties benefit internally from the certainty that a disclosure will not result in waiver. They also benefit in the event of a truly inadvertent disclosure that the opposing party will be unable to use that document before the jury. These protections lead to a third benefit internal to the litigation: a party can choose to reduce or forego privilege review in order to possibly reduce costs and increase the speed of the litigation. Those same benefits then apply externally as well.

36. See *Hearing of the Advisory Comm. on Evidence Rules 27–28* (Jan. 12, 2007) [hereinafter *Phoenix Hearing*], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EV_Hearing_Transcript_011207.pdf (testimony of Michael O'Connor, Attorney, Jennings, Strouss & Salmon, PLC).

37. See Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 261 (2006).

38. See *Chevron Corp. v. Weinberg Grp.*, No. 11-mc-409 (D.D.C. Oct. 26, 2012).

39. See *infra* Part III.

40. See Panel Discussion, *Reinvigorating Rule 502*, 81 FORDHAM L. REV. 1533, 1535 (2013).

41. Buffmire, *supra* note 4, at 169.

42. See *Phoenix Hearing*, *supra* note 36, at 28.

II. MANY CRITICISMS OF COURTS IMPOSING 502(D) ORDERS ARE UNFOUNDED

As courts have increasingly entered 502(d) orders either sua sponte or absent party agreements,⁴³ attorneys have asserted new arguments in support of their objections. One argument questions the power of courts to enter the order sua sponte.⁴⁴ Another argues that 502(d) orders may implicate or even conflict with an attorney's state ethical obligations.⁴⁵ Neither critique has merit.

A. *The Power To Enter a 502(d) Order Sua Sponte.*

Courts entering 502 orders sua sponte have recently been the subject of an interesting critique, namely that the text of the rule itself does not empower courts to enter the order sua sponte.⁴⁶ The authors of one particular critique argue that “[n]othing in the text of Rule 502 gives federal courts the power to enter a nonwaiver agreement sua sponte.”⁴⁷ They contend that until July 2010, nonwaiver orders were only the product of party agreement.⁴⁸ This argument is flawed.

Unlike most of the Federal Rules, Congress enacted Rule 502.⁴⁹ So the typical arguments in support of textualism may apply more readily to Rule 502 than to other Federal Rules that Congress did not enact.⁵⁰ As one court noted regarding Rule 502, albeit a different provision than 502(d), “the

43. *See infra* Part III.

44. Note that this critique is different than the challenge to courts' power to enter a Rule 502(d) order that binds state courts, which I have addressed elsewhere. *See* Buffmire, *supra* note 4, at 178 (discussing, among other commentaries); Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 678 (2009) (arguing that Rule 502 exceeds Congress's Commerce Clause power, violates the Due Process Clause in certain situations, and raises serious questions about a federal court's power to enter orders binding in state courts).

45. *See infra* Part II.B.

46. H. Christopher Boehning & Daniel J. Toal, *Broad Federal Court Powers Under Evidence Rule 502(d)*, N.Y. L.J., Apr. 5, 2011, at 5.

47. *Id.*

48. *Id.*

49. *See* Act to Address the Waiver of the Attorney-Client Privilege and the Work Product Doctrine, Pub. L. No. 110-322, 122 Stat. 3537 (2008) [hereinafter Act to Address Privilege Waiver] (enacting Rule 502 into law on September 19, 2008).

50. *Wyeth v. Levine*, 555 U.S. 555, 600–01 (2009) (Thomas, J., concurring) (“This Court has repeatedly stated that when statutory language is plain, it must be enforced according to its terms. . . . [T]here is no factual basis for the assumption . . . that every policy seemingly consistent with federal statutory text has been authorized by Congress.”); *City of Joliet v. New West, L.P.*, 562 F.3d 830, 837 (7th Cir. 2009) (“When courts rely on purpose clauses, rather than the concrete rules that the political branches have selected to achieve the stated ends, judges become effective lawmakers, bypassing the give-and-take of the legislative process.”). *See generally* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994).

Advisory Committee Note is not the law, the rule is.”⁵¹ But here, Rule 502(d) expressly provides that “[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.”⁵² There is no inherent requirement that the order can only be entered “upon motion.” So a strictly textualist argument would not read such a requirement into the rule.⁵³ The argument raises an interesting point—one not often discussed in the context of a Federal Rule of Evidence—but it should not dissuade courts from entering 502(d) orders sua sponte.

Aside from the text that imposes no limitation on a court’s ability to enter the 502(d) order sua sponte, a court’s inherent power to act sua sponte under a federal rule, even when not expressly provided by the rule in question, is nothing new. The Supreme Court held in *Link v. Wabash Railroad*,⁵⁴ that Federal Rule of Civil Procedure 41(b) permitted sua sponte orders of dismissal, though the rule only explicitly mentioned dismissals effected by a party.⁵⁵ Federal Rule of Evidence 105 similarly does not mention courts’ power to give limiting instructions sua sponte.⁵⁶ Yet, courts must nonetheless give such instructions sua sponte if the evidence has the potential to prejudice a defendant substantially.⁵⁷ So courts should not be hesitant to adopt the model order as part of their standard case management or discovery orders.

This critique’s main concern, though, is not simply that courts are without power to enter the order sua sponte, but that parties would be ordered to produce documents without review.⁵⁸ As I will discuss below, courts should avoid that result.⁵⁹ However, it is unrelated to the court’s power under Rule 502(d).

B. Attorneys’ Ethical Obligations

Some have questioned whether Rule 502(d) implicates ethical concerns for attorneys.⁶⁰ This fear is also unfounded. Indeed, ethical obligations

51. *Bear Republic Brewing Co. v. Cent. City Brewing Co.*, 275 F.R.D. 43, 48 (D. Mass. 2011) (quoting *United States v. Carey*, 120 F.3d 509, 512 (4th Cir. 1997)) (discussing FED. R. EVID. 502(a)).

52. FED. R. EVID. 502(d).

53. Rule 502(e), however, could lend support for this the criticism of sua sponte orders, but any argument similarly fails. Rule 502(e) relates to party agreements. It states that party agreements will only be binding on those parties, unless it is incorporated into a court order. FED. R. EVID. 502(e). But we already know that party agreements are not the only circumstance in which a 502(d) order can be entered. *See* FED. R. EVID. 502(d).

54. 370 U.S. 626 (1962).

55. *Id.* at 630–32.

56. FED. R. EVID. 105.

57. *United States v. Brawner*, 32 F.3d 602, 605 (D.C. Cir. 1994).

58. *Boehning & Toal*, *supra* note 46.

59. *See* discussion *infra* at Part III.B.

60. *See* Ann M. Murphy, *Federal Rule of Evidence 502: The “Get Out of Jail Free” Provision—or Is It?*, 41 U.N.M. L. REV. 193, 234 (2011) (“All of these opinions require that

arguably weigh in favor of entry of a Rule 502(d) order rather than against it.

Model Rule of Professional Conduct 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”⁶¹ Ethical opinions interpreting the rule require attorneys to take reasonable care to keep privileged information confidential when producing client documents.⁶²

But these are not reasons to decline to enter a 502(d) order. Paragraph (b) of Rule 1.6 provides that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (6) to comply with other law or a court order.”⁶³ Further, Rule 1.6 permits disclosure with informed consent.⁶⁴ So attorneys should counsel clients about the benefits of Rule 502(d), not unilaterally decide to disclose privileged information.⁶⁵ Regardless of their decision on the privilege review procedures, attorneys should explain to clients the added protections of Rule 502(d). An attorney will not run afoul of ethical obligations by entry of a 502(d) order.⁶⁶ First, the order does not require disclosure absent review, and a client can consent to that protocol. Second, disclosure pursuant to a court order does not violate Rule 1.6.

In fact, Rule 502(d) affords additional protection to a client’s information at no cost. Because Rule 502(d)’s protections effectively preclude the possibility of waiver as a consequence of inadvertent disclosure of

the attorney take ‘reasonable steps’ ‘reasonable precautions’ or ‘reasonable care’ in transmitting a client’s documents and information. . . . [T]his creates a problem for an attorney’s use of FRE 502(d) and (e).”); Schaefer, *supra* note 24, at 241–42.

61. MODEL RULES OF PROF’L CONDUCT R. 1.6(a).

62. Murphy, *supra* note 60, at 234 (citing Ala. State Bar Office of the Gen. Counsel, Formal Op. 2007-02 (2007); State Bar of Ariz. Ethics Counsel, Formal Op. 07-03 (2007); Ethics Comm. of the Colo. State Bar Ass’n Formal Op. 119 (2008); D.C. Bar Legal Ethics Comm., Op. 341 (2007); Fla. Bar Ethics Dep’t, Op. 06-2 (2006); Ky. Bar Ass’n, Office of Bar Counsel, Op. KBA E-374 (1995); Me. Prof’l Ethics Comm., Op. 196 (2008); Minn. Lawyer’s Prof’l Responsibility Board, Op. No. 22 (2010); N.H. Bar Ass’n., Ethics Comm., Op. 2008-2009/4 (2008-2009), N.J. Advisory Comm. on Prof’l Ethics, Op. 701 (2006); N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 749 (2001); N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 782 (2004); Vt. Bar Ass’n, Op. 2009-1 (2009); W. Va. Bar Ass’n, Lawyer Disciplinary Board, Formal Op. L.E.O. 2009-1 (2009)); *see also* Louise L. Hill, *Emerging Technology and Client Confidentiality: How Changing Technology Brings Ethical Dilemmas*, 16 B.U. J. SCI. & TECH. L. 1, 27–45 (2010) (summarizing some of the ethical opinions).

63. MODEL RULE OF PROF’L CONDUCT R. 1.6(b)(6) (2012).

64. *Id.* R. 1.6(b).

65. *See* Buffmire, *supra* note 4, at 184; Schaefer, *supra* note 24, at 247–48 (proposing additional comments to Model Rule of Professional Conduct 1.6 in order to provide guidance to attorneys in discussing the potential risk of inadvertent disclosure of privileged information inherent in protective orders, such as those under Rule 502(d)).

66. *See, e.g.*, *Belcher v. United States*, No. 3:12-cv-04717, 2012 WL 5386564, at *2–3 (S.D. W. Va. Nov. 1, 2012) (rejecting an attorney’s attempt to rely on Rule 1.6 to avoid being compelled to disclose communications with a client).

privileged information, it is difficult to argue that an attorney took reasonable steps to protect the communications whenever a court holds that privilege was waived by a disclosure.

III. COURTS BENEFIT FROM 502(D) ORDERS, ESPECIALLY WHEN ENTERED AT THE OUTSET OF LITIGATION

Several recent district court decisions have included 502(d) orders.⁶⁷ But the decisions have arisen from discovery disputes. For example, courts are beginning to invoke Rule 502(d) in conjunction with orders on motions to compel. While this development is an improvement, many times the dispute could have been resolved, or prevented, if the order had been entered at the outset of the case.

A. *The Good: Courts Using 502(d) Orders To Facilitate Just, Speedy, and (Comparatively) Inexpensive Litigation*

A Texas district court used a Rule 502(d) order to protect a party against privilege waiver in separate litigation.⁶⁸ In *Whitaker, Chalk, Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*,⁶⁹ a law firm filed suit against a former client for unpaid legal fees.⁷⁰ The claim arose out of the law firm's representation and billing in litigation that remained ongoing in a Texas state court.⁷¹ The client sought to stay the federal proceedings and to be relieved of Rule 26(a) disclosure obligations because it feared that disclosures in the fee dispute litigation would waive privilege for those documents in the state court litigation.⁷² In response to plaintiff's argument that Rule 502(d) would address the former client's concerns, the former client argued that Rule 502(d) "is limited to inadvertent disclosures."⁷³ The court correctly held that it was within the court's authority under Rule 502(d) to order that any disclosure of privileged information would not result in waiver in the state proceeding.⁷⁴

Courts have also used Rule 502(d) to facilitate discovery when attorney-client privilege or work-product protection was not central to the dispute. In *Northern Natural Gas Co. v. L.D. Drilling, Inc.*,⁷⁵ a discovery dispute arose over production of trade secrets, and the parties could not agree on an

67. *Baez-Eliza v. Instituto Psicoterapeutico de P.R.*, 275 F.R.D. 65, 67–68 (D.P.R. 2011); *Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, No. 09-0885, 2010 WL 4928866 (D.N.M. Oct. 22, 2010).

68. *Whitaker, Chalk, Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, No. 4:08-CV-684-Y, 2009 WL 464989, at *2, *4 (N.D. Tex. Feb. 23, 2009).

69. *Id.* at *1.

70. *Id.*

71. *Id.*

72. *Id.* at *2.

73. *Id.* at *4.

74. *Id.* (noting its authority under Rule 502(d)).

75. *N. Natural Gas Co. v. L.D. Drilling, Inc.*, No. 08-1400-WEB-DWB, 2010 U.S. Dist. LEXIS 8810 (D. Kan. Feb. 1, 2010).

appropriate protective order.⁷⁶ In resolving the dispute, the court fashioned a protective order to govern the discovery process.⁷⁷ The court included a provision in the order that stated, “Pursuant to *Federal Rule of Evidence 502(d)*, any privilege or protection shall not be waived by inadvertent disclosure connected with this Litigation.”⁷⁸ There was no reason that this provision could not have been included in a default protective order, but it is nonetheless a good example of a court implementing Rule 502(d).

Rule 502(d) also reduces the consumption of judicial resources otherwise required to resolve privilege disputes.⁷⁹ For example, a party may be more willing to disclose certain documents it would otherwise claim on a privilege log if the disclosing party could be assured that the disclosure will not result in waiver in the present litigation or any other litigation in the future.⁸⁰ This will reduce the need for a court to adjudicate disputes over whether documents may be properly withheld on grounds of privilege. Courts should enter 502(d) orders in cases that have already begun, in order to narrow the field of potential dispute. Courts may also couple a nonwaiver ruling under Rule 502(b) with an order under Rule 502(d). This mechanism has important implications for subsequent litigation. Though a court does not find waiver, a court examining that disclosure in a separate proceeding may view the reasonableness analysis differently.⁸¹ As a New Jersey district court judge ruled in *Peterson v. Bernardi*,⁸² a court may include language along with its Rule 502(b) holding that “pursuant to FRE 502(d) any privilege or discovery protection attached to [the relevant documents] is not waived by the inadvertent disclosure in this court.”⁸³

*In re Avandia Marketing, Sales Practices & Products Liability Litigation*⁸⁴ illustrates how the use of Rule 502(d) can avoid unnecessary disputes.⁸⁵ A special master was appointed to resolve a year-long discovery dispute over defendant’s assertion of privilege on tens of thousands of documents.⁸⁶ After the special master reviewed in camera a sample of 120 documents claimed on the defendant’s privilege log, the defendant agreed to produce fifty-six of the documents without further litigation of the

76. Order Granting in Part and Denying in Part Motions for Protective Orders and Entry of Protective Order, *N. Natural Gas Co. v. L.D. Drilling, Inc.*, No. 08-1400-WEB-DWB, 2010 U.S. Dist. LEXIS 8810, at *3 (D. Kan. Feb. 1, 2010).

77. *Id.* at *8–21.

78. *Id.* at *16 (emphasis in original).

79. Buffmire, *supra* note 4, at 169.

80. See Eighth Report and Recommendation of the Special Master As to Documents Withheld Pursuant to the Attorney-Client Privilege and/or the Work-Product Doctrine, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 1871 07-md-01871-CMR (E.D. Pa. Oct. 2, 2009), 2009 U.S. Dist. LEXIS 122246 (producing party agreed to produce certain documents coupled with entry of 502(d) order).

81. Buffmire, *supra* note 4, at 163–65.

82. 262 F.R.D. 424 (D.N.J. 2009).

83. *Id.* at 431.

84. No. 1871 07-md-01871-CMR, 2009 U.S. Dist. LEXIS 122246 (E.D. Pa. Oct. 2, 2009).

85. Eighth Report and Recommendation, *supra* note 80.

86. *Id.* at *1.

matter, provided that the court entered a nonwaiver order.⁸⁷ The 502(d) order used clear language.⁸⁸ Because Rule 502(d) protects the documents from waiver—provided they are in fact privileged—the disclosing party can afford to be less conservative in protecting a document’s secrecy since it has less to lose from disclosure.

Magistrate Judge Facciola, a leading authority on discovery issues, recently entered a 502(d) order that implicates the numerous benefits afforded by 502(d) orders as well as the related discovery decisions.⁸⁹ The order reflects the proper analysis and considerations that courts should use when they choose to enter 502(d) orders absent party agreement.

Judge Facciola entered the order after extensive litigation related to the Weinberg Group’s claims of privilege.⁹⁰ Judge Facciola had previously ordered the Weinberg Group to produce certain documents previously withheld under a claim of work-product privilege, subject to redactions of any “true opinion work product.”⁹¹ Therein he stated that he would “grant an order pursuant to Rule 502(d) of the Federal Rules of Evidence that would alleviate any concern [the Weinberg Group] has about [disclosure of documents containing work product] constituting a waiver in any other state or federal proceedings.”⁹² When the Weinberg Group moved for entry of the 502(d) order, it stated that it was willing to produce all documents requested by Chevron without redacting opinion work product, provided that it would not amount to a waiver of the right to assert a privilege when Chevron attempted to use those documents.⁹³ Judge Facciola rejected a procedure relating to Weinberg Group’s assertion of protection, but ultimately entered the order so that the parties could exchange information,

87. *Id.* at *2, 34–35.

88. *Id.* at *34–35 (“GSK’s production of the approximately 56 documents, which it agreed to produce in a September 15, 2009 meeting with the Special Discovery Master, shall not constitute a waiver of any privilege or protection with respect to: (a) those documents; (b) any other communications or documents relating to the subject matter of those documents; or (c) any other communications or documents relating to the parties who sent or received or are named in those documents. This Order is, and shall be construed as, an Order under Rule 502(d) of the Federal Rules of Evidence ordering that privilege or protection is not waived by disclosure connected with the litigation pending before this Court. Accordingly, as is explicitly set forth in Rule 502(d), the production of these documents is not a waiver of any privilege or protection in any other federal or state proceeding. Without limiting the foregoing, the existence of this Order shall not in any way impair or affect GSK’s legal right to assert privilege claims for the documents produced in any other actions, shall not effect a waiver, and shall not be used to argue that any waiver of privilege or protection has occurred by virtue of any production of these documents in this case before this Court or any other Court or in any other litigation or proceeding.” (emphasis added)).

89. *Chevron Corp. v. Weinberg Grp.*, No. 11-mc-409 (D.D.C. Oct. 26, 2012).

90. *Id.* at 2.

91. *Id.*

92. *Id.* (alterations in original) (internal quotation marks omitted) (citing *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95 (D.D.C. 2012)).

93. *Id.*

and Weinberg Group could later seek protection without waiving work-product protection.⁹⁴

Judge Facciola's order is an exemplar of what a court should consider when entering a 502(d) order, both for what it contemplated and what it did not. First, Judge Facciola told the parties that he would grant a 502(d) order to alleviate the producing party's concern related to waiver in other state or federal proceedings.⁹⁵ So the 502(d) order was a tool to reduce the risk of information being disclosed to parties external to the litigation. Second, Judge Facciola did not compel production of documents, or information contained therein, that would otherwise be subject to opinion work-product. He instead ordered Weinberg Group to produce documents with the protected information redacted.⁹⁶ In doing so, he allowed Weinberg Group to determine the protected information it would withhold in the case before him (provided, of course, it was protectable). Weinberg Group decided that it could disclose potentially protected information in this case if the protection was not waived, particularly in other proceedings.⁹⁷ But Weinberg Group made that decision, not the court.

B. The Bad: Potentially Problematic Orders

Courts should routinely enter 502(d) orders, but the order's protections seem to tempt certain pathologies that courts should resist. The reduced privilege review made possible through 502(d) orders should not influence cost-shifting determinations related to the production of electronically stored information (ESI). Rule 502(d) does not mandate a reduced privilege review and the consequent cost-savings, and that choice should be solely that of the party conducting the review. When courts assume the possibility of a reduced privilege review and base their cost-shifting ruling on a reduced review, they incrementally take that choice away from parties. Courts also should not justify an order of production without review by citing to the presence of a 502(d) order preventing waiver of any privileged information. Doing so effectively requires a party to forego privilege review that would otherwise be proper absent the protective order. A court can also overextend the benefits of 502(d) by expediting the discovery schedule to the point that no review is feasible. Courts should be aware of these potential pitfalls, usually made with the best intentions of reducing cost and increasing efficiency, because they can erode the protections of the attorney-client privilege.

In *Adair v. EQT Production Co.*,⁹⁸ the court ordered production of ESI in part because the 502(d) order justified a less cost-intensive privilege

94. *Id.* at 3.

95. *Chevron Corp. v. Weinberg Grp.*, 286 F.R.D. 95, 101 (2012).

96. *Id.* at 100 (ordering that Weinberg only redact information that would disclose opinion work product).

97. *Chevron*, No. 11-mc-409, slip op. at 2.

98. Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982 (W.D. Va. June 29, 2012).

review.⁹⁹ The district court issued its order following the parties' objections to the magistrate judge's order holding the same.¹⁰⁰ The parties' protective order provided that a producing party was "specifically authorized to produce Protected Documents without a prior privilege review, and the producing party shall not be deemed to have waived any privilege or production in not undertaking such a review."¹⁰¹ Assuming that this language justified protection under Rule 502(d) without specifically invoking the Rule,¹⁰² disclosure of privileged information during discovery would not waive privilege in the *Adair* proceeding or any other state or federal litigation.¹⁰³

The *Adair* court's analysis of the cost shifting issue provides a useful example of the potential erosion of the attorney-client privilege as a result of overextending the benefits of a 502(d) order. The cost-shifting issue arose from a discovery dispute in which the plaintiff requested emails and other ESI that the defendant argued it should not be required to produce without the plaintiff bearing the cost of the production.¹⁰⁴

Federal Rule of Civil Procedure 26(b) protects a party from being required to produce ESI that is not reasonably accessible because of undue burden or cost.¹⁰⁵ As an initial matter, it is not well settled whether the cost of privilege review is properly considered when a court reviews a discovery request for undue burden and cost under Federal Rule of Civil Procedure 26(b)(2)(B).¹⁰⁶ But that is a different question. If a given discovery request calls for ESI that is unduly burdensome absent a 502(d) order (regardless of whether cost of privilege review is a factor) then it should remain unduly burdensome when a 502(d) order is in place. A court erodes the delicate balance struck by the discovery rules and attorney-client privilege when it either orders production of the ESI without review or denies a request to shift the cost of the production because of a 502(d) order where cost-shifting or privilege protection is otherwise appropriate.

In *Adair*, the court did just that. It held that cost-shifting was not necessary because the production could proceed using only electronic searches for responsiveness and privilege "without further individual review."¹⁰⁷ It noted further that "this approach would not be appropriate

99. *Id.* at *4.

100. *Id.* at *1 (referencing *Adair v. EQT Prod. Co.*, No. 1:10cv00037, 2012 WL 1965880 (W.D. Va. May 31, 2012)).

101. *Id.* (quoting the protective order).

102. Buffmire, *supra* note 4, at 172–74.

103. FED. R. EVID. 502(d).

104. *Adair*, 2012 WL 2526982, at *1 (quoting the protective order).

105. FED. R. CIV. P. 26(b)(2)(B).

106. *Compare* *Universal Del., Inc., v. Comdata Corp.*, No. 07-1078, 2010 WL 1381225 (E.D. Pa. Mar. 31, 2010) (ordering cost shifting for the cost of production, not including the cost of privilege review), *with* *Rodriguez-Torres v. Gov't Dev. Bank of P.R.*, 265 F.R.D. 40, 44 (D.P.R. 2010) (holding that requested ESI was not reasonably accessible because of undue burden and cost, including the cost of privilege and confidentiality review).

107. *Adair*, 2012 WL 2526982, at *3.

without the existence of the Protective Order and Clawback Order.”¹⁰⁸ The court reasoned that the order to produce documents in this manner was distinct from an order to produce privileged or nonrelevant information.¹⁰⁹

There is a problem when a court steps in and, through the mechanism of cost-shifting or privilege protection, orders a party to conduct their privilege review in a certain way. A party and counsel are best positioned to determine the necessary steps to protect the attorney-client privilege in a given matter. Courts should not intrude on this province unless the parties would be required to produce that information to each other regardless of the protective order in place—as in *Whitaker*, where the information was not privileged between the parties.¹¹⁰

This is not to say that a court should never order discovery and point out that less expensive, often equally thorough, electronic searches are available. Rather, a court should not bypass Rule 26(b)(5)(B) due to the presence of the 502(d) order and fail to analyze the burden and expense of producing information.¹¹¹ And that analysis should not change when a 502(d) order has been entered because allowing 502(d)’s protections to infiltrate the default cost-shifting calculus necessarily assumes a party’s reduction or elimination of privilege review.

One might argue that such an approach incentivizes a party to overrepresent the burden and necessity of a document-by-document privilege review in every case. Maybe. But even then, a party can either choose whether to conduct that review or not. Rule 502 affords the party the discretion to tailor the privilege review depending on what that particular case requires. The party then carries the burden of that cost should it choose to impose the price on itself. The contrary result effectively discourages, or even precludes, a party from being able to conduct that review by eliminating cost shifting to which it would otherwise be entitled or forcing a disclosure without review.

Indeed, a party’s own evaluation of the benefit associated with the cost of review was likely a relevant issue in *Adair*.¹¹² The court explicitly pointed out that, although the responding party was quoting costs of individual review in support of its overly burdensome argument, “[it] never indicated that it would rather assume the costs of individualized human review . . . and would prefer to rely on the [electronic] production process outlined by the magistrate judge.”¹¹³ This realization by both the court and the party reveals a newly emerging reality—parties *should* be as comfortable with electronic review as they typically have been with human review.¹¹⁴ As

108. *Id.* at *4.

109. *Id.*

110. *See, e.g., Whitaker, Chalk, Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, No. 4:08-CV-684-Y, 2009 WL 464989, at *2 (N.D. Tex. Feb. 23, 2009).

111. FED. R. CIV. P. 26(b)(2)(B).

112. *Adair*, 2012 WL 2526982, at *5.

113. *Id.*

114. *John B. v. Goetz*, No. 3:98-0168, 2010 WL 8754110, at *79 (M.D. Tenn. Jan. 28, 2010) (noting that courts have recognized that computer searches are a viable means of

Adair noted, “the risk of inadvertent disclosure is present in every case, and particularly present in those cases in which the document production is of significant size. Such inadvertent production can occur and does occur whether the documents are searched and reviewed electronically or by human eyes.”¹¹⁵

In *Radian Asset Assurance, Inc. v. College of the Christian Brothers of New Mexico*,¹¹⁶ the court explicitly acknowledged that it was ordering the producing party to disclose information unreviewed.¹¹⁷ The court agreed that the material requested from backup tapes was not reasonably accessible and “searching [it] would create an undue burden.”¹¹⁸ But it also held that “rule 502 is not a cost-shifting tool.”¹¹⁹ And it was not “rely[ing] on rule 502 for its authority to order [the producing party] to produce the [ESI].”¹²⁰ The court nonetheless ordered the production without review.¹²¹ The court’s reasoning reveals a dangerous fiction.

When a court orders production without review, it effectively orders that a party does not have attorney-client privilege over those documents. A party has a right to keep confidential information covered by the attorney-client privilege.¹²² When a court orders the disclosure of information without review, it effects a substantive change in privilege law because the party no longer has that right to confidentiality over those documents. This is not to say that the law precludes an order for the disclosure of privileged information in all circumstances.¹²³ But a 502(d) order should not factor into that decision. A 502(d) order, by default, protects privilege against parties external to the litigation through its extension to any other state or federal proceeding.¹²⁴ As such, courts ruling on discovery issues should only consider the 502(d) order for its effects external to the litigation, not for its protection between parties within the litigation. The internal protections benefit courts by potentially limiting the range of discovery

reducing privilege review costs); *MSF Holding, Ltd. v. Fiduciary Trust Co. Int’l*, No. 03 Civ. 1818 PKLJCF, 2005 WL 3338510 (S.D.N.Y. Dec. 7, 2005) (noting that some degree of human error is almost inevitable with a large document production).

115. *Adair*, 2012 WL 2526982, at *4 (citing *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991)).

116. No. 09-0885, 2010 WL 4928866 (D.N.M. Oct. 22, 2010).

117. *Id.* at *5.

118. *Id.*

119. *Id.* at *8.

120. *Id.*

121. *Id.* at *9.

122. See *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 230–31 (3d Cir. 2007) (federal courts must only apply the privilege where necessary to achieve its purpose); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002). See generally *Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the balance between the search for truth through discoverable evidence and the need to protect attorney work product and privileged communications).

123. See *United States v. Zolin*, 491 U.S. 554, 568 (1989) (discussing the crime-fraud exception to privilege and the potential for ordering production of privileged information, if only to the court, for in camera review to determine whether privilege applies).

124. FED. R. EVID. 502(d).

disputes, but any benefit beyond that should be the producing party's choice because it implicates their right to keep confidential the privileged information. The contours of a party's right to keep from his adversary confidential documents should not change simply because that information will not be admitted into evidence. Some other justification is needed.

A court's imposition of discovery deadlines that effectively require a party to reduce or forego privilege review when it would not otherwise do so similarly affects the privilege. Courts may be tempted to seek additional efficiency in the discovery process by ordering shorter deadlines, justified by the protections afforded through the Rule 502(d) order. And Rule 502(d) may afford a court that ability more readily. But that temptation should be resisted to the extent that a party desires to keep privileged information from his adversary within the proceeding, as opposed to a desire to keep information from actors external to the proceeding. The *Whitaker* case is a good example of these considerations.¹²⁵ The court ordered the discovery over the objection of the producing party because the party's only legitimate objection was that it feared that the discovery would waive privilege in separate litigation.¹²⁶ The producing party preferred to simply stay the discovery.¹²⁷ Critically, though, *Whitaker* was a fee-dispute case between a law firm and a former client.¹²⁸ Thus, the information that was privileged as to the separate litigation was not privileged between the parties within the proceeding in which Judge Means ordered the discovery.¹²⁹

CONCLUSION

The model order implicates none of these concerns by its terms. And the benefits far outweigh the potential missteps. But in order to prevent any (even slight) erosion of a party's power to protect its attorney-client privilege, courts should be aware that their decisions, made to further the benefits of Rule 502(d), may be subject to paternalistic concerns. Parties should remain free to tailor privilege review according to their own needs in a given case. After all, one benefit of 502(d) orders is that they allow a party to do so. And parties should not lose the benefit of cost-shifting simply because they have invoked the protections of 502(d). Doing so effectively requires them to reduce privilege review, thereby undermining their rights to protection, if only slightly. There is no inherent need for 502(d) orders to be subject to these pathologies, and courts can easily avoid them if they are aware they exist.

125. *Whitaker, Chalk, Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, No. 4:08-CV-684-Y, 2009 WL 464989, at *2 (N.D. Tex. Feb. 23, 2009).

126. *Id.* at *3.

127. *Id.* at *4.

128. *Id.* at *1.

129. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 (2000)) (discussing exceptions to the attorney-client privilege).