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Troubling Ambition of Federal Rule of Evidence 502(d), The

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The Troubling Ambition of Federal Rule of Evidence 502(d)

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ABSTRACT

Federal Rule of Evidence 502 promised to change American litigation for the better. It was heralded as a solution to the gross inequity and spiraling litigation costs associated with the painstaking, cumbersome, and largely wasteful document reviews necessary to protect the attorney-client privilege. And in some measure, it succeeded. It has brought uniformity, predictability, and equity to issues of inadvertent disclosure and subject matter waiver. But a largely overlooked provision of the rule promises even bigger, and more troubling changes. Federal Rule of Evidence 502(d) authorizes district courts to enter discovery orders protecting parties from the waiver consequences normally attached to sharing privileged materials. This new power, however, was not meaningfully circumscribed by Congress. Instead, Rule 502(d)'s plain language appears to authorize everything from court-sanctioned "clawback" and "quick peek" agreements to wholesale voluntary disclosures. What is more, once a district court authorizes a disclosure, subsequent parties and even state courts are bound by the district court's decision. This Article examines the development and early application of Rule 502(d) as well as its underlying rationale in an effort to address some of the potential benefits and consequences attendant to such a far-reaching – even paradigm changing – evidentiary rule. It finds that, while the new rule could promote more efficient litigation, Rule 502(d) orders may ultimately bring about little in the way of cost savings, erode the attorney-client privilege, and further complicate modern discovery practice.

I. INTRODUCTION

An end to spiraling discovery costs.[1] No more inadvertent waiver.[2] The final days of the much-dreaded subject matter waiver.[3] Federal Rule of Evidence 502 has been heralded as the legislative innovation that could bring an

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1. 154 CONG. REC. H7817-18 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee); 153 CONG. REC. S15141-43 (daily ed. Dec. 11, 2007) (statements of Sen. Leahy and Sen. Specter).

2. 154 CONG. REC. H7817-18 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee).

3. *Id.* at H7819 (statement of Rep. King).

end to all of these common and costly afflictions plaguing American litigation. After two decades of largely unsuccessful tinkering with the Federal Rules of Civil Procedure,[4] Congress believed that it had struck upon a novel and effective solution – shift the focus from how information is shared in discovery to how it is actually used as evidence in litigation.[5] But what if this shift portends even more significant structural changes to the fundamental operation of federal trial courts? The plain language of Rule 502(d) appears to authorize courts to protect even voluntary disclosures of attorney-client privileged information where such an authorization best serves the immediate needs of a pending matter.[6] Are the possible consequences of this new judicial authority – affecting everything from the types of information shared in discovery to the forms of evidence that can be admitted at trial to the troubling consequences of shielding trial proceedings from public view – worth the purported cost-savings that brought about this shift in the first place?

These claims may, at first blush, seem alarmist. After all, Rule 502(d) – a very brief, forty-six-word "enabling" provision[7] – sits at the end of a fairly narrow rule clearly targeted at issues regarding inadvertent disclosures and productions in government investigations.[8] Further, Rule 502(d) limits itself to the attorney-client privilege and work product protection.[9] But in the short time since Rule 502 went into effect, it has already overleaped these limitations. Federal courts around the country immediately embraced the new rule with open arms in the two years following its effective date, and many of these courts have already begun casting a hopeful eye toward expanding the rule's reach to resolve a host of common problems with both large- and small-scale litigation.[10] In the most striking examples, courts have used Rule

4. The numerous, and arguably only marginally successful, revisions to the Federal Rules of Civil Procedure designed to address the increasing costs and burdens of discovery in an electronic world have been well-documented and fall beyond the scope of this Article. For more on these rules, see Henry S. Noyes, *Is E-Discovery So Different that It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585, 617-54 (2004) (examining and criticizing several more recent efforts to effect reform through the Federal Rules of Civil Procedure).

5. FED. R. EVID. 502 addendum to advisory committee notes.

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

7. *See id.* ("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 pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.").

8. *See generally* FED. R. EVID. 502.

9. *Id.* (limiting all of the provision of the rule to "information covered by the attorney-client privilege or work-product protection").

10. *See, e.g.*, Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp., No. 4:08-CV-684-Y, 2009 WL 464989, at *4 (N.D. Tex. Feb. 23, 2009) (holding that the plain language of Rule 502(d) does not limit district courts to using their newfound authority to redress inadvertent waivers).

502(d) to justify compelled disclosures of privileged documents[11] and even to authorize purely voluntary disclosures between adverse parties.[12] These early cases mark a truly radical shift away from more than a century of privilege jurisprudence. If left unchecked, this shift will carry a wide array of collateral consequences. And while these consequences could be both beneficial and detrimental, one thing is clear: they were largely overlooked throughout the rule-making process.

This Article explores the potential applications and extensions of Rule 502(d) already starting to emerge in the case law. Part II examines the aspects of the attorney-client privilege that created the problems Rule 502 was intended to resolve. Specifically, it addresses the relatively brief history of the requirement that a party forever preserve the confidentiality of privileged communications to avoid a waiver. Part III takes a detailed look at the rule-making process that resulted in the promulgation of Rule 502 to determine what potential issues were considered by Congress and identify some of the unexpected issues that have arisen in the early application of the rule. Part IV evaluates the early applications of Rule 502(d) since its inception, as well as some of the early noteworthy developments related to other parts of the rule. This analysis focuses on the various judicial innovations and expansions that have already pushed this fledgling judicial power in bold new directions. Part V assesses a number of consequences of adopting a broad view of Rule 502(d), ranging from the potential due process implications of binding absent parties with a federal court order to the potential discovery cost reductions to the ever-increasing assault on the sanctity of the attorney-client privilege.

II. THE PERSISTENT PROBLEM OF CONFIDENTIALITY

The attorney-client privilege is an extraordinary device. In an effort to promote candor and the better pursuit of truth through the adversarial process, it excludes and suppresses relevant, factual information.[13] Though not im-

11. *See* PIC Grp., Inc. v. LandCoast Insulation, Inc., No. 1:09–CV–662–KS–MTP, 2011 WL 2669144, at *4 (S.D. Miss. July 7, 2011); Radian Asset Assurance, Inc. v. Coll. of the Christian Bros., No. CIV 09-0885 JB/DJS, 2010 WL 4928866, at *2 (D.N.M. Oct. 22, 2010); Wade v. Gaither, No. 2:08-cv-641-WFD-DN, 2010 WL 624249, at *3 (D. Utah Feb. 20, 2010); *Whitaker Chalk Swindle & Sawyer, LLP*, 2009 WL 464989, at *5; Jicarilla Apache Nation v. United States, 93 Fed. Cl. 219 (Fed. Cl. 2010).

12. *See, e.g.*, D'Onofrio v. SFX Sports Grp., Inc., No. 06-687 (JDB/JMF), 2010 WL 3324964, at *3 (D.D.C. Aug. 24, 2010) (authorizing a voluntary arrangement whereby "[d]efendants agreed to permit plaintiff to test the validity of the privilege log using statistical sampling" that involved the voluntary disclosure of randomly selected privileged documents without working a waiver of the attorney-client privilege as to those documents).

13. 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2:3 (2d ed. 1999).

penetrable, it represents a sturdy and reliable shield against prying eyes such that clients in the American judicial system feel comfortable sharing information with their counsel. And the requirements to invoke this invaluable protection are fairly straightforward: the attorney-client privilege protects (1) communications between a client and her attorney (2) made in the pursuit of legal advice or assistance (3) that are intended to be confidential (4) so long as that confidentiality is preserved.[14] It is this last aspect of the privilege – the requirement that confidentiality be preserved – that bears most of the blame for the laborious and expensive process of privilege review that, as discussed *infra* in Part III, motivated Congress to reform the law of attorney-client privilege.[15] Though held sacred today by most courts, this requirement that privileged information remain confidential against all outsiders is a fairly modern invention[16] that, in many respects, has caused far more harm than good during its relatively brief existence.

This Part considers the history, the current condition, and the merits of this key element of privilege analysis. First, it examines the twentieth-century origins of this addition to the much older elements of the attorney-client privilege along with the surrounding circumstances that purportedly motivated its development. Second, it explores the current state of the confidentiality requirement while addressing the growing chorus of scholarly, judicial, and practical voices calling for an end to the perpetual preservation requirement.

A. The Origins of the Not-So-Old Confidentiality Requirement

Like so many common law doctrines, the attorney-client privilege bears the ratification of age. Thus, the more than 400 year history of the privilege often entices the unwary into simply assuming that every aspect of the privilege has enjoyed the full vetting of centuries of common law tradition. But, in reality, the privilege also shares another feature of a great many common law doctrines: what it is today is not what it always was.[17] Specifically, the preservation of confidentiality was not a requirement of the early common law privilege.[18] In fact, the requirement of *initial* confidentiality is only a

14. *See id.* § 2.1; 8 WIGMORE, EVIDENCE § 2292 (McNaughton ed. 1961); *see also* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (propounding the modern definition in the first instance); PROPOSED FED. R. EVID. 503.

15. *See infra* Part III.A.

16. *See* 1 RICE, *supra* note 13, § 6:3.

17. Though beyond the scope of this Article, a great many aspects of the privilege have undergone radical changes since their initial inception in the sixteenth century. For more discussion and authorities on this fascinating early development of the law of privilege, see 1 RICE, *supra* note 13, §§ 1:1-2.

18. *Id.* § 6:3.

relatively modern innovation.[19] A careful review of the history of the preservation requirement reveals it to be the product of little more than the scholarly success of John Wigmore and the prevailing jurisprudential notions of the early twentieth century.[20]

The modern confidentiality requirement of initial confidentiality and the attendant mandate that confidentiality be preserved traces its roots directly to the ascendance of Wigmore as the leading evidence scholar of the early twentieth century.[21] As David Drysdale notes in his extensive and detailed history of this topic, the imperative application of the confidentiality requirement first came into vogue with Wigmore's 1899 revision of Professor Simon Greenleaf's earlier seminal treatise "A Treatise on the Law of Evidence."[22] In that edition, Wigmore introduced the forerunner of what would later become the modern *per se* "disclosure rule"[23] when he added an illustration asserting that "[t]he presence of a third person will usually be treated as indicating that the communication was not confidential; moreover, a third person who overhears the communication is not within the confidence and may disclose what he hears."[24] In the years that followed, Wigmore made the confidentiality requirement explicit – adding that "communications must originate in a confidence that they will not be disclosed" as a prerequisite to claiming the privilege.[25] In short, as Paul Rice has put it, "[t]he concept of confidentiality and secrecy was literally made up by Wigmore in the first edition of his treatise."[26]

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. As the Third Circuit recently explained, "[t]he disclosure rule operates as a corollary" to the idea that a privileged communication must originally be made in private and away from third parties. Teleglobe Commc'ns Corp. v. BCE Inc. (*In re* Teleglobe Commc'ns Corps.), 493 F.3d 345, 361 (3d Cir. 2007). Thus, under the disclosure rule, "if a client subsequently shares a privileged communication with a third party, then it is no longer confidential, and the privilege ceases to protect it." *Id.* This effect is because such an external disclosure signals that the client does not intend to keep the communication secret. 2 RICE, *supra* note 13, § 9:28.

24. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 245 (16th ed. 1899), *available at* http://tinyurl.com/4ylzlh9; *see also* 1 RICE, *supra* note 13, § 6:3.

25. 1 RICE, *supra* note 13, § 6:3 (quoting 4 JOHN WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2285 (1905)).

26. Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 968 n.5 (1999). Prof. Rice is not without his critics. For a vigorous challenge to his approach, see Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31 (2000). Though Prof. Leslie makes an interesting case in support of the confidentiality requirement (and, by extension, the preservation requirement), her challenge appears to be premised on a single faulty assumption – that the privilege prevents judicial access to in-

Importantly, this approach to the privilege was not universally accepted or left unchallenged even in Wigmore's day.[27] In fact, as late as the 1950s, it remained unsettled whether the privilege could arise *in the first place* if a communication was made in the presence of a third party.[28] This dispute was not resolved conclusively until Judge Wyzanski expressly held in the landmark case *United States v. United Shoe Machinery Corp.* that a communication would not be deemed privileged unless it was made "without the presence of strangers."[29] Therefore, the fundamental requirement that a commu-

formation that would otherwise exist. *Id.* at 33 ("[T]he confidentiality requirement exists to limit the exclusion of reliable evidence by ensuring that the privilege applies to only those statements that would not have been made absent the privilege."). Absent the privilege, however, the communications very likely would not exist. Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie's Defense of the Indefensible*, 2001 WIS. L. REV. 187, 188-89 (2001) [hereinafter Rice, *A Bad Idea Dying Hard*] (arguing that clients would be less candid with their attorneys if not for the existence of the attorney-client privilege). Arguably, clients would be forced to feed their counsel as little information as possible and leave lawyers to draw their own inferences to fill the gaps. Thus, the judicial process most likely loses very little that would otherwise exist if the privilege did not protect communications.

In fact, the costs of limiting the privilege may be higher than affording it a broader scope. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 860 (1998) [hereinafter Rice, *The Eroding Concept of Confidentiality*] ("[P]remising the application of the privilege protection on the existence of confidentiality that the client does not desire serves only to restrict arbitrarily its application and increase the cost of its use for everyone, with no corresponding benefit."). Prof. Leslie makes no allowance for the fact that, presumably, full disclosure encourages accurate and ethical confidential counseling in the context of litigation. *See id.* at 858. If a client is encouraged to dole out only the minimal information possible, then attorneys will be forced to advocate based on that information alone. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that . . . such advice or advocacy depends upon the lawyer's being fully informed by the client"). In theory at least, access to greater information circumscribes the story the client can make their lawyer tell – protecting the truth-finding function and at least partially offsetting the cost of excluding otherwise relevant material.

27. Prof. Drysdale explains that another leading treatise writer, Prof. Burr Jones, took a very different view. *See* 1 RICE, *supra* note 13, § 6:3. Prof. Jones argued that communications would only lose their otherwise privileged status due to a lack of confidentiality if they were either made in the presence of an adverse party or if someone present at the time of the communication subsequently became adverse to the client. *Id.* In other words, lack of confidentiality would only be fatal where the privilege was invoked to keep an adversary from using information it already knew before the litigation.

28. *See id.*

29. 89 F. Supp. 357, 358 (D. Mass. 1950). Importantly, even Judge Wyzanski failed to offer any insight into how he reconciled this mandate with what Prof. Rice has characterized as the illogic of the confidentiality requirement. As Prof. Rice succinctly put it, "[i]f the client is willing to speak without secrecy, requiring it will not

nication be made in confidence has only been a steadfast feature of American jurisprudence for roughly sixty years.

The requirement that confidentiality be maintained has an even more dubious pedigree. Until *United Shoe*, the question of whether confidentiality needed to be preserved to maintain the privilege was, and in large part still remains, ancillary to the threshold question of whether confidentiality even mattered. And, unlike the underlying requirement that an original communication be made in confidence, the duty to preserve confidentiality appears to be something of an accepted aberration that lacks a clear organic origin or single source. As Professor Rice explains, early privilege was not a function of "confidences" so much as "secrets."[30] In other words, "[t]he attorney-client privilege was premised upon the confidential nature of the attorney-client relationship – the attorney's obligation not to reveal what his client had communicated to him – not upon the confidential or secret nature of the communications."[31]

As the confidentiality requirement took hold, so too did a requirement that a party must use the privilege in a manner that was equitable. Courts quickly declined to permit a party to use privileged information offensively and then assert the privilege when that same information or related material was invoked against them – the so-called "sword and shield" prohibition.[32] As Professor Rice's collected cases indicate, this appeal to equity gave rise to a rule where subsequent disclosure of attorney-client privileged material destroyed the privilege.[33] But it is a significant leap from requiring equitable use of privileged information to requiring absolute preservation of confidentiality in the context of eavesdroppers, inadvertent recipients, or, as is the subject of this Article, court-sanctioned exchanges of information designed to expeditiously advance pending litigation. Nonetheless, this leap became the

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increase the client's candor." Rice, *The Eroding Concept of Confidentiality*, *supra* note 26, at 860. Ironically, it is the disclosure rule itself that provides the only, albeit circular, retort – clients who would speak without secrecy demand secrecy because it is required to preserve the privilege.

30. Rice, *The Eroding Concept of Confidentiality*, *supra* note 26, at 868 n.38.

31. *Id*. at 868.

32. *See, e.g.*, Sims v. Blot (*In re* Sims), 534 F.3d 117, 132 (2d Cir. 2008) ("In other words, a party cannot partially disclose privileged communications or affirmatively rely on privileged communications *to support its claim or defense* and then shield the underlying communications from scrutiny by the opposing party." (alteration in original) (internal quotation marks omitted) (quoting *In re* Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (emphasis added))). Wigmore also appears to have originated this aptly named and commonly invoked privilege doctrine. *See* 4 WIGMORE, *supra* note 25, § 2388 ("[The privilege] is not to be both a sword and a shield (in Lord Mansfield's phrase concerning an infant's exemption from liability).").

33. *See* Rice, *The Eroding Concept of Confidentiality*, *supra* note 26, at 871 n.45 (collecting cases and noting that voluntary disclosures by the client for the purpose of securing an advantage after the initial communication often work as a waiver).

modern disclosure rule.[34] Thus, it appears that the modern requirement that a party preserve confidentiality flows from a logical and equitable rule prohibiting abuse of the privilege. Unfortunately, that reasonable approach has morphed into a *per se* rule imposing extraordinary cost before ever acknowledging or assessing the equities of a given case.[35]

Ultimately, the requirements of initial and preserved confidentiality do not deserve their vaunted place in the law of privilege. They are not grounded in centuries of trial and error like the privilege itself. Nor are they a product of some popular democratic process or collective scholarly endeavor. Instead, they represent two extraordinary aberrations in the much longer history of the privilege that, in their short life, have been heavily assailed and gradually eroded by an array of judicially created exceptions and limitations.

B. Confidentiality's Death by a Thousand Cuts

For decades, the preservation requirement has faced a series of assaults from both litigants and the bench. It struggled through the rise and fall of selective waiver.[36] It marched onward as courts developed elaborate frameworks to address inadvertent disclosures because the volume of discovery material had increased exponentially.[37] It persisted still as actual exceptions were carved out of the disclosure rule to authorize the sharing of information in an increasing variety of cases.[38] Protective orders and other sealing de-

34. FED. R. EVID. 502.

35. FED. R. EVID. 502 explanatory note to advisory committee notes.

36. For an updated review of the tortured history of selective waiver, see Patrick M. Emery, Comment, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J.L. & COM. 231, 248-66 (2009). As discussed *infra*, selective waiver played a special role in the development of Rule 502. *See infra* Part III.B. Though originally included in the mandate to the Judicial Conference, efforts to address selective waiver died by the time the draft rule was submitted to Congress. *See infra* note 62 and accompanying text. Nonetheless, the intricacies of selective waiver case law and the various policy arguments for and against it are implicitly addressed by the new mantra of non-waiver embodied in Rule 502(d). *See infra* Part III.B.

37. *See* Cont'l Cas. Co. v. Under Armour, Inc., 537 F. Supp. 2d 761, 766-67, 766 n.3 (D. Md. 2008) (providing a recent survey of the three major approaches to inadvertent waiver used in state and federal court); *see also* Elizabeth King, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, and Federal Rule of Evidence 502*, 32 CAMPBELL L. REV. 467, 472-90 (2010) (identifying various approaches to disclosure).

38. The two most noteworthy exceptions in this area are the joint defense privilege and the community of interest privilege. Teleglobe Commc'ns Corp. v. BCE Inc. (*In re* Teleglobe Commc'ns Corps.), 493 F.3d 345, 362-66 (3d Cir. 2007). The former exception preserves privilege when a communication is disclosed to another individual represented by the same lawyer in the same matter. *Id.* at 363. The latter, a far more complicated exception, "comes into play when clients with separate attor-

vices – once extraordinary – have become unremarkable, commonplace tools invoked as a matter of course.[39] What is more, these various carve-outs, exceptions, and external protections vary, in some cases dramatically, from jurisdiction to jurisdiction.[40] In short, the confidentiality and preservation requirements of the attorney-client privilege have become little more than a hedgerow maze of technicalities. On the one hand, existing jurisprudence requires that parties preserve confidentiality at extraordinary expense even where they would be inclined to share the information if only they could retain control over their documents as to the rest of the world.[41] At the same time, parties escape the harsh consequences of the disclosure rule and attendant costs in the circumstances that may actually be most detrimental to the truth-finding function of the trial process – such as where multiple parties seek to coordinate their defense by sharing information that they could not otherwise access to the disadvantage of the opposing party.[42]

The preservation and confidentiality requirements, both of which rest upon questionable foundations as discussed *supra*, have begotten an array of common law caveats that have left these requirements at cross-purposes with their original functions. The once "tight circle" of privilege, to use Professor Rice's terminology, has now expanded to eclipse much of the original rule.[43] As that circle continues to grow, the examples discussed above seem to render the rule all the more arbitrary and lead to the disturbing consequence of only enforcing the disclosure rules in situations that least advance the judicial process. At the end of the day, the high-minded principles and evidence-saving goal of the preservation requirement are no longer vindicated by imposing the onerous responsibility of maintaining secrecy at all costs. Put differently, the slow death of the disclosure rule appears to reflect the judicial recognition that, so long as privileged information is used fairly in one in-

neys share otherwise privileged information in order to coordinate their legal activities." *Id.* at 359.

39. *See Judges: Too Many Civil Cases Kept Secret*, ASSOCIATED PRESS, Sept. 13, 2011.

40. *See generally* 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 (2006) (discussing disclosures made at the federal and state levels). Importantly, Profs. Broun and Capra offer authoritative current scholarship on the thought process behind Rule 502 as both professors were members of the Judicial Conference Advisory Committee on Evidence Rules at the time Rule 502 was first proposed. *Id.* at 211 n.a1.

41. *See* Rice, *The Eroding Concept of Confidentiality*, *supra* note 26, at 860-61.

42. *In re Teleglobe Commc'ns Corp.*, 493 F.3d at 359; *see also* Rice, *The Eroding Concept of Confidentiality*, *supra* note 26 at 890-91.

43. Rice, *A Bad Idea Dying Hard*, *supra* note 26, at 189-98; *see also* Rice, *The Eroding Concept of Confidentiality*, *supra* note 26, at 880-88 (asserting that the development of client intent-driven waviers and of wavier exceptions occurred when confidentiality ceased to be a requisite for attorney-client privilege and was replaced by fairness and client intent).

stance with one adversary, there is simply no justification to hold the privilege waived as to the rest of the world. After all, the rest of the world loses nothing by allowing litigants added flexibility where evidence would not otherwise publically exist absent the privilege.

The preservation requirement has experienced a steady decline in authority, and that decline shows no sign of slowing. At this juncture, the potential merits and adverse consequences of that decline are beyond the scope of this Article.[44] Instead, this gradual-but-hastening shift highlights one of the more recent problems further contributing to the extraordinary costs attached to protecting attorney-client privileged materials – unpredictability. With so many exceptions and so many jurisdiction-specific variations on how those exceptions are viewed, a party must think twice before relaxing its guard and sharing information in reliance on any of these erosions of the preservation requirement. The addition of Rule 502(d) orders to this pantheon may signal the final step in the slow demise of the requirement for maintained confidentiality as it adds an element of predictability as well as legislative and judicial approval to abandoning Wigmore's theory. That terminal decline may, as discussed *infra*, justify a far-reaching evidentiary rule that consolidates these scattered common law creations into a predictable and ordered system for administering the privilege.[45]

III. THE PROMULGATION OF RULE 502 AND ATTENDANT LEGISLATIVE HISTORY

Rule 502 is different. Unlike the run of evidence rules, it addresses privilege.[46] Thus, it falls within the strictures of 28 U.S.C. § 2074(b). Under that statute, the Supreme Court's broad power to develop evidentiary rules is limited, albeit narrowly, by a requirement that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."[47] As a consequence, Rule 502 has an extensive and detailed legislative history providing critical insight into what the Judicial Conference and Congress understood the new rule to mean. Focusing primarily on subparagraph (d) of the rule, this Part examines the development of the rule from the initiation of the rule-making process, through the detailed reports of the Judicial Conference, to the substantial floor debate, and the rule's passage with an unusual "statement of congressional intent" aimed at providing targeted guidance to future courts.

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44. For competing views on that subject, see Rice, *The Eroding Concept of Confidentiality*, *supra* note 26 (arguing that the benefits outweigh the potential consequences) and Leslie, *supra* note 26, at 84 (arguing that the eliminating the requirement would drastically harm the judicial process).

45. *See infra* Part IV.B.

46. *See* FED. R. EVID. 502.

47. 28 U.S.C. § 2074(b) (2006).

A. The History of Rule 502(d)

Rule 502 grew out of a 2006 letter from Congressman Bob Sensenbrenner, on behalf of the House Committee on the Judiciary, to the Judicial Conference.[48] In that letter, Representative Sensenbrenner charged the Judicial Conference with initiating a rule-making process to address "forfeiture of privileges."[49] He narrowed the focus of this request to three particular problems: (1) protection against forfeitures attributable to "innocent mistake;" (2) authorization to protect disclosures of information between parties in pending litigation; and (3) allowing parties to cooperate with government agencies by turning over privileged materials without waiving privilege as to other parties.[50] The letter explained that satisfying these three objectives would help to reduce "[t]he expense in reviewing an enormous volume" of discovery materials while also creating consistency in the enforcement of privilege rules between different proceedings and varying judicial "fora."[51]

In response to Representative Sensenbrenner's letter, the Judicial Conference undertook a painstaking twenty-month rule-making effort.[52] The Advisory Committee on Evidence Rules initiated its process with a conference and public hearing at Fordham University in April 2006.[53] From there, it developed a first draft of the new rule and made it publicly available for comment in August 2006.[54] Over the next six months, the Advisory Committee received more than seventy public comments from practitioners, professors, state bar organizations, interest groups, and federal agencies.[55] These comments addressed virtually every facet of the proposed rule.[56] The Com-

48. *See* Letter from Rep. F. James Sensenbrenner, Jr., Chairman, House of Representatives Comm. on the Judiciary, to Mr. Leonidas Ralph Mecham, Director, Admin. Office of the U.S. Courts (Jan. 23, 2006) [hereinafter Sensenbrenner Letter], *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/2006-01-23-Sensenbrenner.pdf.

49. *Id.* at 1.

50. *Id.*

51. *Id.* at 1-2.

52. *See* Letter from Lee H. Roenthal, Chair, Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., to Sen. Patrick Leahy, Chairman, Senate Comm. on the Judiciary & Sen. Arlen Specter, Ranking Member, Comm. on the Judiciary (Sept. 26, 2007) [hereinafter Rule 502 Letter to Congress], *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/Hill_Letter_re_EV_502.pdf.

53. *See generally* ADVISORY COMMITTEE ON EVIDENCE RULES: HEARING ON PROPOSAL 502 (Apr. 24, 2006) (transcript on file with author).

54. Rule 502 Letter to Congress, *supra* note 52, at 2.

55. ADVISORY COMM. ON EVIDENCE RULES, JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE 15-49 (2007) [hereinafter PROPOSED AMENDMENT] (summary of public comment), *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/Reports/2007-05-Committee_Report-Evidence.pdf.

56. *Id.*

mittee made two critical changes in response to these public critiques: (1) it eliminated (before ultimately including but bracketing) a provision of the proposed rule codifying selective waiver; and (2) it adjusted the language of the proposed rule to allow courts to protect disclosures without prior agreement by the parties.[57] The carefully honed product of this process was finally transmitted to the Standing Committee on Rules of Practice and Procedure on May 15, 2007, and it was subsequently delivered to Congress roughly four months later with only a handful of minor changes.[58]

The accompanying report to Congress explained that the new rule sought to limit the scope of waiver, prevent unfair consequences from attaching to inadvertent disclosures, and provide an element of security to parties mired in the unpredictable world of common law exceptions to the disclosure

57. *Id.* at 15; *see also* ADVISORY COMM. ON EVIDENCE RULES, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 4 (2007) [hereinafter 2007 ADVISORY COMM. REPORT], *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/Reports/2007-05-Committee_Report-Evidence.pdf. The Advisory Committee also directly incorporated a number of other changes proposed by members of the public, including emphasizing "that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision" and "stressing that Rule 502 appl[ies] in state court to determine whether a disclosure previously made at a federal level constitutes a waiver . . . ." *See* PROPOSED AMENDENDMENT, *supra* note 55, at 14.

58. 2007 ADVISORY COMM. REPORT, *supra* note 57, at 1; COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PROPOSED NEW EVIDENCE RULE 502 1-4 (2007) [hereinafter JUDICIAL CONFERENCE REPORT] (attached to Rule 502 Letter to Congress, *supra* note 54), *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/Hill_Letter_re_EV_502.pdf. Notably, the Standing Committee did make a few stylistic revisions to subparagraph (d). The original version proposed by the Advisory Committee read:

> **(d) Controlling effect of court order.** – A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court. The order binds all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation.

PROPOSED AMENDMENT, *supra* note 55, at 3. The subsequent version transmitted to Congress by the Standing Committee read:

> **(d) 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 pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.

JUDICIAL CONFERENCE REPORT, *supra* note 60, at 3. The change in the final clause of the rule suggests at least a mild reluctance to portray the new rule as authorizing courts to decide the rights of absent parties, an issue discussed infra in Part V. As enacted, the rule incorporates the Standing Committee's approach without amendment. *See* FED. R. EVID. 502(d).

rule.[59] With respect to subparagraph (d), the Standing Committee explained that the "provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review."[60] In so doing, the Standing Committee appears to have either intentionally or accidentally given the impression that Rule 502(d) orders were somehow linked primarily to the inadvertent disclosure issues addressed in subparagraph (b). After all, Representative Sensenbrenner's letter and numerous public comments appear to attribute the entire cost-savings justification to privilege reviews employed to prevent inadvertent disclosure waivers.[61] Notably, subparagraph (d) received no further attention in the Standing Committee's report (or in the Advisory Committee's earlier report for that matter). In fact, none of the Judicial Conference materials – save the broad language of the rule itself – heralded the extraordinary grant of power created by the order provision of the Rule.

In Congress, the proposed rule met with broad acceptance and vocal support. Other than rejecting the selective waiver provision bracketed by the Judicial Conference, Congress made no meaningful changes to the rule.[62] In the House, Congresswoman Sheila Jackson-Lee urged the new rule's passage, noting that something needed to be done "to address a growing problem that is adding inordinate and unnecessary burden, expense, uncertainty, and inefficiency to litigation."[63] Representative Jackson-Lee identified the potential cost-savings and the rule's ability to remedy the unfairness of inadvertent waiver and subject matter waiver as the primary changes wrought by the bill.[64] Congressman Steve King voiced his support on the grounds that the new rule was justified by a "spike[]" in the cost of discovery and his belief that the new rule would fix the broken system of assessing waiver "by providing a predictable standard . . . ."[65] In the Senate, Senator Patrick Leahy pressed for the adoption of the new rule for many of the same reasons.[66] He argued that "[b]illions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials" – a problem made

59. Rule 502 Letter to Congress, *supra* note 52, at 3-4.

60. *Id.* at 4.

61. Sensenbrenner Letter, *supra* note 48, at 1; PROPOSED AMENDMENT, *supra* note 55, at 18 (comment of George L. Paul, Esq.), 21 (comment of Paul J. Neale, Esq.), 22 (comment of Michael J. O'Connor, Esq.), 27 (comment of Patrick Oot, Esq.), and 37 (comment of the Federal Magistrate Judges Association).

62. *Compare* JUDICIAL CONFERENCE REPORT, *supra* note 60, at 1-4, *with* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (2008).

63. 154 CONG. REC. H7817 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee).

64. *See id.* at H7817-18.

65. *Id.* at H7819 (statement of Rep. King).

66. 153 CONG. REC. S15141-42 (daily ed. Dec. 11, 2007) (statement of Sen. Leahy).

worse by the increasing primacy of electronic documents.[67] Senator Arlen Specter cited his belief that "[c]urrent law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery[.]"[68] In perhaps the only congressional statement truly addressing the scope of subparagraph (d), Senator Specter also noted that "[the rule] permits parties and courts to protect against the consequences of waiver by permitting *limited* disclosure of privileged information between the parties to litigation."[69] Unfortunately, Senator Specter's statement offered no insight into the nature or source of the limitations he believed would circumscribe the courts' authority to prevent waiver.[70]

The other available pieces of legislative history provide little additional guidance. The Senate report on the new rule identified high discovery costs associated with preventing inadvertent disclosures as the primary motivation for the new law, noting that "the costs of privilege review are often wholly disproportionate to the overall cost of the case."[71] The report states that the purpose of the new rule is to create a predictable, uniform standard that improves the efficiency of the discovery process.[72] After further discussing inadvertent disclosures, the report addresses the new authority of the district courts to enter binding orders under Rule 502(d) but only as an instrument of uniformity and predictability.[73] It does not comment on the scope of that new authority.

Congress did, however, provide one more piece of important legislative history. Though the congressional record on Rule 502 is somewhat sparse, Congress took the unusual step of issuing a "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence" to be attached to the explanatory Advisory Committee notes provided with the rule.[74] Though not itself law, the special placement of this material as an addendum to the normally authoritative Advisory Committee notes has led some early courts to grant it more weight than ordinary legislative history materials.[75] The

67. *Id.* at S15142.

68. *Id.* (statement of Sen. Specter).

69. *Id.* at S15143 (emphasis added).

70. *Id.* at S15142-43.

71. S. REP. NO. 110-264, at 2 (2008), *reprinted in* 2008 U.S.C.C.A.N. 1305-06.

72. *Id.* at 3.

73. *Id.* at 2-3.

74. *See* FED. R. EVID. 502 addendum to advisory committee notes; *see also* 154 CONG. REC. H7818 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee) (adding the "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence" to the Congressional Record).

75. *See, e.g.*, Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DWJ, 2010 WL 2949582, at *4 (D. Kan. July 22, 2010) (citing the Statement to find that Rule 502(d) confers *sua sponte* authority); Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 134 (S.D. W.Va. 2010) (relying on the Statement to interpret the "[f]airness [c]onsiderations" included in Rule 502(b)), *objections overruled sub nom.* Felman

Statement describes the "limited though important … focus of the rule" thusly:

> The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding.[76]

Again, however, though Congress took great pains to suggest the rule is limited, it did not identify the limitations it envisioned. The Statement suggests that the "sword and shield" prohibition remains intact and underscores the importance of equitable application of the rule (arguably the same limitation) but stops short of demarcating any other boundaries.[77] Specifically with respect to subparagraph (d), it simply reiterates the codified requirement that a court may only enter orders in litigation before a disclosure and highlights the fact that courts may enter Rule 502(d) orders *sua sponte*.[78] It does not purport to restrict Rule 502(d) orders to issues of subject matter waiver and inadvertent disclosure, nor does it address court-sanctioned voluntary disclosure.[79]

Rule 502 passed through both the House and the Senate without opposition,[80] and President Bush signed it into law without noteworthy comment.[81] Rule 502 became effective on September 19, 2008.[82]

B. Taking Meaning From Gaps in the Legislative History of Rule 502

Like the rule itself, the legislative history of Rule 502 is very different from the run of statutes. On the one hand, Congress carefully developed a substantial record explaining, justifying, and clarifying their decision to fun-

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Prod., Inc. v. Indus. Risk Insurers, No. 3:09-048, 2010 WL 2944777 (S.D. W.Va. July 23, 2010). *But see* Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D. 43, 48-49 (D. Mass. 2011) (declining to apply the Statement in light of contradictory plain language of the rule itself).

76. 154 CONG. REC. H7818.

77. *Id.*

78. *Id.* at H7819

79. *Id.*

80. *Id.* at H7820 (House passage); 154 CONG. REC. S1318-19 (daily ed. Feb. 27, 2008) (Senate passage).

81. Acts Approved by the President, 44 WEEKLY COMP. PRES. DOC. 1234 (Sept. 19, 2008).

82. Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (2008).

damentally alter the law of privilege in federal courts.[83] On the other hand, the constant specter of selective waiver and its *de facto* realization under Rule 502(d) suggest Congress acted with something like willful blindness in ratifying such a far-reaching law. In other words, with Rule 502, Congress seemed to recognize that the privilege itself is an artificial creature of fiat, and fiats are inherently malleable to the needs of those institutions with the authority to change the rules. But Congress stopped short of acknowledging the full extent of its ability to reform the disclosure rule without completely setting it aside.

The legislative history set out *supra* makes it clear that Congress was concerned about two basic issues when it created Rule 502: (1) cost and (2) uniformity. Though the fairness of current waiver provisions played a secondary role,[84] these two concerns stood out as major stimuli animating this rulemaking process. To achieve both of these goals, Congress resolved longstanding conflicts about the proper disposition of inadvertent waivers.[85] It clarified the effects of agreements by the parties to warn that such agreements, in themselves, would not preserve privilege.[86] And, most important to this discussion, it granted courts the authority to enter confidentiality orders that are enforceable against future third parties.[87] More generally, reducing or eliminating the "billions" spent on privilege review referenced by Senator Leahy served as the popular refrain offered to justify the strongly-worded provisions of the new rule. [88] The chorus of cost reduction was repeated again and again from Representative Sensenbrenner's original letter through the bill's ultimate enactment in September 2008. [89]

What is more noteworthy about the legislative history of this rule is what it does not address. Again, whether by conscious omission or simple oversight, Congress failed to provide any guidance as to what boundaries, if any, circumscribe Rule 502(d). Congress did not explain why, for instance, Rule 502(d) creates the legal fiction that a court-sanctioned disclosure is "not a waiver" rather than simply acknowledge that the rule authorizes a limited waiver with court approval. Congress also did not explain, though at least

83. *See supra* notes 62-82 and accompanying text.

84. *See generally* Rule 502 Letter to Congress, *supra* note 52, at 1-2. The secondary emphasis on the equity of uniformity is also clearly conveyed by the various statements made during floor debate discussed and cited above. *See supra* note 51 and accompanying text.

85. *See* King, *supra* note 37, at 472-85 (explaining the three major approaches to inadvertent waiver – the "lenient approach," the "strict approach," and the "middle approach" – that were in place at the time Rule 502 became law and Congress's conscious choice to select the moderate approach).

86. *See* FED. R. EVID. 502(e).

87. FED. R. EVID. 502(d); *see also* King, *supra* note 37, at 503-04.

88. 153 CONG. REC. S15141-42 (daily ed. Dec. 11, 2007) (statement of Sen. Leahy).

89. Sensenbrenner Letter, *supra* note 48, at 1.

some legislators and other secondary authorities certainly suggested,[90] if it meant to make Rule 502(d) merely a vehicle to effectuate the goals of Rule 502(a) and Rule 502(b). While the format of the rule suggests that Congress intended such a limitation, the text of the rule makes no such concession.

Another noteworthy aspect of the development of Rule 502 was the quiet death of the selective waiver provision originally developed by the Advisory Committee. In his original letter, Representative Sensenbrenner unabashedly called for the legislative adoption of selective waiver when he requested a new rule that would "allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation."[91] Based on that request, the Advisory Committee developed such a provision and subjected it to public comment.[92] But, in the face of strong public opposition, it dropped the provision.[93]

What is noteworthy about this series of amendments, however, is not that selective waiver was omitted from the rule.[94] Instead, what is notable is

90. *See* 153 CONG. REC. S15143 (statement of Sen. Specter) (describing the rule as "permitting limited disclosure"); Rule 502 Letter to Congress, *supra* note 52, at 4 (describing Rule 502(d) as providing enforceability in state and federal proceedings).

91. Sensenbrenner Letter, *supra* note 48, at 1.

92. The selective waiver provision ultimately dropped from the rule read:

> (c) Selective waiver. – In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

ADVISORY COMM. ON EVIDENCE RULES, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITEE. ON EVIDENCE RULES: PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE 6 (2006) [hereinafter 2006 ADVISORY COMM. REPORT], *available at* http://www.uscourts.gov/uscourts/rulesAndPolicies/rules/Reports/EV05-2006.pdf.

93. 2007 ADVISORY COMM. REPORT, *supra* note 57, at 4.

94. For more on the demise of selective waiver and the justifications underlying that policy choice, see generally Emery, *supra* note 36. As Mr. Emery's comment makes clear, the troubled history of selective waiver and its coalition of enemies made it unlikely to ever enjoy widespread adoption either as a function of common law development or legislative action. *Id.* at 297. Mr. Emery's argument stops short of acknowledging that Rule 502 creates a functional equivalent to selective waiver. *Id.* at 293. Nonetheless, he does persuasively (and correctly) argue that the new rule so effectively accommodates the various concerns that have promoted selective waiver

that no one in the rule-making process appears to have acknowledged that the rule, through legal fiction, allows district courts to sanction a new breed of limited waiver. Rule 502(d) empowers a court to declare that a disclosure will not constitute a waiver. Admittedly, that concept differs from selective waiver because a "selective waiver," by definition, involves a waiver as to one party but not as to other parties.[95] Still, the practical effect is the same: one party gets to see (and perhaps use) otherwise privileged documents while the rest of the world is still blocked by the disclosing party's ability to assert the privilege in other litigation. Though the Statement on Congressional Intent states that Rule 502(d) "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege,"[96] it neither suggests the alternative non-waiver approach is somehow barred, nor does it otherwise indicate where the actual limit of Rule 502(d) authority lies.[97]

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in the past so as to effectively render any further resort to selective waiver unnecessary. *Id.* at 232.

95. Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1423 n.7 (3d Cir. 1991); *see also* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (originating the selective waiver doctrine). *See generally* Alexander F. Smith, Comment, *Should Congress Adopt Selective Waiver Legislation?*, 80 TEMP. L. REV. 595 (2007) (evaluating the history and status of selective waiver *circa* the adoption of Rule 502).

96. Fed. R. Evid. 502 addendum to advisory committee notes.

97. *See id.* At most, the Statement of Congressional Intent prohibits willing acquiescence to the *use* of privileged material. *See id.* But this purported limitation is something of a straw man. First, proponents of selective waiver make clear that the primary purpose of the rule is to permit cooperation and openness in government investigations. *See, e.g.*, Andrew J. McNally, Comment, *Revitalizing Selective Waiver: Encouraging Voluntary Disclosure of Corporate Wrongdoing by Restricting Third Party Access to Disclosed Material*, 35 SETON HALL L. REV. 823, 824-25 (2005) (arguing that selective waiver "aligns corporations' interests in maintaining crime-free operations and the government's interest in ensuring that applicable laws are followed"). In many instances, just opening the books to federal investigators will be sufficient to accomplish these ends as the investigators will be satisfied with what they find and the investigation will terminate. *See* William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 645-46 (2002) (exploring the way in which "organizational cooperation and acceptance of responsibility," including various privilege waivers, often leads to "mitigation, exculpation, or absolution"); *see also* Memorandum from The Deputy Attorney Gen., Dep't of Justice, to All Component Heads and U.S. Attorneys 3 (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF (instructing United States prosecutors that a corporation's willingness to waive privilege over requested material should be considered in deciding whether to bring charges). Second, while Rule 502(d) covers disclosure, Rule 502(a) covers use. FED. R. EVID. 502(a), (d). Thus, even in a worst case scenario, a party relying on Rule 502(d) to disclose materials would face, at most, only a limited waiver (as opposed to a subject matter waiver) if the disclosed material is "used" by the government in an actual judicial or administrative proceeding.

Ultimately, the otherwise detailed legislative history of Rule 502 does little to address, much less circumscribe, the extraordinarily broad language of Rule 502(d). While Congress made passing references to limiting district court authority and openly repudiated any suggestion it was embracing selective waiver, it never stopped to discuss the actual boundaries it envisioned. As a consequence, courts have been left with the exceptionally broad plain language of a rule that appears to afford district courts virtually unfettered discretion to manipulate the common law rules of privilege waiver in whatever way best serves the needs of the litigation before them. It is unclear whether these omissions were intentional or simply borne of the lack of opposition to the new rule. Regardless, as discussed in Part IV, Rule 502(d)'s sweeping language and the lack of guidance as to its limits have served as the catalyst behind what can only be described as a nascent revolution in both the law of privilege and the practical realities of discovery.

IV. THE RISE OF RULE 502(D)

District courts around the country wasted no time resorting to their newest discovery tool following the enactment of Rule 502. Though initial usage was tempered by a lack of awareness of the new rule,[98] the rule has nonetheless generated an increasing number of cases over the past three years. Admittedly, much of the early case law has focused on the primary area intended by Congress – inadvertent disclosures.[99] Nonetheless, Rule 502 has not been so limited. Instead, it has grown rapidly in a variety of directions to address an increasing number of discovery problems. Most notably, the early Rule 502 case law reflects a steady movement toward a broad system of court-sanctioned non-waiver.

This Part tracks the early development of the rule over the past three years. First, it examines the rapid, albeit largely predictable, spread of Rule 502(a) and Rule 502(b) as major discovery mechanisms used almost as a matter of course in a number of different settings. Second, it addresses the particularly unusual development of Rule 502(d). Even in its early applications, Rule 502(d) has served as something of a flashpoint for controversy and confusion – resulting in no less than three distinct approaches to the new rule. These divergences may not be sufficiently developed at present to be viewed as absolute and insular. Still, they nonetheless clearly reflect three different schools of thought on how the district courts' newfound authority should be used.

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98. Hon. Paul W. Grimm et al., *Federal Rule of Evidence 502: Has It Lived Up to its Potential?*, 17 RICH. J.L. & TECH. 8, at *2 (2011) (providing a judicial evaluation of Rule 502, and arguing that part of Rule 502's slow development can be attributed to the fact that "a disappointingly small number of lawyers seem to be aware of the rule and its potential, despite the fact that the rule is over two years old").

99. *See infra* Part IV.A.1.

A. Early Applications of Rule 502(a) and Rule 502(b)

A brief explanation of the early development of Rule 502(a) and Rule 502(b) is necessary to give context to the early development of Rule 502(d). Without question, Rule 502(d) has *not* been the primary focus of the early case law addressing the broader rule. Instead, as one would expect, courts and practitioners have devoted most of their efforts to using the new rule for its much-heralded dual purposes: correcting problems associated with inadvertent disclosure and limiting subject matter waivers. The early cases evaluating, analyzing, and ultimately applying Rule 502(a) and Rule 502(b) demonstrate a number of interesting and important features that provide a better understanding of how district courts view this latest addition to the federal rules.

1. Rule 502(b)

Though it appears second in the text of the rule, Rule 502(b)'s standardization of the strictures governing inadvertent disclosures represents the single biggest change wrought by Congress's rule-making efforts. The fact that Rule 502(b) is the focal point of the new rule should come as no surprise. Inadvertent disclosure concerns were cited as the driving force behind the exponential growth in discovery costs.[100] Further, the common law inadvertent disclosure jurisprudence had split into three, inconsistent variations – producing the primary inconsistency that troubled Congress.[101] Still, the immediate and frequent application of Rule 502(b) has produced several interesting and surprising developments that may provide insight into the future of the less-cited Rule 502(d). Specifically, early Rule 502(b) jurisprudence has (1) relied on the Advisory Committee materials and legislative history to an extraordinary extent; (2) diverged on key interpretive issues regarding what a party must do to receive protection from the rule; and (3) begun to demonstrate something of an inverse correlation between the breadth afforded to Rule 502(b) and other parts of the rule.

A few cases have applied Rule 502(b) without issue and in keeping with what the legislative history suggests Congress intended. One such example is *Datel Holdings Ltd. v. Microsoft Corp*.[102] In *Datel*, a plaintiff sought to make use of a number of privileged emails contained in a larger, non-privileged

100. 154 CONG. REC. H7817 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee); 153 CONG. REC. S15142 (daily ed. Dec. 11, 2007) (statement of Sen. Leahy).; *see* Sensenbrenner Letter, *supra* note 48, at 1.

101. King, *supra* note 37, at 472-85; *see also* S. REP. NO. 110-264, at 2 (2008), *reprinted in* 2008 U.S.C.C.A.N. 1305-06 ("The bill addresses these problems by providing a predictable and consistent standard to govern the waiver of privileged information.").

102. No. C-09-05535, 2011 WL 866993 (N.D. Cal. Mar. 11, 2011).

chain that had been inadvertently disclosed due to a "computer glitch."[103] In response, the *Datel* court carefully walked through each of the three prongs set forth in Rule 502(b). First, it rejected the plaintiff's argument that the term "inadvertent" excluded "'ill-considered production, or production made without bothering to acquire a complete understanding of the four corners of a particular document."[104] Instead, the district court found that an accidental and unintentional disclosure produced by a software malfunction fell squarely within the definition of an "inadvertent disclosure."[105] The district court then turned to the defendant's efforts to prevent the inadvertent disclosure and concluded that "[i]nadvertent production of a relatively low proportion of documents in a large production under a short timetable due to mistake should be and usually is excused."[106] Citing the Advisory Committee's note, the district court refused to require post-production reviews as a precondition to invoking Rule 502(b) protections.[107] Finally, the district court concluded that the defendant's prompt objection and assertion of privilege when the inadvertently produced emails were presented at a deposition was adequate to satisfy the timeliness prong of Rule 502(b) analysis.[108] Accordingly, the district court held that the production "was inadvertent and did not constitute a waiver of the attorney-client privilege or the work product doctrine."[109] In short, the district court refused to find waiver where the disclosure was truly accidental, the production was large, and the producing party quickly sought to rectify the situation – exactly what the authors of the various reports and other legislative documents discussed *supra* likely envisioned.

Notwithstanding the straightforward nature of the *Datel* court's analysis, the balance of Rule 502(b) cases has not necessarily proceeded so smoothly. First, the proper method for interpreting the basic language of the rule has proven to be a matter of some controversy. Given the rule's relative novelty, some district courts have relied heavily – even exclusively – on legislative history materials to define concepts as basic as the meaning of "inadvertent."[110] Other district courts have resorted to pre-rule case law for guid-

103. *Id.* at *3.
104. *Id.*
105. *Id*.
106. *Id.* at *4.
107. *Id.*
108. *Id.* at *5.
109. *Id.*
110. *See* Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125, 133-34 (S.D. W.Va. 2010) (looking to the advisory committee note on Rule 502(b) to provide a standard for assessing inadvertence), *objections overruled sub nom.* Felman Prod., Inc. v. Indus. Risk Insurers, No. 3:09-048, 2010 WL 2944777 (S.D. W.Va. July 23, 2010); Smith & Nephew, Inc. v. N.H. Ins. Co., No. 2:04-cv-03027-STA-cgc, 2011 WL 1930703, at *2 (W.D. Tenn. May 19, 2011) (same with respect to Rule 502(a)), *supplemented*, No. 2:04-CV-03027-STA-cgc, 2011 WL 2462215 (W.D. Tenn. June 17, 2011). *But see* Bear Republic Brewing Co. v. Cent. City Brewing Co., 275 F.R.D.

ance.[111] Still, others have limited themselves to the plain language and relied upon dictionaries to supply definitions for key terms.[112] What these approaches suggest for Rule 502(d) – particularly in light of the crucial interpretive debate already emerging with respect to its broad parameters – is that courts may well consider and afford greater weight to secondary sources of authority that would not ordinarily enjoy such prominence and influence.[113]

Second, a clear divide has already emerged with respect to the sorts of preventative requirements imposed by Rule 502(b)(2). In *Relion, Inc. v. Hydra Fuel Cell Corp*., the district court concluded that Rule 502(b)(2) requires parties to employ "all reasonable means" to prevent inadvertent disclosure before they can invoke the protections of the rule.[114] Imposing this particularly stringent standard, the *Relion* court refused to permit a party to clawback two emails inadvertently disclosed amidst forty linear feet of files because the requesting party had been permitted to make a set of copies in addition to the

43, 49 (D.Mass., 2011) (explaining that the plain language of the rule trumps any statement of intent or advisory materials).

111. *See* Sidney I. v. Focused Retail Prop. I, LLC, 274 F.R.D. 212, 215 (N.D. Ill. 2011) (explaining that "older cases applying [the pre-Rule 502(b)] factors remain relevant to the Rule 502(b) inquiry"); Jeanes-Kemp, LLC v. Johnson Controls, Inc., No. 1:09CV723, 2010 WL 3522028, at *1 (S.D. Miss. Sept. 1, 2010) (citing Alldread v. City of Grenada, 988 F.2d 1425, 1434-35 (5th Cir. 1993) as binding authority notwithstanding the fact that it predates the Rule by more than a decade); Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP, No. 06-cv-2804, 2010 WL 275083, at *5 (S.D. Cal. Jan. 13, 2010). Though beyond the scope of this brief introduction to Rule 502(b), the resort to pre-rule case law arguably reflects a judicial reluctance to abandon the common law standards that were intentionally abrogated by Congress. More troubling still, the most extreme case, *Jeanes-Kemp*, resorts to pre-rule case law as if Congress somehow incorporated or ratified the existing inadvertent waiver jurisprudence. *See Jeanes-Kemp, LLC*, 2010 WL 3522028, at *1. Not only does this approach potentially represent a usurpation of legislative authority under the guise of interpretation, it seriously undermines the "uniformity" goal sought by Congress insofar as different jurisdictions appear determined to hew to their divergent pre-rule standards. *See supra* Part III.A.

112. *See, e.g.*, Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471-PAB-KMT, 2009 WL 4949959, at *10 (D. Colo. Dec. 14, 2009) (resorting to Webster's New World Dictionary to define "inadvertent").

113. *See supra* note 110-02 and accompanying text. Another interesting quirk in the early case law may prove potentially formative with further development. Several early cases have struggled with the question of *when in the litigation process* Rule 502(b) – and Rule 502 more generally – can apply. Some courts suggest that Rule 502 is limited to a discovery context. *See, e.g.*, Alpert v. Riley, 267 F.R.D. 202, 209-10 (S.D. Tex. 2010). Other courts take a slightly broader view and have considered Rule 502 claims addressing disclosures preceding or following formal discovery. *See, e.g.*, Multiquip, Inc. v. Water Mgmt. Sys. LLC, No. CV 08-403-S-EJL-REB, 2009 WL 4261214, at *4 n.4 (D. Idaho Nov. 23, 2009).

114. No. CV06-607-HU, 2008 WL 5122828, at *2-3 (D. Or. Dec. 4, 2008).

set that was actually produced.[115] Put slightly differently, the *Relion* court refused to afford a disclosing party *any relief* where that party – however diligent – permits or creates an opportunity for privileged materials to slip through the party's review protocol.[116] Shortly thereafter, the district court in *Coburn Group, LLC v. Whitecap Advisors LLC*, expressly rejected *Relion*'s stringent new standard.[117] Instead, it concluded that parties need only take "reasonable steps to prevent disclosure" – but not *all* reasonable steps – as indicated in the Advisory Committee notes.[118]

This simple but significant split signals two important things for the broader rule. First, where *Relion* and *Coburn* appear to diverge is their willingness to focus on the "purpose" behind the rule. Whereas *Relion* paid no attention to the legislative history and Advisory Committee notes in its analysis,[119] *Coburn* specifically noted its desire to conform to the Advisory Committee's goal of avoiding unnecessary discovery burdens.[120] Thus, just as courts look to different sources to interpret Rule 502, they also may not agree that the purpose behind the rule should be an animating force dictating its application.[121] Second, the preventative requirements of Rule 502(b) speak directly to the likely development of Rule 502(d) in a given jurisdiction. Admittedly, the case law data is simply too limited at present to see if this hypothesis is fully borne out. Still, at least logically speaking, a strict interpretation of Rule 502(b), which is always applied *after* an inadvertent disclosure, would suggest a broad, prophylactic view of Rule 502(d) orders, which are entered *before* the possibility of an inadvertent disclosure. Conversely, Rule 502(d) orders are arguably less important, at least with respect to inadvertent disclosures, in jurisdictions that adhere to *Coburn*'s more lenient standard. After all, a district court would be rightly reluctant to exercise its broad discretion under Rule 502(d) when it already possesses the judicial tools to easily fix any problem an inadvertent disclosure might create.[122]

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115. *Id.* at *3.

116. *Id.*

117. 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009).

118. *Id.* (rejecting *Relion* based on the explanatory notes to the rule).

119. *Relion*, 2008 WL 5122828, at *2.

120. *Coburn*, 640 F. Supp. 2d at 1040.

121. As illustrated *infra*, this reality cuts both ways. On the one hand, a plain, non-referential reading of Rule 502(b) may increase discovery costs. At the same time, a similar approach to Rule 502(d) arguably permits unfettered discovery with little or no privilege review. *See infra* Part V.A.

122. For still another take that unites these two Rule 502(b)-Rule 502(d) connections, see *Amobi v. D.C. Dep't of Corrs.*, 262 F.R.D. 45 (D.D.C. 2009). In *Amobi*, the district court not only expressed its view that Rule 502 primarily only protects large scale electronic productions, but it went even further to suggest that Rule 502(b)'s primary purpose was simply to protect against subject matter waiver in the run of cases. *Id.* at 52 n.1, 53. This approach takes an extraordinarily narrow view of the rule but also sticks closely to the stated congressional purposes. FED. R. EVID. 502

In short, Rule 502(b) – the primary focus of Congress, the Advisory Committee, and the early case law – has proven far more controversial than the unanimous legislative history of the rule appears to have anticipated. Those controversies, while too new and undeveloped to offer reliable instruction, illustrate a number of potential roadblocks, judicial preferences, and unanticipated issues that may guide the future development of other aspects of the rule.

2. Rule 502(a)

Limiting the application of subject matter waivers was another major stimulus driving this statutory reform effort. Rule 502(a) represents something of a compromise position. Though it covers a wide range of disclosures, the rule's limits on subject matter waiver were quite clearly an attempt to encourage cooperation with government investigations.[123] At the same time, it also serves as a reminder that the rule stopped short of adopting selective waiver.[124] In practice, Rule 502(a) has proven less controversial than Rule 502(b), but it too has introduced an array of potential problems that likely anticipate the future development of Rule 502(d). Specifically, early cases in this area have continued the heavy reliance on legislative history observed in Rule 502(b) cases, have demonstrated a holistic view of the broader rule, and have even broached the difficult question of where discovery protections end and evidentiary problems begin.

Early applications of Rule 502(a) have focused simply on equity. And, in many respects, Rule 502(a) might fairly be seen as a straightforward codification of the sword-and-shield prohibition discussed in Part II *supra*. The fairly recent decision in *Coleman v. Sterling* represents a prime example of this phenomenon.[125] In *Coleman*, the defendants voluntarily disclosed a redacted version of investigative reports in discovery.[126] The question presented was whether the defendants were required, under Rule 502(a), to produce unredacted versions.[127] Much like the *Datel* court in the Rule 502(b) context, the *Coleman* court simply walked through the three prongs of the new rule. First, the court concluded that the defendants had voluntarily pro-

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advisory committee notes. Accordingly, it militates in favor of a supporting broad approach to Rule 502(d) in electronic discovery cases to better facilitate those purposes. *See, e.g.*, *Amobi*, 262 F.R.D. at 54. In short, the case law should eventually reveal an inverse relationship between the breadth of construction afforded Rule 502(b) and the breadth of construction afforded Rule 502(d).

123. *See* FED. R. EVID. 502(a) (expressly referencing disclosures made "to a federal office or agency").

124. Rule 502 Letter to Congress, *supra* note 52, at 6.

125. No. 09-CV-1594, 2011 WL 2005227 (S.D. Cal. May 23, 2011).

126. *Id.* at *1.

127. *Id.* at *1-2.

duced the redacted reports.[128] Second, the court found that the defendants had conceded in briefing that the redacted material directly related to the unredacted material.[129] Finally, the court turned to the question of whether the redacted material ought, in fairness, be disclosed to provide context to the unredacted material.[130] The court found that disclosure was required on the grounds that "[d]enying Plaintiffs access to the redacted sections would advantage Defendants by allowing them to use attorney client privilege and work-product protection at once as a sword and shield."[131] In short, *Coleman* illustrates that early application has focused, by and large, on equity.[132]

However, the early interpretations of Rule 502(a) have not been without their noteworthy quirks. First, district courts taking the first stab at applying Rule 502(a) have afforded unusual and disproportionate weight to legislative history and Advisory Committee notes.[133] At the same time, many of these same courts have also invoked pre-rule case law to shore up their reasoning.[134] The courts have used the available legislative materials to harmonize the new rule with existing common law limits on subject matter waiver. Combined with the emphasis on the sword-and-shield prohibition, this trend strongly suggests that courts do not see Rule 502(a) as a new device. In fact,

128. *Id.* at *3.

129. *Id.*

130. *Id.*

131. *Id.* Interestingly, in support of this reasoning, the court cited to *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) and *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). *Id.* Both cases substantially predate the rule and address the sword-and-shield prohibition. *See Chevron Corp.*, 974 F.2d at 1162; *Bilzerian*, 926 F.2d at 1292. This choice of authority underscores the early judicial perception that Rule 502(a) is functionally just a codification of that common law rule.

132. This trend is particularly apparent in cases denying Rule 502(a) protection. *See generally* Johnson Outdoors, Inc. v. Gen. Star Indem. Co., No. 05-C-0522, 2011 WL 196825, at *2-3 (E.D. Wis. Jan. 19, 2011); Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471-PAB-KMT, 2009 WL 4949959, at *12-14 (D. Colo. Dec. 14, 2009). *But see* Wi-LAN, Inc. v. LG Elecs., Inc., No. C-10-80254, 2011 WL 500072, at *3-4 (N.D. Cal. Feb. 8, 2011) (withholding subject matter waiver protection where the rule would otherwise apply but that disclosures predated the filing of the suit), *vacated sub nom.* Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364 (Fed. Cir. 2012).

133. *See* Smith & Nephew, Inc. v. N.H. Ins. Co., No. 2:04-cv-03027-STA-cgc, 2011 WL 1930703, at *2 (W.D. Tenn. May 19, 2011), *supplemented*, No. 2:04-CV-03027-STA-cgc, 2011 WL 2462215 (W.D. Tenn. June 17, 2011); *Coleman,* 2011 WL 2005227, at *2; *Silverstein*, 2009 WL 4949959, at *9-10.

134. *Smith & Nephew*, 2011 WL 1930703, at *2 (citing *In re* United Mine Workers of Am. Emp. Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994)); *Coleman*, 2011 WL 2005227, at *3 (citing *Bilzerian*, 926 F.2d at 1292; *Chevron Corp.*, 974 F.2d at 1162).

other than the occasional reference to the rejection of selective waiver,[135] these courts do not even seem to see Rule 502(a) as a particularly remarkable innovation. This view of the rule could have far reaching implications with respect to other provisions. If courts eventually come to see the larger rule as doing nothing more than selecting among and codifying previously competing doctrines, they may be unwilling to fully embrace the significant authority conferred by Rule 502(d) discussed *infra*.[136] While this restrained approach to the rule may not be a bad thing, it seriously undercuts the utility of Rule 502 as a cost-cutting and standardizing device.

Further, as noted above, the emphasis in applying Rule 502(a) has been equity – not efficiency.[137] While Rule 502(a) nominally provides a degree of predictability, courts still view the third prong of Rule 502(a) – whether disclosed and undisclosed materials "ought in fairness to be considered together"[138] – as a case-specific, normative analysis.[139] To that end, the early approach employed by most courts has been to conduct *in camera* reviews of the disclosed and undisclosed documents to assess this requirement.[140] This methodology fatally undermines the twin goals of cost reduction and uniformity that underpin the rule. The strong emphasis on the third prong's case-specific analysis means a party will never know the consequences of a given disclosure until it is too late. Thus, a party will be required to engage in the same intensive review and analysis before making disclosures. Consequently, Rule 502(d) becomes all the more important in the context of voluntary partial disclosures. Assuming, as argued *infra*, courts have broad discretion to authorize virtually any disclosure, Rule 502(d) can restore the lost predictability of Rule 502(a) by providing declaratory-judgment-style advance guidance.

The early case law has also demonstrated two additional surprises that, while it is too soon to see if they will continue, could have an enormous impact on the entire rule. The first issue addresses how courts view the interplay between the various provisions of the rule. In *Silverstein v. Federal Bureau of Prisons*, the district court addressed a party's attempt to clawback a

135. *Silverstein*, 2009 WL 4949959, at *12 (reiterating the suggestion in the explanatory notes that Rule 502(a) reserves subject matter waiver to, *inter alia*, "prevent a selective and misleading presentation of evidence to the disadvantage of the adversary" (quoting FED. R. EVID. 502 advisory committee notes)).

136. *See infra* Part IV.B.

137. *See supra* notes 125-32 and accompanying text.

138. FED. R. EVID. 502(a)(3).

139. *See, e.g.*, Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc., 764 F. Supp. 2d 736, 744 (D. Md. 2011).

140. *See e.g.*, Smith & Nephew, Inc. v. N.H. Ins. Co., No. 2:04-cv-03027-STA-cgc, 2011 WL 1930703, at *2 (W.D. Tenn. May 19, 2011), *supplemented*, No. 2:04-CV-03027-STA-cgc, 2011 WL 2462215 (W.D. Tenn. June 17, 2011); *Richardson*, 764 F. Supp. 2d at 744.

number of documents that the party deemed privileged after production.[141] The party sought to restore its claim of privilege pursuant to Rule 502(b) or, in the alternative, limit the scope of waiver using Rule 502(a).[142] In concluding that Rule 502(b) did not apply but Rule 502(a) did, the court made several notable decisions. First, the court determined that, quite logically, Rule 502(b) and Rule 502(a) must be assessed in that sequence – first assessing inadvertence then assessing intentionality.[143] Second, the court went to great lengths to distinguish the concept of "inadvertent disclosure" under Rule 502(b) from "intentional waiver" under Rule 502(a).[144] Again, though an obvious conclusion, it reflects a budding belief that each of these provisions can be seen as a discrete unit subject to their own case law and interpretive guidance. Therefore, the various provisions of the rule, or at least the operative provisions, may be seen as truly discrete rules notwithstanding their nominal combination under a single rule.

In another important development, a recent district court opinion addressed the question of when Rule 502(a) should be considered. In *Smith & Nephew, Inc. v. New Hampshire Insurance Co.*, the court considered a motion to compel disclosure under Rule 502(a).[145] Though the offensive use of the rule by the moving party is itself an interesting and novel tactic, that development is not the most interesting aspect of the *Smith & Nephew* decision. Rather, the striking part of the decision was the court's refusal to decide. Rather than immediately compel production, the court determined that,

> [I]t is not appropriate [during discovery] to determine whether either attorney-client privilege or work-product protection has been waived. The question of waiver is more appropriately determined if and when either party attempts to present arguably privileged information as substantive evidence, either upon motion for summary judgment or at trial, because it is at this point in the litigation that the District Court would determine whether or not certain materials "ought in fairness to be considered together" to avoid a "selective and misleading presentation of evidence to the disadvantage of the adversary."[146]

Instead, the court held that only Federal Rule of Civil Procedure 26(b)(1) applied and the materials should be presented to the magistrate judge

141. No. 07-cv-02471, 2009 WL 4949959, at *1-4 (D. Colo. Dec. 14, 2009).

142. *Id.* at *9-10.

143. *Id.* at *12.

144. *Id.*

145. No. 2:04-cv-03027-STA-cgc, 2011 WL 1930703, at *1-2 (W.D. Tenn. May 19, 2011), *supplemented*, No. 2:04-CV-03027-STA-cgc, 2011 WL 2462215 (W.D. Tenn. June 17, 2011).

146. *Id.* at *2 (quoting FED. R. EVID. 502 & explanatory note to subdvision (a)).

to determine whether they were discoverable.[147] This emphasis on the split between *discovery* and *evidence* has not been addressed, or even acknowledged, by many courts. Still, it is a critical distinction. Whereas the former controls access to information, the latter controls use. As will be discussed *infra* in Part IV, this split has major implications for the scope and potential uses of Rule 502(d).

Again, as with Rule 502(b), early applications of Rule 502(a) provide enormous insight into how courts view the new rule. The consistent developments between Rule 502(a) and Rule 502(b) suggest that Rule 502(d) will likely follow a similar path. At the same time, the divergences noted above also suggest that courts are willing, in the right circumstances, to treat the various provisions of the rule as discrete authorizations and move in different directions with this newfound authority.

B. The Vaulting Ambition of Rule 502(d)

Rule 502(d) has already overleaped and extended the fairly considerable authority conferred by the narrow reading envisioned by Congress.[148] The early cases applying Rule 502(d) diverge into three distinct categories: (1) courts linking the issuance of Rule 502(d) orders to some sort of satisfaction of the requirements of Rule 502(a) or (b); (2) courts relying upon Rule 502(d) orders to support a decision to compel disclosure over an assertion of privilege; and (3) courts approaching Rule 502(d) as a source of unfettered authority to protect the privilege to whatever extent is necessary to advance the immediate needs of pending litigation.

1. The "Enabling" Approach

Rule 502(a) and Rule 502(b) clearly represent the substantive meat of Congress's effort to reform and reconcile privilege jurisprudence. In fact, the rule can be seen as falling into two parts: two substantive provisions followed by five procedural and technical provisions. The one subparagraph that precedes Rule 502(d) and the three subparagraphs that follow address a variety of procedural details including the consequences of state court disclosures, the effects of party agreements, the effect of the rule on state proceedings, and a few key definitions.[149] It is unsurprising, then, that a great many of the early courts charged with applying Rule 502(d) have treated it as little more than an enabling provision that simply gives force to the protections afforded by Rule 502(a) and Rule 502(b), or alternatively, that allows courts to proactively resolve certain Rule 502(a) and Rule 502(b) issues in advance.

147. *Id.*
148. *See supra* notes 69-70 and accompanying text.
149. *See* FED. R. EVID. 502(c)-(g).

Decided less than a year after the rule went into effect, *Peterson v. Bernardi* represents a quintessential demonstration of this very narrow approach to Rule 502(d).[150] In *Peterson*, the plaintiff brought a "Motion to Compel the Return of Inadvertently Produced Documents Pursuant to [Federal Rule of Civil Procedure] 26(b)(5)(B)."[151] The plaintiff's motion concerned 156 allegedly privileged documents that were inadvertently disclosed by the plaintiff.[152] The court first found, unremarkably, that the majority of the claimed documents were not privileged and that even if they had been privileged, the plaintiff failed to meet the strictures of Rule 502(b).[153] The court then turned to a special, nine-page subset of the claimed documents.[154] The court expressly concluded that this short run of pages satisfied Rule 502(b) and, accordingly, their inadvertent disclosure did not constitute a waiver.[155] But the legally operable language of the order that followed made no reference to Rule 502(b). Instead, it read:

> IT IS FURTHER ORDERED that pursuant to **FRE 502(d)** any privilege or discovery protection attached to documents POO86988-6996 is not waived by the inadvertent disclosure in this court.[156]

In so holding, the court implicitly concluded that Rule 502(b) does not, in itself, afford a presiding judge with any authority to enter a controlling order. Instead, the court treated Rule 502(d) as the source of authority necessary to put the two major substantive provisions of Rule 502 in to effect.

Similarly, a number of courts following the logic of *Peterson* have limited Rule 502(d) to providing for clawback agreements and similar proactive devices for addressing inadvertent disclosures in advance of a problem actually arising. In *Rajala v. McGuire Woods, LLP*, for example, the court considered a motion for entry of such a clawback provision.[157] In deciding whether and in what form to grant the motion, the court hewed closely to Rule 502(b).[158] The court focused its analysis largely on whether a Rule 502(d) order would help prevent disputes regarding (1) the proper understanding of the term "inadvertent" (the principle concern of Rule 502(b)(1));[159] (2) the propriety of a party's efforts to avoid inadvertent disclo-

150. Peterson v. Bernardi, 262 F.R.D. 424 (D. N.J. 2009).
151. *Id.* at 426.
152. *Id.* at 427 n.1.
153. *Id.* at 427-30.
154. *Id.* at 430.
155. *Id.* at 430-31.
156. *Id.* at 431 (emphasis added).
157. No. 08-2638-CM-DWJ, 2010 WL 2949582 (D. Kan. July 22, 2010).
158. *See id.* at *3-8.
159. *Id.* at *7.

sure (the principle concern of Rule 502(b)(2));[160] and (3) the cost-savings issues that motivated the adoption of the rule in the first place.[161] This analysis directly reflected the *Rajala* court's stated understanding of the power conferred by Rule 502(d) to "fashion an order, upon a party's motion or its own motion, to limit the effect of waiver when a party inadvertently discloses attorney-client privileged information or work product materials."[162] In short, even in choosing to proactively address inadvertent disclosure issues, the court still viewed Rule 502(d) as little more than a vehicle for enforcing the express substantive protections contained in the first two provisions of the rule.[163]

Ultimately, this approach to Rule 502(d) does not comport with the text enacted by Congress. First, as will be discussed in greater detail *infra*, Rule 502(d) contains no limiting language. It does not reference Rule 502(a) or (b). It does not reference inadvertent disclosure or subject matter waiver. Rather, it is only restricted in one way: a court may only regulate the consequences of disclosure "connected with the litigation pending before the court."[164] Further, the language of Rule 502(a) and Rule 502(b) does not suggest an external enforcement mechanism is even necessary. Rule 502(a) focuses on subject matter waiver – not the very different Rule 502(d) question of "non-waiver." Assessing the scope of a given waiver has always fallen within a trial court's broad discretion, and Rule 502(a), while arguably narrowing that discretion, does not demand any sort of procedural change for exercising that discretion. Rule 502(b) also focuses on a different problem than Rule 502(d) – *ex post* correction of a mistake that has already occurred. Rule 502(d), on the other hand, is concerned with whether a future disclosure will work a waiver. This fact is underscored in the Advisory Committee notes to Rule 502(d). The note explaining Rule 502(d) associates it with pro-

160. *Id.* at *6.

161. *Id.* at *7; *see supra* Part III.A.

162. *Rajala*, 2010 WL 2949582, at *4. In keeping with this view, the *Rajala* court later refused to enter an order exceeding these bounds when it excluded certain additional requested provisions, such as a clawback protection for documents that a party failed to properly designate as confidential. *Id.* at *8.

163. For another, albeit somewhat unusual, decision reaching similar conclusions, see *Alcon Mfg., Ltd. v. Apotex, Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465 (S.D. Ind. Nov. 26, 2008). *Alcon*, decided only two months after the rule went into effect, was one of the first cases to address the application of Rule 502(d). *See id.* The *Alcon* court afforded a pre-Rule 502 order with Rule 502(d) status because the disclosing party had made a "good-faith representation that [its] disclosure was inadvertent" and had promptly acted to recover the documents. *Id.* at *6. Though the court only cited to Rule 502(b) in passing, its analysis very much mirrors that of the other cases treating Rule 502(d) as a mechanism of Rule 502(a) and Rule 502(b). *Id.* at *4.

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

active confidentiality orders – not the retroactive considerations of Rule 502(b).[165]

Consequently, the early cases reducing Rule 502(d) to a simple tool of Rules 502(a) and (b) are likely in error. A court need not reference Rule 502(d) to enforce Rules 502(a) or (b), and conversely, a court need not limit its authority to enter non-waiver orders based on those provisions.

2. The "Compulsion" Approach

A second group of courts has taken a more liberal view of Rule 502(d) that stops short of allowing wholesale voluntary disclosures but still treats the new authority conferred by Rule 502(d) as a freestanding tool of judicial economy. This small but growing number of courts have issued Rule 502(d) orders to protect a party's claim of privilege while requiring that party to disclose privileged material in discovery. Borne of the cost-saving imperative underlying Rules 502(a) and (b), this approach increasingly looks to become a major corollary to the clawback approach discussed *supra*.[166] Of some concern, these courts have effectively negated parties' ability to assert claims of privilege – the most significant and frequent objection to compelled discovery – and, in some cases, have completely abrogated the Rule 502(b) requirement that a party take reasonable steps to prevent inadvertent disclosures.

Radian Asset Assurance v. College of Christian Brothers of New Mexico represents a prime example of this emerging trend.[167] In *Radian*, the defendant objected to a request for production that demanded it surrender 52 backup tapes and 135 hard drives.[168] By the time of the hearing on the plaintiff's motion to compel, the defendant had only successfully reviewed 6 of the hard drives, and it had only restored 26.5 of the backup tapes.[169] At the hearing, the court proposed issuing a Rule 502(d) order to alleviate any privilege concerns associated with compelling the production of all of the requested materials.[170] The court rejected the plaintiff's argument that allowing whole-

165. FED. R. EVID. 502 advisory committee notes to subdivision (d).

166. *See supra* notes 157-63 and accompanying text.

167. No. CIV 09-0885 JB/DJS, 2010 WL 4928866 (D.N.M. Oct. 22, 2010).

168. *Id.* at *1.

169. *Id.*

170. *Id.* at *2 ("At the October 4, 2010 hearing, the Court proposed ordering the College to produce the CSF ESI, subject to an order under rule 502(d) preserving the College's claims of privilege and of protections for the materials."). The court indicates in its opinion that the defendants were amenable to disclosing the requested materials under a Rule 502(d) order once the court suggested that solution. *Id.* The opinion does not provide sufficient information to assess whether the defendant actually approved of this compromise position or, instead, it read the writing on the wall and seized upon the opportunity to cut its losses. *See id.* Regardless, a court's ability to enter *sua sponte* Rule 502(d) orders to overcome privilege objections in this way presents its own freestanding concerns.

sale disclosure without any review – for privilege or anything else – violated various civil procedure rules or otherwise unfairly shifted costs.[171] It then compelled disclosure but issued an order that "pursuant to [R]ule 502(d) of the Federal Rules of Evidence . . . the disclosure by the College to Radian Asset of the [backup tapes and hard drives] is and shall be made without waiver of any attorney-client privilege or work-product protection[.]"[172] In so doing, the court absolved the defendant of its responsibility to protect its privilege claims – thereby saving potentially enormous document review expenses – while still providing the plaintiff with the material it believed was necessary to prove its case.

And *Radian* is not an aberration. A handful of other cases have reached similar conclusions. In *Wade v. Gaither*, for instance, the court simply granted a motion to compel and dropped a reference to Rule 502(d) in a footnote at the end of its order.[173] Unlike the *Radian* defendant, however, the *Wade* defendant did not acquiesce to a Rule 502(d) order.[174] Instead, the court forced discovery over the defendant's persistent objection.[175] In *PIC Group, Inc. v. LandCoast Insulation, Inc.*, the court used Rule 502(d) to temper discovery sanctions imposed on a defendant.[176] Specifically, the court ordered the defendant to turn over an expert's hard drive after the expert ran a program that deleted certain key discovery materials.[177] While the court was determined to give the plaintiffs access to the withheld and purportedly deleted materials, it was unwilling to impose a waiver of the attorney-client privilege with respect to the defendant's communications with the expert or the expert's electronic documents unrelated to the pending litigation.[178] Accordingly, the court used the Rule 502(d) order to both support and tailor its compelled disclosure sanction.[179]

Finally, Judge Shira Scheindlin of the Southern District of New York, the author of the landmark *Zubulake v. UBS Warburg* decision,[180] has joined

171. *Id.* at *8-9. This cost-shifting issue is addressed in greater detail *infra* in Part V.A as one of the significant problems starting to become apparent in the case law. As it relates to the present discussion, the cost-shifting problem represents one of the few checks that might dissuade a court from simply gutting privilege protections by compelling privileged disclosures as a matter of course.

172. *Id.* at *9.

173. No. 2:08-cv-641-WFD-DN, 2010 WL 624249, at *3, *3 n.15 (D. Utah Feb. 20, 2010).

174. *See id.* at *1-3.

175. *Id.* at *3.

176. No. 1:09–CV–662–KS–MTP, 2011 WL 2669144, at *4 (S.D. Miss. July 7, 2011).

177. *Id.*

178. *Id.*

179. *Id.*

180. 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (functionally creating modern "hold notice" requirements).

the growing list of jurists subscribing to the use of Rule 502(d) as a way to compel disclosure without stripping a party of its privilege claims. In *Pensions Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, the defendants sought sanctions against the plaintiffs for permitting the "destruction of relevant evidence, submit[ting] false and misleading declarations, and … [giving] false deposition testimony."[181] When the plaintiffs responded to the sanctions motion, they served the defendants with "heavily redacted copies" of the declarations supporting their defense.[182] Responding to the defendant's demand for unredacted copies, Judge Scheindlin ordered the plaintiffs to remove most of their redactions but ordered that the disclosure of the redacted material would not work as a waiver per Rule 502(d).[183] In so doing, Judge Scheindlin took the compelled disclosure track of Rule 502(d) jurisprudence in something of a new direction. She used the rule to support a compelled disclosure related to a *collateral proceeding* rather than the core merits dispute.[184] Thus, her decision to grant the defendant's request for access went beyond the realm of discovery.

Ultimately, the "compulsion" jurisprudence developing around Rule 502(d) appears to be growing. These early decisions use Rule 502(d) to protect advertent but involuntary disclosures. Though seemingly equitable in cases like *Radian*, where the subject party was satisfied with Rule 502(d) protection, this trend presents an array of troubling questions in other circumstances that, as discussed at length *infra* in Part V, strike to the very heart of the attorney-client privilege and threaten its continued reliability. Moreover, though arguably permitted by the plain language of the rule, nothing in the rule's text, interpretive notes, or legislative history suggests Congress intended for courts to be able to force parties to share their privileged documents with adversaries in cases. This "compulsion" approach to Rule 502(d) represents, perhaps, the most troubling line of cases to emerge thus far.

3. The "Separate Authority" Approach

The most striking development in the early case law, however, has not been the anticipated use of Rule 502(d) orders to support Rule 502(a) and Rule 502(b) or the district courts' realization that Rule 502(d) can smooth the way for compelling disclosure. Instead, what stands out as the most interesting, and perhaps most far-reaching, development is the increasing number of courts that view Rule 502(d) as a source of broad authority to authorize *any* sort of privileged disclosure – even voluntary sharing between parties – that advances pending litigation. Specifically, two undeveloped but increasing lines of authority suggest that Rule 502(d) may be able to protect any disclo-

181. No. 05 Civ. 9016(SAS), 2009 WL 2921302, at *1 (S.D.N.Y. Sept. 8, 2009).
182. *Id.*
183. *Id.* at *1.
184. *See generally id.*

sure authorized by a district court. The first line of authority still maintains the pretense of linking Rule 502(d) to Rule 502(b), but in truth, advocates a freestanding protection for voluntary disclosures. The second line of cases goes one step further and would authorize courts to ratify virtually any voluntary disclosure between parties.

Before turning to these two schools of thought, it is important to note one important precursor concept that permeates all of the "separate authority" case law. The provisions of Rule 502 can be broken out in a variety of ways. One approach used by courts that have adopted the "enabling" view treats Rules 502(a) and (b) as the only substantive provisions of the rule and regards the remainder of the rule as providing the mechanics for carrying out those substantive provisions. The courts in the "separate authority" cases appear to take a different view. Rather than treating Rule 502(d) as a mechanical device, they treat it, along with Rule 502(e), as a source of proactive relief while viewing Rule 502(a) and (b) as sources of reactive relief. The decision in *Community Bank v. Progressive Casualty Insurance Co*. provides an important example of this mode of Rule 502 analysis.[185] In that case, the court started by rejecting the parties *ex ante* Rule 502(e) agreement.[186] While it acknowledged that Rule 502(e) was a source of proactive relief, it found the agreement too technically flawed to permit enforcement.[187] The court then moved to Rule 502(b) as the source of appropriate *ex post* authority after noting the parties had not sought a Rule 502(d) order.[188] Thus, *Community Bank* squarely bifurcates Rules 502(a) and (b) from Rules 502(d) and (e). As the cases *infra* bear out, this distinction between proactive relief under Rules 502(d) and (e) versus reactive relief under Rules 502(a) and (b) provides one of the primary justifications for applying a broad reading to the plain language of Rule 502(d).

The first of the "separate authority" approaches to emerge looks and feels very much like the "enabling" interpretation discussed *supra*.[189] In these cases, courts typically invoke Rule 502(d) to preserve privilege where one party allows another party to take a "quick peek" at privileged materials either to test the accuracy of a privilege log or otherwise confirm the disclosing party has acted in good faith.[190] *Flomo v. Bridgestone Americas Holding, Inc.* provides a particularly bold application of this "quick peek" view.[191] In ordering significant disclosures from the defendant, the *Flomo* court paused

185. No. 1:08-cv-01443-WTL-JMS, 2010 WL 1435368 (S.D. Ind. Apr. 8, 2010).

186. *Id.* at *3.

187. *Id.* at *3-4.

188. *Id.* at *4.

189. *See supra* Part IV.B.1.

190. *See, e.g.*, D'Onofrio v. SFX Sports Grp., Inc., No. 06-687 (JDB/JMF), 2010 WL 3324964, at *3 (D.D.C. Aug. 24, 2010) (noting the court's use of a protective order promulgated under Rule 502(d) and (e) "to permit plaintiff to test the validity of the privilege log" without working a waiver of any claimed privilege).

191. No. 1:06-cv-00627-DHF-JMS, 2009 WL 1456736 (S.D. Ind. May 20, 2009).

to note that, "[i]f [d]efendants are concerned about the inadvertent disclosure of privileged information by making available documents that they have not themselves reviewed, the Court directs Defendants to [Fed. R. Evid.] 502(d) and (e), which may provide a vehicle to minimize the risk."[192] The *Flomo* court's superficial adherence to the "inadvertent disclosure" justification of Rule 502(b) belies its apparent understanding of the rule. After all, the court suggested that the defendant seek an order protecting privilege over documents the defendant planned to intentionally surrender – either voluntarily or under compulsion of court order.[193] Thus, nothing about the disclosure in *Flomo* was poised to be "inadvertent." Instead, the court was inviting the defendant to make voluntary disclosures under the protection of Rule 502(d).[194] Therefore, this approach only imposes the most superficial of limits on the ability of parties to protect their privilege claims while at the same time authorizing regular disclosure of protected documents.

Not all of the courts have been so coy, however. A small number have begun shedding all restriction and treating Rule 502(d) as exactly what its language provides – a broad grant of judicial authority confined only by the bounds of trial court discretion. Nowhere is this approach more clearly articulated than the increasingly cited decision in *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp*.[195] Though *Whitaker* actually applied Rule 502(d) to compel a particular disclosure, the court's reasoning pushes Rule 502(d) past the ordinary "compulsion" approach discussed *supra*. The non-moving party in *Whitaker* expressly argued that "Rule 502 is limited to inadvertent disclosures."[196] Rejecting this contention, the court explained:

> Although the rule address [sic] the consequences of an inadvertent disclosure of privileged information, this is not the extent of the rule. Instead, the plain language of the rule addresses the "disclosure of a communication or information covered by the attorney-

192. *Id.* at *8 n.5.

193. *Id.* This point bears additional emphasis. Whether by mistake or some new understanding of the law, many of the courts applying Rule 502 appear to conflate "inadvertent" with "involuntary." In a case like *Flomo* where a party has agreed to disclose documents, there is nothing "inadvertent" about the disclosure because the documents are intentionally provided to the opposing party. *Id.* at *3. Similarly, where a court orders disclosure, the disclosing party is still intentionally transmitting documents it believes to be privileged. Hence, Rule 502(b) and its approach to inadvertent disclosures should, when viewed properly, be inapposite to voluntary and involuntary-but-compelled disclosures.

194. *See id.* at *8 n.5.

195. No. 4:08-CV-684-Y, 2009 WL 464989 (N.D. Tex. Feb. 23, 2009).

196. *Id.* at *4.

> client privilege or work-product protection" in various "circumstances."[197]

Accordingly, the court broadly ordered that disclosure in the then-pending suit would not work as a waiver in any other litigation.[198] The most important facet of *Whitaker* is its unequivocal resort to the plain language of the rule in the face of an argument pointing to the clear purpose of the rule. In short, the court's reading as excerpted above would place no limits on the sorts of disclosures that could be protected by a Rule 502(d) order.

Two important decisions, one of which has been implicitly ratified by the United States Supreme Court, support *Whitaker*'s approach. First, in *Jicarilla Apache Nation v. United States*, the United States Court of Federal Claims entered an order compelling the Government to disclose certain documents and refusing to stay the litigation pending appeal.[199] Based on this order, the parties subsequently developed and presented a joint stipulation and proposed order pursuant to Rule 502(d).[200] The order preserved any claim of privilege attached to any document disclosed pursuant to the court's earlier order.[201] After the order was entered, the Government disclosed the documents and pursued an appeal.[202] That appeal ultimately reached the United States Supreme Court.[203] The point of this procedural narrative is simple: the stipulated order developed by the parties and entered by the Court of Federal Claims had the effect of preserving privilege in the context of a voluntary disclosure. If it had not, then the Government would have lacked standing because the privilege would no longer have existed. But, instead, as the Supreme Court noted in its decision, the "Government's compliance with the production order [did] not affect [the Court's] review" because the Government only complied after the entry of a "protective order."[204] Therefore, while certainly collateral to the main decision, this single footnote strongly suggests that the Court was willing to accept that the Rule 502(d) order protecting a voluntary, rather than inadvertent, disclosure was sufficiently effective to preserve the privilege pending review *after the documents were disclosed*.

The second important decision illustrates how *Whitaker*'s view of Rule 502(d) is being used even outside of the district courts to authorize wholesale voluntary disclosures. In *In re Portland Natural Gas Transmission System*,

197. *Id.* (quoting FED. R. EVID. 502).

198. *Id.* at *5-8.

199. 91 Fed. Cl. 489, 496 (Fed. Cl. 2010).

200. Jicarilla Apache Nation v. United States, 93 Fed. Cl. 219, 219-21 (Fed. Cl. 2010).

201. *Id.* at 220.

202. *In re* United States, 590 F.3d 1305 (Fed. Cir. 2009), *rev'd sub nom.* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (U.S. 2011).

203. *See Jicarilla Apache Nation*, 131 S. Ct. 2313.

204. *Id.* at 2320 n.2.

the presiding administrative law judge entered a stipulated protective order dictating that disclosure of a specific document that a party had claimed was privileged would not work a waiver in that litigation or any other matter pursuant to Rule 502(d).[205] As a consequence, the parties were able to avoid a costly dispute about whether the commission should compel disclosure.[206] The commission's decision demonstrates the logical endpoint of *Whitaker*'s "plain language" approach – complete abrogation of the disclosure rule in the discovery context. This case presents an extreme example: parties were permitted to use Rule 502(d) to agree, some might even say collude, to engage in private discovery proceedings shielded from public view.

The plain language reading of Rule 502(d) advocated explicitly by *Whitaker* and implicitly by the other courts discussed in this section would effectively authorize courts to ratify any disclosure of any information between parties in pending litigation. Taken to its logical end, this approach could permit a broad shielding of litigation proceedings and disclosure from the public record while also largely obviating the need for privilege review and other measures to prevent disclosure of privileged information. Interestingly, this approach encourages courts to advance their own interests – specifically their own dockets – and the interests of the parties in front of them without regard to the secondary consequences a Rule 502(d) order could create. Thus, it appears quite likely that more and more courts will begin moving toward this "separate authority" approach and taking a broader view of their own discretion to authorize this unfettered-but-private exchange of information in an effort to move pending litigation along all the while failing to account for potential collateral costs.

V. POTENTIAL CONSEQUENCES OF A PLAIN LANGUAGE ADOPTION OF RULE 502(D)

The three emerging approaches discussed in Part IV make one thing clear: Rule 502(d) has the potential to be revolutionary. And "revolutionary" is not a term used lightly. Unlike so many other so-called "revolutionary" developments in the rules and cases governing modern civil procedure and evidence, Rule 502(d) may bring about a fundamental Gestalt switch in how American litigants (and litigators) view not only discovery, but the role and function of the attorney-client privilege, the appropriate reach of judicial authority, and the proper understanding of the courts as a public system employed to resolve private disputes.

Virtually all of the scholarship addressing Rule 502(d) has focused on the validity of the rule as an appropriate exercise of congressional author-

205. 132 F.E.R.C. 63015 (2010), 2010 WL 3738365.
206. *See id.*

ity.[207] This Part takes the constitutionality of Rule 502(d) as a given and, instead, seeks to refocus the discussion on the Rule's potential consequences. To that end, it explores a non-exhaustive list of three major issues presented by the rule: (1) whether Rule 502(d) orders reduce costs or merely shift the burden and risk of privilege review to the receiving party; (2) whether prophylactic Rule 502(d) orders may ultimately undermine client confidence in the attorney-client privilege; and (3) whether Rule 502(d) orders implicate the Due Process rights of absent parties.

A. The Cost-Shifting Effect of Rule 502(d)

Before turning to its more far-reaching implications, the first major issue presented by Rule 502(d) is whether it actually accomplishes anything. After all, as has been discussed at length, the fundamental goal of the new rule – regardless of which interpretive approach a court applies – is to expedite litigation and reduce costs. But the early case law has raised an important question: does a Rule 502(d) order protecting privilege actually reduce costs, or does it merely shift the cost of privilege review and the attendant risk of failing to spot privileged documents to the receiving party? While the answer to this question remains uncertain in light of the varying early applications of the rule, this potential problem presents a range of possibilities that could, in practice, defeat any gains created by issuing Rule 502(d) orders in a majority of cases.

The most common emerging use of Rule 502(d) orders appears to adhere to a consistent pattern. First, the court enters a Rule 502(d) order finding that any "disclosure of privileged information" in the course of discovery will not work a waiver.[208] The order likely would not make any reference to inadvertence notwithstanding the fact that most courts already appear to believe their orders imply an inadvertence limitation.[209] Second, relying upon the order, the disclosing party forgoes privilege review or applies a very minimalist privilege review protocol.[210] Third, the receiving party evaluates the

207. *See* 2 CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE § 5:35 (2012) (defending Congress's Commerce Clause authority to enact the rule); Roger P. Meyers, *An Analysis of Federal Rule of Evidence 502 and its Early Application*, 55 WAYNE L. REV. 1441, 1462-68 (2009) (touching upon constitutionality of application of federal orders to state courts); 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 (2009) (focusing on the legislative constitutionality issues of the rule).

208. *See, e.g.*, Flomo v. Bridgestone Ams. Holding, Inc., No. 1:06-cv-00627-DFH-JMS, 2009 WL 1456736, at *8 n.5 (S.D. Ind. May 20, 2009).

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

210. The lack of authority on this particular point is a function of the relative novelty of prophylactic Rule 502(d) orders. An exhaustive search reveals no cases

documents it receives. It can no longer assume that it has received non-privileged material from the opposing party.[211] Thus, the receiving party does not know whether any of the documents it has received from opposing counsel will be subject to a claim of privilege that has been protected by the Rule 502(d) order.[212] This mundane but problematic sequence of events appears to be based on the generally consistent trends exhibited by the limited Rule 502(d) corpus.

The first possible consequence of this scenario is that litigants and courts will discover that worries about cost shifting are much ado about nothing. After all, a receiving party winnows down mountains of documents to a small selection it views as important to its case. Once it has done so, quickly ascertaining whether that much smaller selection is privileged may not require much additional effort. Further, courts could make disclosure of major privilege flags, such as the names of in-house and outside counsel, part of the discovery process without adding any meaningful cost. Thus, while the receiving parties would have some uncertainty, a few minor adjustments could restore their confidence in their ability to rely on the produced materials as non-privileged evidence.

Still, this outcome only works if a few requirements are met. First, receiving parties will have to develop yet unseen ways of assuring themselves that materials they received are not privileged and, therefore, be able to confidently rely on them going forward. More specifically, receiving parties will need to develop verification procedures to determine a document's status without prematurely disclosing their interest in a given document – lest they sacrifice a strategic advantage in the name of verification. Second, this outcome also falls apart if disclosing parties attempt to broadly assert privilege claims over any damaging evidence that comes to light as the litigation proceeds. After all, the disclosing party, acting under a Rule 502(d) order, has made no implicit or explicit certification that it believes it is producing *non-privileged* responsive documents. Thus, if disclosing parties routinely assert privilege citing a Rule 502(d) order well after disclosure, then the risk of evidence being snatched away likely would persist. That risk would force receiving parties to carefully conduct privilege reviews of disclosed documents to evaluate whether a given piece of evidence will ultimately be barred by a privilege claim.

The second possibility is that Rule 502(d) does shift the costs – resulting in a zero net gain. The mechanics of this outcome are actually quite simple.

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yet where a party specifically challenges the deficient review of disclosing party in the context of a Rule 502(d) order after the fact.

211. *See* Rajala v. McGuire Woods, LLP, No. 08–2638–CM–DJW, 2010 WL 2949582, at *3 (D. Kan. July 22, 2010) (noting receiving party's argument that it "would essentially be made to perform [the disclosing party's] privilege review and proceed with depositions and motion practice with the ever-present concern that any document could suddenly be taken back by [the disclosing party]").

212. *Id.* at *3-4.

After a court issues an order preserving the privilege, the privileged documents are subject to exclusion at all phases of the litigation, including in motions for summary judgment[213] and at trial.[214] Further, assuming litigants continue to behave as they do now, neither of the preconditions discussed *supra* will be satisfied – receiving parties will not be satisfied with their ability to anticipate claims of privilege absent full-blown privilege reviews and disclosing parties will make Rule 502(d) privilege claims at critical points, such as during motions for summary judgment, to challenge adverse evidence. As a consequence, one likely outcome may be that Rule 502(d) orders simply force receiving parties to conduct full privilege reviews. Such a shift would, at minimum, move the costs of discovery currently charged to disclosing parties over to receiving parties. In reality, this practice could actually *increase* discovery costs from their present level by sharing rather than completely shifting privilege protection costs. Because, as noted earlier, some courts mix Rule 502(b) and Rule 502(d) analyses,[215] a court may attempt to assess the reasonableness of a disclosing party's privilege review measures in deciding whether to enforce the Rule 502(d) order to exclude evidence. Consequently, at least in jurisdictions exhibiting any tendency to link Rule 502(d) and Rule 502(b), disclosing parties would be well-advised to conduct at least some sort of privilege review to justify later Rule 502(d) claims. Hence, in this scenario, the combined efforts of both parties to screen for privilege would, at minimum, match and possibly increase discovery costs.

Still, the third possible outcome is even worse. Rule 502(d) orders could dramatically escalate the costs of discovery. In all likelihood, Rule 502(d) orders might lull disclosing parties into relaxing their privilege reviews. As a result, damning documents will eventually be disclosed. Thus, a disclosing party will be faced with the very high likelihood that the receiving party will work vigorously to admit these particularly adverse privileged documents. Put simply, Rule 502(d) will only reduce the costs of disclosing parties if receiving parties accept that they cannot circumvent the protection of a Rule 502(d) order – notwithstanding the fact that they may be looking at the proverbial smoking gun. In reality, receiving parties are far more likely to seek to strip away such protections under the guise of penalizing the disclosing party for wholesale or unjustifiable failures to stop the disclosure of privileged information. If courts permit this sort of gamesmanship and allow receiving parties to work around Rule 502(d) orders, then discovery costs may well escalate dramatically. Disclosing parties would be forced to engage in the same costly privilege reviews they do today to ensure the protections of a

213. *See, e.g.*, Alexander v. CareSource, 576 F.3d 551, 558 (6th Cir. 2009) ("[E]vidence submitted in opposition to a motion for summary judgment must be admissible." (quoting Alpert v. United States, 481 F.3d 404, 409 (6th Cir. 2007) (internal quotation marks omitted))).

214. *See generally* Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) (explaining and affirming the exclusion of evidence under the privilege).

215. *See supra* Part IV.B.1.

Rule 502(d) order will continue to apply. In short, depending on how courts choose to enforce the protections of a Rule 502(d) order, these new "cost-saving" "protections" could actually double the amount of privilege review required.

As with so many aspects of Rule 502(d), it is too soon to tell how orders preserving privilege will play out. Nonetheless, if past litigation behavior is any indicator of future action, only a strong judicial refusal to bend on the protections granted by Rule 502(d) orders and an effort to provide clarity to receiving parties will actually bring about any meaningful cost-savings. In particular, courts should take three important steps to avoid these problems. First, Rule 502(d) disclosures cannot be linked to the abstract "reasonable steps" analysis governing Rule 502(b) determinations.[216] Either disclosing parties must be permitted to safely abandon all privilege review (not that they actually will do so) without fear of later consequences, or, alternatively, courts must specifically identify in a given order what steps a disclosing party must take. This measure would prevent receiving parties from seeking to work around Rule 502(d) orders – the primary risk that would motivate continued privilege review expenditures by disclosing parties in a Rule 502(d) world. Second, courts should require disclosing parties that want the benefit of Rule 502(d) to provide a comprehensive and exclusive list of attorneys, employees, and agents. Such a requirement would give receiving parties the ability to make provisional privilege determinations after identifying the documents they wish to use as evidence. Third, receiving parties should be afforded an opportunity to invite an *in limine*-style review in advance of any attempt to rely upon documents disclosed under a Rule 502(d) order. This last requirement is key because receiving parties will not be able to confidently make use of any disclosed documents if they have no vehicle for determining whether a Rule 502(d) order will pull the documents out of their hands.[217] Together, these three guidelines may be able to dramatically reduce the persistent risks that threaten the efficacy of Rule 502(d) as a cost-reducing tool.

B. Attorney-Client Privilege in a Rule 502(d) World

Unlike the issue of potential cost shifting, the next problem presented by Rule 502(d) orders has far broader implications. As one early commentator has explained, Rule 502(d) orders may well become prophylactic devices included as a matter of course in court scheduling orders.[218] In theory, such an approach makes sense. It would create uniformity between pending mat-

216. FED. R. EVID. 502(b), (d); *see supra* note 117-21 and accompanying text.

217. *See* FED. R. EVID. 502(d). This problem obviously exists anytime a system does not impose a total waiver based on inadvertent disclosures, but it is particularly exacerbated if the disclosing party is relieved of all risk and responsibility.

218. *See* Noyes, *supra* note 207, at 756-57.

ters, provide predictability at the outset of litigation, and functionally eliminate the need for Rule 502(b) analysis by addressing all potential privilege disclosures *ex ante*. In practice, however, widespread use of Rule 502(d) orders to make the disclosure of privileged information routine could produce several severe consequences. The regular disclosure of privileged material – through sloppy (or non-existent) privilege reviews or voluntary sharing – may ultimately whittle away client confidence in the ability of the privilege to protect their secrets. More practically, it would encourage the disclosure of privileged information that, while forbidden from use by such an order, would still impart critical knowledge to opposing parties. Finally, Rule 502(d) orders, married with the "compulsion" approach discussed earlier, could place forced disclosures beyond the critically important reach of meaningful review.

Should Rule 502(d) orders become commonplace and the expectation that counsel protect privileged documents start to fall away, *client faith in the promise of privilege* – the most critical cornerstone supporting the persistence of the attorney-client privilege – could give way. To lawyers and the lawyer-legislators behind Rule 502, privilege is often viewed only as an important shield at critical moments in the litigation process. Clients, however, are likely to see privilege in a very different light. The privilege does not only protect their disclosures years later in the face of discovery requests. Instead, it authorizes, enables, empowers, and otherwise eases the process of sharing the truth with counsel. Thus, while lawyers tend to consider privilege in the context of discovery and, to a lesser extent, trial, clients worry about the protection of their confidences from the outset of the attorney-client relationship.

That initial need to assess the risk that confidences will escape the bounds of the attorney-client relationship is where regular use of Rule 502(d) orders may become a problem. Though counsel obviously cannot voluntarily share privileged information without client authorization in most circumstances,[219] the early case law readily demonstrates that courts and attorneys see Rule 502(d) as a way to reduce the amount of effort they put into protecting privileged communications from inadvertent disclosure.[220] As that bur-

219. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009) ("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).").

220. *See* Radian Asset Assurance v. Coll. of the Christian Bros., No. CIV 09-0885 JB/DJS, 2010 WL 4928866, at *7-9 (D.N.M. Oct. 22, 2010) (authorizing the wholesale, unreviewed disclosure of large quantities of electronic documents over objections by the receiving party); Rajala v. McGuire Woods, LLP, No. 08-2638-CM-DJW, 2010 WL 2949582, at *2, *7 (D. Kan. July 22, 2010) (accepting a Rule 502(d) order offered to help prevent "contentious, costly, and time consuming discovery disputes"); Flomo v. Bridgestone Ams. Holding, Inc., No. 1:06-cv-00627-DFH-JMS, 2009 WL 1456736, at *8, *8 n.5 (S.D. Ind. May 20, 2009) (encouraging the parties to seek a Rule 502(d) order after noting that the disclosing party need not conduct a

den wanes under Rule 502(d) orders, more and more "inadvertent" disclosures will occur. In fact, should courts move toward the "separate authority" approach and circumvent the "reasonable means" requirement of Rule 502(b), "inadvertent" disclosures could become a feature of all large-scale (and most small-scale) litigation.

From the litigator's perspective, this turn of events may not seem problematic. But from the client's perspective, every inadvertent disclosure – whether used by the other side or not – represents a loss of control over sensitive information that began when the client relied upon the privilege in deciding to share confidences with counsel. As the risk of disclosure increases, the potential benefit from engaging in "privileged" communications declines. While some communication will always be necessary to press a claim or mount a defense, full disclosure, or at least near-full disclosure, will become less and less likely or, for that matter, advisable. In short, if clients cease to believe that the privilege will protect their secrets from disclosure – not just from the use of those secrets as evidence – then the privilege may well be left with nothing (or at least far less) to protect.[221]

Similarly, Rule 502(d) also threatens the protective reach of the privilege insofar as early use of these orders incorrectly appears to assume that the disclosure of privileged documents can be undone by a simple judicial command. Relying on a judicial fiat to excuse these disclosures is problematic for a number of reasons.[222] Perhaps the most straightforward problem, though, is that a court simply cannot "un-ring the bell" after privileged materials have been shown to the other side. Rule 502 is only an evidentiary rule. While it

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comprehensive responsiveness review); Capitol Records, Inc. v. MP3TUNES, LLC, 261 F.R.D. 44, 51 n.6 (S.D.N.Y. 2009) (suggesting a 502(d) order would suffice to alleviate privilege review responsibilities). Notably, even the model ethics rules create an exception for involuntary but intentional disclosures pursuant to a court order. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6). Thus, compelled disclosures can also be seen as an eroding force much to the same extent as protected inadvertent disclosures.

221. The Supreme Court recently recognized this potential, at least implicitly, in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). *Mohawk* held that compelled disclosures do not constitute immediately appealable collateral orders. *Id.* at 603, 609. The Court reasoned that "[o]ne reason for the lack of a discernible chill is that, in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone on the timing of a possible appeal." *Id.* at 607. But the Court dropped a footnote in which it paused to caution that "[p]erhaps the situation would be different if district courts were systematically underenforcing the privilege, but we have no indication that this is the case." *Id.* at 607 n.2. Arguably, the widespread underenforcement envisioned by the Court may well become a very real problem under a broader Rule 502(d) regime.

222. One particularly interesting problem that falls beyond the scope of this particular discussion is that Rule 502(d) orders may authorize lawyers to engage in disclosures that could violate professional responsibility requirements in some states. *See* Noyes, *supra* note 207, at 742-53.

does dictate how privileged materials can be used, it has no mechanism for accounting for the harmful effects of disclosing secret information. Once a receiving party knows the disclosing party's secrets, it cannot help but adjust its strategy around those secrets even if it cannot use the documents that conveyed the information.

At least a handful of courts have begun addressing this issue. In *Jicarilla Apache Nation v. United States*, a party facing a forced disclosure objected that it would be harmed by turning over its own privileged materials even in light of the court's offer to issue a protective order.[223] Rejecting the defendant's prejudice arguments, the court held:

> While defendant contends that this remedy is inadequate – that the court cannot thereby "un-ring the bell" after the documents are produced – that simply is untrue. A procedure similar to that described – the preliminary provision of documents and the ordering of their return upon a subsequent determination that a privilege lies – is specifically sanctioned by recent amendments to the Federal Rules of Civil Procedure (and this court's rules).[224]

Similarly, even before the enactment of Rule 502, earlier courts, such as the court in *Stratienko v. Chattanooga-Hamilton County Hospital Authority*, held that, even if it could not "un-ring that bell . . . the Court can, and will, ensure that any evidence used in this matter complies with the Federal Rules of Evidence and the Federal Rules of Civil Procedure."[225]

But these judicial pronouncements miss the point of the disclosing parties' objections. Use of privileged documents as evidence only represents half the problem. The other half of the problem is that a receiving party cannot reasonably be expected to put privileged information out of its mind once it has reviewed it. The best solution devised by a court thus far has been to mark Rule 502(d) protected materials as "Attorneys' Eyes Only."[226] But restricting access to attorneys does not address the fact that those attorneys will internally retain the information clawed back under a Rule 502(d) order.[227] Reliance on the legal fiction that clawing back information "un-rings the bell" simply will not suffice. At a minimum, this risk of improper use of

223. 91 Fed. Cl. 489, 494 (Fed. Cl. 2010).

224. *Id.*

225. No. 1:07-CV-258, 2008 WL 2001990, at *4 (E.D. Tenn. May 7, 2008), *aff'd*, 402 Fed. App'x 990 (6th Cir. 2010).

226. *See* D'Onofrio v. SFX Sports Grp., Inc., 256 F.R.D. 277, 279 (D.D.C. 2009).

227. Further, the "Attorneys' Eyes Only" designation cannot reasonably be affixed to every document. But if the disclosing party provides documents without substantial review, it will not know until after the fact – and possibly after non-attorneys on the receiving side – that it has disclosed documents that should be so designated. Thus, this solution, as in *D'Onofrio*, could only conceivably work in the context of a compelled disclosure.

privileged material threatens to force parties to continue with costly privilege reviews. At worst, it underscores the possibility that clients may lose faith in the privilege when also faced with the reliability issues discussed above.

Finally, Rule 502(d) could well grant district courts unfettered discretion to compel disclosures that leave parties without any hope of immediate judicial review, further deteriorating the attorney-client privilege. Securing interlocutory review is almost always an uphill battle.[228] Parties seeking to prevent compelled disclosures under the pre-Rule 502 privilege regime had, at best, mixed success seeking appellate interdiction to save their claims of privilege from a forced disclosure. In 2009, the Supreme Court closed the door on most immediate appeals in the run of attorney-client privilege discovery disputes. In *Mohawk Industries, Inc. v. Carpenter*, the Court held that adverse attorney-client privilege rulings were *not* collateral orders subject to immediate review.[229] But in *Mohawk*, the district court's adverse ruling was premised upon its belief that the disclosing party had implicitly waived the privilege by making a series of inequitable representations.[230] Now, under Rule 502(d), a district court will no longer need to justify its decision to compel a disclosure. Instead, it may, as the early cases seem to indicate, take a "let's see what happens and address it later" approach.[231] And, in light of *Mohawk*, no review of these orders will be possible outside the context of mandamus in most cases.[232] Given the extraordinary difficulty attendant to securing mandamus relief and Rule 502(d)'s ability to ameliorate the worst superficial consequences of compelled disclosure, district courts would ap-

228. *See generally* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 607-09 (2009).

229. *Id.* at 603.

230. *Id.* at 604.

231. Prof. Noyes also provides important commentary on this point. Noyes, *supra* note 207, at 754-56. As he explains, neither the rule nor the advisory committee notes nor the congressional statement of intent give a district court *any* guidance on how to use its newfound discretion. *Id.* at 755. As explained in Part IV *supra,* that oversight in the drafting process has already led to a tripartite split in the early Rule 502(d) jurisprudence. This area is particularly ripe for legislative clarification and express limitation.

232. Admittedly, *Mohawk* suggests immediate review may be available pursuant to 28 U.S.C. § 1292(b). 130 S. Ct. at 607. But such review requires both a controlling question of law and the ability to materially advance litigation. *Id.* Neither feature will likely be present after a district court enters a Rule 502(d) order in most cases because (1) such orders permit the *arguendo* assumption that privileged documents are being disclosed, thus foreclosing the need to address their actual legal status and (2) any gains from an appeal are provided in equal measure by an order creating an artificial shield governing a compelled disclosure. As noted above, *Mohawk* did suggest the collateral order doctrine could apply to permit immediate appeal in the face of systematic underenforcement of the privilege. *Id.* at 607 n.2. Whether that would apply here, what constitutes "systematic" action, and what the Court meant by "underenforcement" all remain to be seen.

pear to have virtually unreviewable authority to compel disclosures as they see fit.

The lack of interlocutory review occasioned by these orders presents two important problems. First, it again undermines the ability of clients to rely upon the privilege at the time they decide to share confidential information with their counsel. Second, it could destroy the uniformity and predictability Rule 502(d) was supposed to create. After all, if more discretion is afforded to individual trial judges, then rulings could vary more significantly from judge to judge and from court to court. Thus, unlike the previous two issues already discussed, the apparently unbounded discretion created as a consequence of Rule 502(d) will also undercut the confidence *counsel* can place in the privilege. In practice, any increase in the ability of district courts to compel disclosures – particularly without any possibility of meaningful review – means counsel cannot comfortably expect that privilege will serve as a trustworthy shield when the time comes.

Rule 502(d) orders have already helped lubricate the sticking points in a number of discovery disputes. But as 502(d) orders become more prevalent and trend toward becoming the norm, they pose serious threats to the entire concept of the attorney-client privilege. This problem can be remedied in one of two ways. Courts could refuse to treat Rule 502(d) orders as prophylactic devices and restrict their use to situations in which they are truly necessary to advance litigation. But that approach will only work if courts generally refrain from using these orders to compel disclosure. Thus, all that would remain would be the very narrow subset of conceivable cases where a disclosing party wants to share information to move a case along but does not want to waive privilege as to the rest of the world. Consequently, such an approach would marginalize Rule 502(d) orders and render them extraordinary devices that can only reduce costs and expedite litigation on rare occasions.

Alternatively, Rule 502(d) orders could be subjected to the strictures of Rule 502(b) with respect to inadvertent disclosures and regularly accepted for interlocutory review with respect to compelled disclosures. Such an approach would encourage counsel to apply "reasonable means" to catch privileged documents and would provide both counsel and clients with confidence that their privileged documents will not be forcibly taken from them for arbitrary reasons – preserving a modicum of faith in the efficacy of the privilege. Again, however, this solution is imperfect. Applying the Rule 502(b) standards would suggest that a party should just wait and address inadvertent disclosures *ex post* – obviating the need for a Rule 502(d) order. And authorizing interlocutory review, while limiting judicial discretion, would add another round of costs to the discovery process.

In sum, there are no easy answers. The broader the reach of Rule 502(d) becomes, the more efficient discovery may become but the less reliable the privilege becomes. The appropriate degree of tradeoff between these two competing values remains to be seen as the case law develops. Regardless, Rule 502(d) and the privilege are on a collision course that may fundamentally alter the way lawyers and clients interact and share information.

C. Absent Parties, Due Process, and Rule 502(d)

Though this Article has generally skirted the underlying issues of legislative constitutionality that have haunted Rule 502 since its inception, one key constitutional issue deserves some discussion. Rule 502(d) affords district courts a very unusual power – the ability to alter the rights of the rest of the world. If a party makes a disclosure pursuant to a Rule 502(d) order, it does not work a waiver "in any other federal or state proceeding."[233] Thus, a non-party that could previously use a disclosure to force the disclosing party to provide the same information in later (or pending) litigation now lacks that ability by virtue of a proceeding to which it is not a party. At least one scholar, Professor Henry Noyes, has argued that any order circumscribing the rights of an absent party in this way could present a due process violation.[234] While Professor Noyes probably overstates the problem, his point is well taken: properly accommodating the due process rights of absent parties will seriously undermine the efficacy of Rule 502(d) as an expediting device.[235]

In what is perhaps the most comprehensive article to address Rule 502, Professor Noyes argues that,

> Entry of a Rule 502(d) order raises a significant question whether it violates the Due Process rights of persons and entities who are not parties to the federal court litigation because the rule purports to make an order of a federal court binding on all persons and entities in all . . . proceedings, whether or not they were parties to the litigation and regardless of whether the nonparties are subject to the jurisdiction of the issuing court.[236]

His argument is not without merit. After all, Rule 502(d) breaks from the traditional limitation that an order is only binding on the parties to the litigation in which it is issued.[237] Additionally, as Professor Noyes also points out, Rule 502(d) purports to allow one federal district court to control the waiver determinations of other federal *and state* courts.[238] This defensive non-mutual collateral estoppel by virtue of an order in a non-precedential court certainly suggests something unusual and possibly unconstitutional.

Nonetheless, these problems likely do not give rise to an actual due process problem notwithstanding the unusual nature of the authority conferred by Rule 502(d). First, the universe of potential non-parties that could

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

234. Noyes, *supra* note 207, at 736-42.

235. *Id.*

236. *Id.* at 736.

237. *Id.* at 736-37 ("[N]o court can make a decree which will bind any one but a party," (quoting Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.))).

238. *Id.* at 740-41.

be inhibited by a Rule 502(d) order falls into two major categories: (1) current adverse parties and (2) potential adverse parties. The due process issues applicable to the former category are easily dispensed. The Federal Rules of Civil Procedure expressly authorize the intervention of interested parties in any proceeding that directly affects their particular interests.[239] Thus, a non-party with a matter pending in another court would have a present interest that would likely create standing to intervene. This solution should resolve the great majority of due process issues presented by Rule 502(d) orders.

The other group – non-parties that are not currently adverse to the disclosing party – presents similar issues that are both more difficult to resolve and less troubling. The procedure discussed above regarding third-party intervention cannot apply. After all, a non-party with no present claim would have no standing to intervene.[240] That fact is only exacerbated by the fact that any intervention – by either group – must be premised on wholesale speculation that the protected documents are somehow relevant to an independent (and possibly unrelated) claim.[241] But courts make decisions that bind future non-party litigants all the time. Protective orders foreclose access to a wide array of materials – sometimes even court documents. Judgments permanently dispose of assets that, as a result, are no longer available to satisfy other claims. And, perhaps most importantly, permanent injunctions mandate conduct that may subsequently produce adverse consequences for an absent non-party that does not face any present harms to justify (or, for that matter, spur) an intervention. Put differently, a Rule 502(d) order only affects the "rights" of absent parties until it does not. A future party could certainly appear before a district court and ask it to revise or rescind a Rule 502(d) order upon good cause shown.[242]

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239. FED. R. CIV. P. 24(a)(2). Though the phrase "subject of the action" is somewhat ambiguous, it may well apply to afford a party an absolute right to intervene so long as the same material is the subject of pending litigation in another court. *See id.* That said, a party would very likely be able to seek, at minimum, leave to intervene by permission. FED. R. CIV. P. 24(b). If a court denied an interested party access after it affirmatively sought to defend its "right" to information, this situation would present a more interesting, and more difficult, due process question.

240. *See* FED. R. CIV. P. 24 (limiting both intervention by right and permissive intervention to parties with a present "interest," "claim," or "defense" that will be affected by a particular judicial ruling).

241. *See id.*

242. Arguably, the mechanism for such a motion would be Federal Rule of Civil Procedure 60(b)(5). Under that rule, a final judgment, order, or proceeding may be revised or rescinded when it ceases to be equitable. FED. R. CIV. P. 60(b)(5). Arguably, a Rule 502(d) order is sufficiently final to warrant Rule 60(b)(5) relief given that it operates like a permanent injunction binding absent parties and other courts. 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2863 (2d ed. 1990 & 2005 Supp.) (citing United States v. Swift & Co., 286 U.S. 106, 114 (1932) for the proposition that a court retains power "to modify an injunction in adaptation to changed conditions, though it was entered by consent . . . .

Second, with respect to courts, the appearance of outside interference in this case is really little more than just that – the *appearance* of interference. All Rule 502(d) orders do is allow courts to make case-specific, unique exceptions to the disclosure rule. Under general principles of comity, it would be bad form in the ordinary course of litigation for another court to revisit a district court's determination that particular conduct did not work a waiver. Rule 502(d) orders simply give that same comity principle the force of law in a very unique subset of situations. Thus, Rule 502(d), at worst, encourages a parallel "race to judgment" to get access to a document before a Rule 502(d) order temporarily closes the door.[243]

Finally, even on a philosophical level, as Professor Noyes acknowledges, it is unclear what cognizable interest is lost as a consequence of a Rule 502(d) order eliminating a single privilege waiver.[244] At best, litigants have some sort of cognizable property right in discovery.[245] But that right is limited to the discovery of *non-privileged* information. Consequently, it becomes a very difficult question whether material subject to a Rule 502(d) order is "non-privileged information." In one sense, it has always been privileged – thus, no right attaches. In another sense, such material is non-privileged following disclosure *but for* the Rule 502(d) order. Again, at the risk of splitting the hair too finely, the answer to this conundrum can likely be found in the legislative history of the rule. Congress soundly rejected any attempt to introduce an evidentiary rule creating "selective waiver."[246] Instead, they adopted a rule that, by its terms, imposes a finding of non-waiver.

While the difference between these two categories is little more than a legal fiction, it may well control this key aspect of the due process problem. Quite simply, the disclosed material has been privileged since its creation and that privilege has never been interrupted. Thus, an absent party never had a right to the material as non-privileged evidence. More specifically, to use Professor Noyes's point with respect to California law, a Rule 502(d) order

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Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints"). Moreover, the rule, by its terms, does not limit relief to parties to the original judgment. *See* FED. R. CIV. PRO. 60(b). Consequently, a non-party bound by an order entered under Rule 502(d) would likely have standing to bring a motion seeking relief from judgment notwithstanding their absence from earlier proceedings and the unique nature of Rule 502(d) orders.

243. Again, it bears noting that even with a Rule 502(d) order in place, a non-party only loses one ground for claiming waiver. Rule 502(d) orders do not preserve the privilege against any challenge other than the particular disclosure in pending litigation that they are issued to address. FED. R. EVID. 502 addendum to advisory committee notes to subdivision (d). Consequently, even this "race to judgment" articulation probably overstates the potential problem.

244. *See* Noyes, *supra* note 207, at 739-42 (discussing the due process implications of Rule 502(d)).

245. *See id.*

246. *See supra* note 64 and accompanying text.

does not compete with state law.[247] First, though Professor Noyes points to a potential conflict with California's evidence code, Rule 502(d) does not implicate California Evidence Code section 952 and its concern for disclosures at the inception of a confidential communication because Rule 502(d) orders only address existing privileged material.[248] Second, with respect to the California's waiver rules addressed by Professor Noyes, California Evidence Code section 912(c) provides that "[a] disclosure that is itself privileged is not a waiver of any privilege."[249] Rule 502(d) orders expressly create a "privileged disclosure" through the district court's imposition of a finding of non-waiver. This result is not unlike any other time a court finds that a disclosure did not work a waiver because an exception to the disclosure rule applies.

Still, even if Rule 502(d) does not actually give rise to a due process issue, the rights of absent parties certainly complicate matters and threaten the efficacy of the rule. For instance, in cases involving large corporations and other frequent targets of litigation, any attempt to issue a Rule 502(d) order could implicate the rights of dozens – if not hundreds – of potential interveners. In the cases that most need Rule 502(d) orders to reduce discovery costs, attempts to issue such an order could provoke innumerable objections that would have to be briefed, argued, and resolved one-by-one. That process would, in itself, add to litigation costs and drag out already long-running matters. Additionally, this issue injects an element of uncertainty as to the enforceability of Rule 502(d) orders. Though perhaps a remote contingency, a disclosing party cannot be certain that a given Rule 502(d) order will withstand constitutional scrutiny until the rule is challenged. And, in a much more mundane way, the ability of non-parties to later approach the court to revisit a given order similarly detracts from the predictability of Rule 502(d) orders and their effect on a privilege that otherwise is supposed to persist *ad infinitum*.

Thus, while not dispositive, the due process issues inherent to far-reaching Rule 502(d) orders present yet another significant issue limiting the efficacy of the rule and raising troubling questions about the appropriate scope of judicial authority in the realm of discovery disputes. And, unlike the other problems already discussed, these issues do not lend themselves to readily apparent solutions. The additional litigation costs created by interveners are unavoidable. And the predictability problems attendant to the novelty of the rule and the need to revisit orders may be insurmountable in the short-term. While Rule 502(d) remains an important new tool, these problems detract from the rule's utility and may prohibit its use in some of the cases that stand to gain the most from protected disclosure.

247. Noyes, *supra* note 207, at 740-41.
248. *See* FED. R. EVID. 502(d); Noyes, *supra* note 207, at 740-41.
249. CAL. EVID. CODE § 912(c) (West, Westlaw through 2012 Reg. Sess.).

VI. CONCLUSION

Rule 502 very well may spell the end for inadvertent waiver. And it may finally knockout the much-dreaded subject matter waiver bugaboo. But early application and the myriad problems starting to emerge with respect to the rule's most effective tool – Rule 502(d) orders – suggests that any impact on the spiraling costs of litigation will be muted at best. Nonetheless, that may not be a bad thing. In some sense, the tide of reform addressed at the *cost* of discovery seems to have forgotten about the *value* of the privilege. Much of the cost of discovery can be attributed to the desire of clients and lawyers to protect their right to freely converse. A prophylactic approach to Rule 502(d) threatens that fundamental right provided by the American legal system. Thus, as Rule 502(d) continues to evolve and encourage the free flow of information in litigation, its expansion should be tempered by need to protect the attorney-client privilege. Because, at the end of the day, the *cost* of undermining this critical cornerstone that supports the American approach to litigation quite likely far outweighs the *purported value* conferred or saved through quick-fix disclosure orders in one-off cases.