

The Sedona Conference

Commentary on Protection of Privileged ESI

(December 2015 Ed.)

Since the discovery of electronically stored information (“ESI”) has become common practice after the adoption of the 2006 Amendments to the Federal Rules of Civil Procedure, we have witnessed the explosion of the sheer volume of information now subject to discovery. It is now difficult or impossible, even with the best processes and technology, to prevent the unintentional production of privileged materials. In 2008, the President signed into law Federal Rule of Evidence 502, which was intended to address waiver of privilege claims and reduce the cost of civil discovery. Rule 502 accomplishes this in three principle ways. *First*, Rule 502(a) limits subject matter waiver to voluntary disclosures and eliminates subject matter waiver for inadvertent disclosures. *Second*, Rule 502(b) precludes waiver for inadvertent disclosures when the privilege holder took reasonable steps to prevent the disclosure and took prompt steps to rectify the error. *Third*, Rule 502(d) enables federal courts to “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.” This Commentary is an attempt by The Sedona Conference to breathe some needed life into the understanding and use of Rule 502.

- Principle 1: Parties and their counsel should undertake to understand the law of privilege and its appropriate application in the context of electronically stored information.
- Principle 2: Parties, counsel, and courts should make use of Federal Rule of Evidence Rule 502(d) and its state analogues.
- Principle 3: Parties and their counsel should follow reasonable procedures to avoid the inadvertent production of privileged information.
- Principle 4: Parties and their counsel should make use of protocols, processes, tools, and technologies to reduce the costs and burdens associated with the identification, logging, and dispute resolution relating to the assertion of privilege.

The full text of *The Sedona Conference Commentary on Protection of Privileged ESI*, December 2015, is available free for individual download from The Sedona Conference website at https://thesedonaconference.org/publication/Commentary_on_the_Protection_of_Privileged_ESI.

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