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# Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502

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# MAKING HORSES DRINK: CONCEPTUAL CHANGE THEORY AND FEDERAL RULE OF EVIDENCE 502

*Liesa L. Richter\**

## INTRODUCTION

Federal Rule of Evidence 502 was designed five years ago in response to an outcry from lawyers, clients, and Congress about the escalating costs of electronic discovery. The vast majority of these rising costs stems from page-by-page attorney review of electronically stored information (ESI) for privilege and work-product protection. This culture of painstaking eyes-on-privilege review is the offspring of traditional common law privilege and waiver doctrine, which has the potential to punish any breach in confidentiality with broad subject matter waiver extending well beyond the original mistaken disclosure and inflicting irreparable damage on the privilege holder's litigation position. The specter of such damaging privilege waivers has led to the tradition of expensive page-by-page pre-production review. In direct response to pleas for a change to common law waiver doctrine to protect clients from such broad exposure and to allow them to capitalize on the nature of ESI by facilitating technology-assisted review, the Advisory Committee for the Federal Rules of Evidence undertook construction of a waiver rule for the twenty-first century.<sup>1</sup> The result was Federal Rule of Evidence 502.<sup>2</sup>

Having valiantly responded to the call for change, rulemakers anticipated rapid adoption and robust use of the new waiver rule to minimize expenditures associated with privilege review of ESI.<sup>3</sup> Instead, Federal Rule of Evidence 502 has been met with suspicion and resistance from the very stakeholders that urged its adoption.<sup>4</sup> Litigants continue to embrace

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\* Thomas P. Hester Presidential Professor, University of Oklahoma College of Law. I would like to extend a special thanks to Dan Capra for allowing me to be part of such a fascinating dialogue. I would also like to thank my colleague Steve Gensler for his helpful insights into the Civil Rules.

1. See Panel Discussion, *Reinvigorating Rule 502*, 81 *FORDHAM L. REV.* 1533, 1535 (2013) (comments of the Honorable Sidney Fitzwater) (explaining that Rule 502 was designed to address specific complaints regarding privilege review of ESI).

2. *FED. R. EVID.* 502.

3. See Panel Discussion, *supra* note 1, at 1544 (comments of the Honorable Paul Grimm) (noting that "there was so much hope and expectation for what this rule would do").

4. *Id.* at 1535 (comments of the Honorable Sidney Fitzwater) ("Rather than enjoying rather robust usage, as had been anticipated, procedures and court orders permitted under Rule 502 are implemented relatively infrequently."); see also Edwin M. Buffmire, *The*

traditional and costly eyes-on methodology in reviewing for privilege, notwithstanding the opportunities provided by Rule 502 to utilize more efficient and economical computer-assisted techniques. This Symposium was designed to explore the reasons for underuse of Rule 502, as well as to identify possible rulemaking and educational measures that may allow the Rule to live up to its full potential.<sup>5</sup>

Back in 2007, prescient commentators identified three key challenges in adapting litigation to the ESI era.<sup>6</sup> First, new techniques needed to be developed for the retrieval and review of ESI.<sup>7</sup> Second, rules of privilege needed to adapt to eliminate the dire consequences of inadvertent disclosure.<sup>8</sup> Third and finally, litigators needed to “embrace creative, technological approaches to grappling with knowledge management,” equating to “perhaps the biggest new skill set ever thrust upon the profession” and a “revolution for the practice.”<sup>9</sup> The first two challenges have largely been met with sophisticated retrieval and review methodologies and meaningful waiver protection in the form of Rule 502. It appears that the third challenge presents a more formidable obstacle. Lawyers steeped in the adversarial tradition and common law privilege doctrine have yet to embrace fully the technology-assisted privilege review that stands ready to preserve significant litigation resources.

In examining reasons for this phenomenon and the current underutilization of Rule 502, “conceptual change theory” provides a useful framework for identifying impediments to fuller implementation of the Rule, as well as potential remedies. This theory, described by Cornell researchers in the 1980s, highlights the process “by which people’s central, organizing concepts change from one set of concepts to another set, incompatible with the first.”<sup>10</sup> Conceptual change theory posits that dramatic conceptual change from longstanding and tenaciously followed practices to inconsistent methodology can only be realized if there is (1) data-supported dissatisfaction with the status quo and (2) data-supported viable alternatives to the status quo.<sup>11</sup>

A shift from eyes-on privilege review methodology to computer-assisted review that allows documents to be produced to an adversary without lawyer review represents the very type of radical change unlikely to

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(Unappreciated) *Multidimensional Benefits of Rule 502(d): Why and How Litigants Should Better Utilize the New Federal Rule of Evidence*, 79 TENN. L. REV. 141, 141 (2011) (noting that litigants “have been slow to adopt” 502 and the Rule “has not lived up to its promise”).

5. See Panel Discussion, *supra* note 1, at 1539 (comments of Professor Daniel J. Capra, Moderator) (noting that the Symposium was designed to provide perspective about what can be done to “energiz[e]” Rule 502).

6. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, at 2–3 (2007).

7. *Id.* at 3.

8. *Id.*

9. *Id.*

10. George J. Posner et al., *Accommodation of a Scientific Conception: Toward a Theory of Conceptual Change*, 66 SCI. EDUC. 211, 211 (1982).

11. *Id.* at 213.

transpire absent satisfaction of both steps in the conceptual change process.<sup>12</sup> Exploring Rule 502 in tandem with litigant incentives reveals several potential impediments to conceptual change at each phase of the process. For several reasons, there may be inadequate dissatisfaction with the traditional eyes-on privilege review methodology to drive meaningful change. Further, litigants may not recognize technology-assisted approaches to privilege review and “quick-peek” arrangements with litigation adversaries as viable alternatives to the traditional model that emphasizes confidentiality at all costs.

Part I of this Essay will briefly discuss the “default” provisions found in Rule 502(a) and (b) and the contributions that those subsections of the Rule have made to reforming costly privilege review. Part I will suggest that these portions of the Rule have largely achieved their purpose and need not be amended to bolster the effectiveness of Rule 502. Part II will focus on the “self-help” provisions found in Rule 502(d) and (e). Increasing litigant reliance on these provisions presents the best opportunity for Rule 502 to achieve its initial goal of reducing prohibitive costs associated with e-discovery. Part II will highlight several impediments to party reliance on these “self-help” provisions through the lens of conceptual change theory. Finally, Part II suggests potential educational and rulemaking measures to remove these impediments to adoption and to increase party reliance on these cost-saving measures.

#### I. A SIGNIFICANT STEP IN THE RIGHT DIRECTION: THE “DEFAULT” PROVISIONS OF RULE 502

In taking stock of Rule 502, it is important to emphasize that subsections (a) and (b) of the Rule have already made significant contributions to more cost-effective privilege review of ESI. Rule 502(a) successfully curtails concerns about subject matter waiver that may fuel wasteful expenditures on privilege review and create leverage to settle otherwise defensible lawsuits.<sup>13</sup> Fear of subject matter waiver was repeatedly cited as a driving force behind costly page-by-page privilege review during the public hearings on Rule 502.<sup>14</sup> Rule 502(a) eliminates the specter of broad and damaging subject matter waivers arising out of inadvertent disclosures by limiting subject matter waiver to instances of intentional selective disclosure of privileged or protected information that creates unfairness to the adversary.<sup>15</sup>

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12. *Id.* at 212 (describing the radical form of conceptual change requiring replacement of central commitments with incompatible principles as an “accommodation”).

13. FED. R. EVID. 502(a).

14. FED. R. EVID. 502 advisory committee’s note (identifying a purpose of the rule as dealing with longstanding disputes over subject matter waiver). Such concerns also animated the discussion of e-discovery amendments to the Federal Rules of Civil Procedure. *See* STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, 531–32 (2012 ed.).

15. FED. R. EVID. 502(a); *see also* GENSLER, *supra* note 14, at 531 (noting lawyer complaints regarding broad subject matter waiver and describing the Rule 502(a) remedy).

Rule 502(b) protects against inadvertent waivers associated with mistaken disclosures by providing protection for parties that utilize reasonable pre-production measures to prevent such accidental disclosures and reasonable and prompt post-production measures to assert and preserve privilege.<sup>16</sup> The commentary to Rule 502(b) encourages judicial recognition of technology-assisted review methodologies as reasonable.<sup>17</sup> Therefore, Rule 502(b) has successfully brought a uniform standard to the issue of inadvertent disclosure by clearly adopting a reasonableness approach and clearly signaling in the Rule and commentary the demise of the strict waiver or merciful “accidents won’t be punished” approaches. Both Rule 502(a) and (b) extend protection against waiver to federal and state proceedings, ensuring that a federal disclosure protected under the Rule will remain protected in other federal or state proceedings.<sup>18</sup> Rule 502(a) and (b) need not be affirmatively utilized by litigants to serve their palliative purposes because they are default provisions that apply regardless of any specialized use by the parties.<sup>19</sup> Accordingly, there is no need to encourage adoption or utilization of these provisions of the Rule.<sup>20</sup>

Notwithstanding the significant advances embodied in these provisions, inconsistent judicial interpretation has undermined somewhat the predictable protection Rule 502 was designed to create.<sup>21</sup> Interpretive difficulties have included questions over the meaning of “inadvertent” production in 502(b). A few courts have suggested that a *voluntary* production of a privileged document, even unwittingly, is not “inadvertent,” thus reinserting the possibility of subject matter waiver for accidental disclosures. Other courts have interpreted the term “inadvertent,” as intended by the drafters of Rule 502, to coincide with the traditional definition of “inadvertent” as meaning “mistaken” or “accidental.”<sup>22</sup>

Much more prevalent are differences in the interpretation of “reasonableness” for purposes of Rule 502(b). Courts analyzing Rule 502(b) vary with respect to the level of pre-production effort necessary to prevent a waiver, thus perpetuating some uncertainty for parties who inadvertently disclose privileged information. Some courts appear to maintain the wide-open forgiving standard that predated Rule 502 by

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

17. *Id.* advisory committee’s note (“[A] party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure.”).

18. *See* FED. R. EVID. 502(a)–(b).

19. Of course, to serve their ultimate purpose of reducing the costs of privilege review, parties must be *aware* of the existence and operation of Rule 502(a) and (b) in order to design privilege review against the backdrop of protection they provide. Still, litigants need not take affirmative steps in the course of discovery to trigger these protections.

20. *See* Panel Discussion, *supra* note 1, at 1539 (comments of Professor Daniel J. Capra, Moderator) (noting that Rule 502(d) is the “foremost focus” of the Symposium).

21. *See* Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has it Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8, at 63–78 (2011) (detailing interpretive pitfalls in federal cases).

22. *Id.* at 29–33.

focusing on the “interests of justice” instead of pre-production precautions.<sup>23</sup> Others appear to maintain a strict view, insisting on “all” reasonable means to prevent disclosure.<sup>24</sup> Still others appear to embrace the middle ground approach embodied in Rule 502(b), but disagree as to which steps are “reasonable” to prevent and rectify inadvertent disclosures. Interpretive difficulties surround issues of reliance on outside document review vendors, use of key word searches to locate potentially privileged information, the size of a production, the deadline for a production, and document retention policies.<sup>25</sup>

While educational measures could advance more uniform interpretation, rulemaking action appears unnecessary with respect to Rule 502(a) and (b) for three primary reasons. First, the commentary explaining the intent behind these provisions is clear and instructive. Courts and litigants consulting the legislative history of the rule should ultimately arrive at the proper reasonableness calibration using the existing standard. Furthermore, as judges become increasingly tech-savvy, attitudinal opposition to computer-assisted review may diminish. Second, a “reasonableness” approach is inherently variable and impossible to nail down with certainty in rule text. In other words, the standard chosen as the optimal one necessarily invites some interpretive flexibility that cannot be cured without adopting a more bright-line standard. Third, and most importantly, Rule 502(a) and (b) represent the *default* waiver rules that apply to discovery disclosures when parties have not planned in advance for waiver issues during production of ESI. The “self-help” provisions found in subsections (d) and (e) of Rule 502 are tailor-made to eliminate unpredictable interpretive pitfalls.

Rule 502(d) and (e) have the potential to give litigants the control and certainty they require by allowing them to request an order preventing waiver of privilege as a result of disclosures to an adversary, irrespective of the care taken in pre-production review.<sup>26</sup> Such federal court orders are binding in all other federal and state proceedings.<sup>27</sup> Therefore, remaining uncertainty in the default provisions can be avoided by affirmative litigant use of Rule 502(d) and (e). Because these “self-help” provisions present the best opportunity for litigants to create the predictability necessary to

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23. *Id.* at 44 (discussing *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008), and the use of the “interests of justice” standard to interpret 502(b)).

24. Grimm et al., *supra* note 21, at 41–42 (noting that courts such as the one in *Mt. Hawley Insurance Co. v. Feldman Production, Inc.*, 271 F.R.D. 125 (S.D. W. Va. 2010), “set the bar quite high for what . . . a party must do to avoid a finding of unreasonableness”).

25. See Ann M. Murphy, *Federal Rule of Evidence 502: The “Get Out Of Jail Free” Provision—or Is It?*, 41 N.M. L. REV. 193, 228–32 (2011) (comparing judicial approaches to Rule 502(b) analysis).

26. FED. R. EVID. 502(d) & advisory committee’s note (the “court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party.”); FED. R. EVID. 502(e) & advisory committee’s note.

27. FED. R. EVID. 502(d) advisory committee’s note (the “terms [of a 502(d) order] are enforceable against non-parties in any federal or state proceeding.”).

reduce e-discovery costs, educational and rulemaking efforts should be directed toward resolving any obstacles to robust party use of these portions of Rule 502.

## II. THE “SELF-HELP” PROVISIONS OF RULE 502: WHAT ARE THEY GOOD FOR?

Pursuant to Rule 502(e), litigants may enter “[a]n agreement on the effect of disclosure [of privileged information] in a federal proceeding.”<sup>28</sup> This provision in the Evidence Rules complements Federal Rule of Civil Procedure 26(f), which directs litigants to develop a discovery plan and to state the parties’ views and proposals on “any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production.”<sup>29</sup> Using these provisions, litigation adversaries may agree to allow one another to “claw back” inadvertently produced privileged or protected documents, regardless of the care taken in pre-production review. Parties may even elect to use a “quick-peek” arrangement whereby they agree to produce documents with no pre-production review and to review for privilege and work-product protection only after designation of documents for use by the opposing side.<sup>30</sup> Pursuant to such agreements, disclosure of privileged or protected documents does not waive privilege or work product protection as between the parties.<sup>31</sup>

While such agreements are helpful in binding the parties that are signatories, they cannot offer protection against arguments of waiver made by nonparties.<sup>32</sup> For this reason, Rule 502(d) allows the parties to seek entry of a federal court order providing that disclosures made in connection with the litigation pending before the court will not result in any waiver of the attorney-client privilege or work-product protection, irrespective of the care taken in pre-production review.<sup>33</sup> Entry of such an order protects the parties from a finding of waiver “in any other federal or state proceeding.”<sup>34</sup> Therefore, it is the entry of a court order pursuant to Rule 502(d) that has the power to provide the certain, predictable, and thorough protection to litigants wishing to reduce the costs of e-discovery by eliminating privilege review altogether or performing it through technology-assisted searches.

Although both the Evidence Rules and the Civil Procedure Rules clearly contemplate party cooperation to address waiver issues, the commentary to Rule 502 expressly provides that “[p]arty agreement should not be a

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28. FED. R. EVID. 502(e).

29. FED. R. CIV. P. 26(f)(3)(D).

30. FED. R. EVID. 502(d) advisory committee’s note (“[T]he rule contemplates enforcement of ‘claw-back’ and ‘quickpeek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product.”); *see also* GENSLER, *supra* note 14, at 558 (discussing “quick-peek” and “clawback” nonwaiver protocols).

31. FED. R. EVID. 502(e).

32. *Id.* (providing that agreement “is binding only on the parties to the agreement”).

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

34. *Id.*

condition of enforceability of a federal court's order."<sup>35</sup> Therefore, a court may enter a Rule 502(d) order where the parties agree, at the request of one party and over the objection of the other, or sua sponte absent party request.<sup>36</sup> Regardless of the method chosen, some stakeholder in the federal litigation—either one of the parties or the trial judge—must recognize the benefits of a 502(d) order and act affirmatively to construct one. Notwithstanding that Rule 502 was enacted in 2008, courts and litigants do not appear to be taking advantage of these “self-help” provisions to the extent anticipated.<sup>37</sup> In order to help Rule 502 achieve its full potential, it is useful to explore why the provisions have not caught on in order to identify rulemaking and educational measures that may increase use of Rule 502(d) and (e).<sup>38</sup>

#### A. *Lessons from Conceptual Change Theory*

In analyzing reasons for the slow adoption of Rule 502's “self-help” provisions, “conceptual change theory” may be a useful construct to frame and identify the problem.<sup>39</sup> This theory, described by Cornell researchers in the 1980s, highlights the process “by which people's central, organizing concepts change from one set of concepts to another set, incompatible with the first.”<sup>40</sup> Conceptual change theory delineates the steps by which the “central commitments” that “define problems, indicate strategies for dealing with them, and specify criteria for what counts as solutions” undergo

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35. *Id.* advisory committee's note (“Party agreement should not be a condition of enforceability of a federal court's order.”).

36. Grimm et al., *supra* note 21, at 59–60 (citing the Statement of Congressional Intent accompanying Rule 502, 154 CONG. REC. 18,017 (2008), noting that a court may enter a 502(d) order on motion of one or more of the parties or “on its own motion”).

37. *See supra* note 4 and accompanying text.

38. Scholars have suggested that merely persuading litigants to incorporate Rule 502(d) orders into their discovery plans as a matter of course would represent a significant step forward. *See Buffmire, supra* note 4, at 145 (urging pro forma adoption of 502(d) orders); *see also* Panel Discussion, *supra* note 1, at 1554 (comments of Chilton Varner, Esq.) (“[W]e negotiate 502(d) orders in every case. We do it as a best practice, because regardless of whether we review or don't review, the chances are that something is going to slip through the filter.”). There can be little question that all rational parties should incorporate a 502(d) order into their discovery plan given that 502(d) provides greater insurance against waiver than the default standard embodied in Federal Rule of Evidence 502(b). Thus, litigants can benefit from a 502(d) order even if they wish to maintain traditional attorney review for privilege. To achieve the intended benefit of Rule 502, however, and to reduce wasteful privilege review costs, parties must *use* the self-help provisions to cut privilege review costs and not merely as additional protection in the context of traditional privilege review methodology. There is merit to the concept of increasing use of 502(d) orders in the context of traditional privilege review as a preliminary step toward eventual cutting of discovery costs, however. If litigants become accustomed to incorporating 502(d) orders into their discovery plans, they may slowly start to cut some privilege review corners after some successful clawback experiences, ultimately advancing the goals of Rule 502. That said, exploring impediments to the paradigm shift in privilege review methodology is crucial to achieving the full benefit of Rule 502.

39. *See* Posner et al., *supra* note 10, at 211.

40. *Id.*



modification.<sup>41</sup> The most radical form of conceptual change, known as an “accommodation,” requires one to “replace or reorganize” central commitments.<sup>42</sup> This form of conceptual change occurs when: (1) “[c]entral concepts . . . have generated a class of problems which they appear to lack the capacity to solve” and (2) when a “competing view . . . appears to have the potential to solve these problems.”<sup>43</sup> In other words, dramatic conceptual change from long-standing and tenaciously followed practices to inconsistent methodology can only be realized if there is: (1) data-supported dissatisfaction with the status quo and (2) a data-supported viable alternative.<sup>44</sup>

The Rule 502 revolution, which encourages litigants to replace page-by-page privilege review with electronic, limited, or no privilege review prior to production, constitutes the type of radical conceptual shift unlikely to occur without data-driven dissatisfaction with traditional review and a data-supported viable alternative. Page-by-page privilege review started with contemporary discovery and derives from longstanding common law rules of privilege that demand maintenance of confidentiality to preserve privilege.<sup>45</sup> Without question, this is a time-honored and tenaciously followed method of protecting privilege.<sup>46</sup> Further, the scarring results of the subject matter waiver and strict inadvertent waiver common law standards helped to establish the stable privilege review methodology practiced in the federal system for decades.<sup>47</sup> Prior to enactment of Rule 502, an attorney who inadvertently disclosed a single privileged document might suffer a waiver with respect to all other privileged documents within the vaguely defined same “subject matter.”<sup>48</sup> Even absent subject matter waiver, an attorney who disclosed a privileged document inadvertently could waive privilege with respect to the disclosed document itself, potentially damaging the client’s litigation position in pending or future

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41. *Id.* at 212.

42. This form of conceptual change is termed an “accommodation.” *Id.*

43. *Id.* at 213.

44. *Id.* at 212 (noting that learning “is best viewed as a process of conceptual change” that is driven by the “available evidence”).

45. See Paul & Baron, *supra* note 6, at 17 (explaining that the modern free exchange of discovery began in 1938 as a reaction to the former system in which “an attorney relied primarily on her opponent’s pleading for discovery”).

46. See, e.g., CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 5.28, at 379 (5th ed. 2012) (noting the common law rule that the “attorney-client privilege is waived by the client’s voluntary disclosure of any significant part of the privileged communication or matter in a nonprivileged setting”).

47. See Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 213 (2006) (“Many courts . . . hold that when waiver is found . . . it covers not only the document itself but also any communication dealing with the same subject matter. Thus, counsel must carefully review all documents to assess the possible application of privilege or work product protection.” (footnote omitted)).

48. *Id.* at 214 (noting that waiver could “extend to all communications on the same subject matter”).

cases.<sup>49</sup> Traditional privilege review practices rely upon page-by-page review of *all* produced documents to prevent such inadvertent disclosures and corresponding waivers.<sup>50</sup> Thus, page-by-page privilege review appears to be the very type of ingrained practice that constitutes part of lawyers' "theoretical hard core."<sup>51</sup>

In contrast, Rule 502 encourages litigants to take advantage of the ESI revolution and to utilize "advanced analytical software applications and linguistic tools in screening for privilege and work product."<sup>52</sup> One computerized review methodology that has been proposed to significantly reduce discovery costs is "predictive coding."<sup>53</sup> This methodology is "a type of computer-categorized review . . . that classifies documents according to how well they match the concepts and terms in sample documents."<sup>54</sup> It requires that attorneys review only samples of ESI for privilege, as well as responsiveness and relevance. With input from the attorneys with respect to this sample, the computer can score a large volume of ESI as to relevance, responsiveness, and privilege. Lawyers again review small sets of scored data to assess the accuracy of the scores, thus refining the search and teaching the computer to score more accurately.<sup>55</sup> While this method involves eyes-on review of small samples of ESI, it significantly decreases lawyer time by relying upon computer learning and computer-generated decisions about privilege. Rule 502(d) was designed to allow reliance on methods like predictive coding to achieve savings with confidence that computer error, should it occur, will not waive privilege. Further, Rule 502(d) was intended to permit parties to forego pre-production privilege review altogether in appropriate cases through "quick-peek" arrangements whereby review for privilege is postponed until after production to an adversary.<sup>56</sup> Adoption of quick-peek arrangements or predictive coding techniques requires a true paradigm shift from one of preserving confidentiality at all costs to one that accepts the potential sharing of privileged information with the adversary. Such a seismic shift in privilege theory appears unlikely to be embraced absent data-driven dissatisfaction with traditional eyes-on privilege review and a data-supported viable alternative upon which litigants can depend. As discussed below, both of these steps necessary for conceptual change may present obstacles to the swift abandonment of traditional privilege-review practice.

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49. *Id.* at 213 (inadvertent or unintentional disclosure results in waiver).

50. *Id.*

51. Posner et al., *supra* note 10, at 212 (describing the central commitments that define problems and identify strategies for dealing with them as part of the "theoretical hard core").

52. FED. R. EVID. 502(b) advisory committee's note.

53. NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xvii (2012) (describing predictive coding as a method that would "achieve substantial savings in producing massive amounts of electronic information" by letting "computers do the heavy lifting for review").

54. *Id.*

55. *Id.*

56. See *supra* note 30 and accompanying text.

*B. Lawyers As the 502 Gatekeepers: Satisfaction with the Privilege Review Status Quo*

The first step to conceptual change involves dissatisfaction with the status quo. Before a radical conceptual change can occur, the prevailing theory must generate dissatisfaction due to its inability to solve a class of problems it was designed to address.<sup>57</sup> When it comes to using Rule 502(d) to abandon traditional privilege review, the question becomes whether the traditional central commitment to eyes-on privilege review has generated a class of problems that it cannot solve.

Ample data has been collected regarding the prohibitive costs of eyes-on privilege review of massive amounts of ESI preserved for litigation that may be discoverable under the Federal Rules of Civil Procedure.<sup>58</sup> A presentation by Verizon at the 2007 public hearings on Rule 502 revealed a shocking \$13.5 million in outside privilege review expenditures for a single piece of litigation.<sup>59</sup> Recent studies suggest that at least 70 percent of ESI discovery costs are generated by the pre-production review process.<sup>60</sup> This data and other examples explored by the Advisory Committee and well-documented in federal cases demonstrate that the advent of ESI discovery has generated prohibitive costs that cannot be controlled using traditional privilege review methodology, at least in some cases.<sup>61</sup> This data notwithstanding, there may be inadequate attorney dissatisfaction with traditional privilege review to drive conceptual change for several reasons.

First, it may be that the type of case in which the traditional model truly no longer functions remains relatively rare in an individual attorney's practice. There may be a sizeable number of cases where there is limited ESI discovery. Even in cases involving extensive discovery of ESI, significant pre-production review expenditures may be eclipsed by the

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57. Posner et al., *supra* note 10, at 213 ("Central concepts are likely to be rejected when they have generated a class of problems which they appear to lack the capacity to solve.").

58. FED. R. EVID. 502 advisory committee's note ("It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive."); PACE & ZAKARAS, *supra* note 53, at xiii ("[I]n recent years, claims have been made that the societal shift from paper documents to [ESI] has led to sharper increases in discovery costs than in the overall cost of litigation."); Broun & Capra, *supra* note 47, at 213 (noting that litigation involving voluminous documents is a "harrowing and enormously expensive business").

59. See *Hearing of the Advisory Comm. on Evidence Rules* 86–88 (Jan. 29 2007) [hereinafter *New York Hearing*], available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/2007-01-29-Evidence-Minutes-Transcript.pdf> (testimony of Patrick Oot, Director of Electronic Discovery & Senior Counsel, Verizon). Total review costs for the litigation exceeded \$11 million. *Id.*

60. PACE & ZAKARAS, *supra* note 53, at xiv (noting that "the major cost component in our cases was the review of documents for relevance, responsiveness, and privilege (typically about 73 percent)").

61. *Id.* at xx (computer-review is "the *only* reasonable way to handle large-scale production").

amount at stake for the producing party.<sup>62</sup> Although the high absolute dollar amount expended in pre-production privilege review in the federal courts may represent a *systemic* failure, there may be inadequate dissatisfaction with traditional privilege review methodology among individual litigants to drive systemic change through the individual decision-making necessary to utilize Rule 502. Where lawyers can depend upon page-by-page review in many cases, they may be unwilling to explore alternatives in the fraction of cases where computer-assisted review would be warranted.

Second, even in cases involving significant and costly ESI production, other available mechanisms may operate to preserve the perceived viability of traditional privilege review. The e-discovery amendments to the Federal Rules of Civil Procedure limit discovery of ESI that is “not reasonably accessible because of undue burden or cost.”<sup>63</sup> These amendments narrow the field of ESI requiring privilege review. In addition, the Civil Procedure Rules require judges to limit the extent of discovery when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”<sup>64</sup> Further, judges have the authority to control prohibitive discovery costs by requiring phased discovery at certain times or in a particular sequence.<sup>65</sup> Parties can also seek protection from undue discovery burdens in the form of a protective order under Federal Rule of Civil Procedure 26(c). These discretionary powers within the Federal Rules of Civil Procedure allow a trial judge to prevent the type of ESI discovery that would truly cost more than the amount in controversy and may serve to maintain the viability of traditional privilege review.

In addition, other measures may be used to preserve traditional privilege review methods. Law firms may hire temporary contract attorneys to perform initial review of ESI at discounted rates. Of course, litigants may always avoid excessive expenditures on pre-production privilege review through settlement. To be sure, the costs of traditional privilege review may inflate the settlement value of a case to the producing party and one of

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62. See *New York Hearing*, *supra* note 59, at 88 (testimony of Patrick Oot) (explaining that, for Verizon matters with privilege review costs in the millions, the amount at stake for the company is around \$20 million).

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

64. FED. R. CIV. P. 26(b)(2)(C)(iii); see also GENSLE, *supra* note 14, at 534 (discussing the importance of proportionality limits on the fair and efficient operation of the discovery rules).

65. See GENSLE, *supra* note 14, at 536 (“[T]he court can structure the order of discovery to ensure that the parties gather the ‘low-hanging fruit’ first, taking discovery from the most important or the most accessible sources before determining whether there is any need to cast the discovery net more widely.”). Judge Grimm’s standard discovery order circulated to Symposium participants represents an excellent example of such proactive judicial discovery management that serves to minimize wasteful discovery and privilege review (on file with author). See Panel Discussion, *supra* note 1, at 1572–73 (comments of the Honorable Paul Grimm) (discussing his standard case management order).

the goals of Rule 502 was to eliminate such e-discovery settlement leverage.<sup>66</sup> While a settlement may ultimately cost the producing party more than technology-assisted review would have, lawyers who perceive significant unquantifiable risk associated with production of privileged materials may find a concrete settlement to be a superior alternative to producing materials without eyes-on review. With these tools in their arsenal to avoid spending amounts on privilege review unjustified by the amount at stake in a particular case, litigants may perceive that traditional eyes-on privilege review remains viable.

Third, even data showing \$13.5 million spent on outside privilege review in a single piece of litigation may not generate the requisite dissatisfaction with the existing privilege review model to drive change. To be sure, such cases may create *client* dissatisfaction with the current method and cost of privilege review, depending on the overall value of the litigation, and *systemic* dysfunction due to potentially wasteful expenditures on privilege review. Still, client economic waste and client dissatisfaction represent only one side of the coin.<sup>67</sup> The other side of the coin represents the outside law firms that billed such a staggering amount for privilege review. Privilege review “sticker shock” may not necessarily lead to widespread *attorney* dissatisfaction with the traditional model, and it is largely attorney dissatisfaction that is necessary to drive a conceptual change in the traditional privilege review model. The outside attorneys who represent clients engaged in massive e-discovery are typically the gatekeepers to the use of vehicles such as Rule 502(d) to truncate privilege review and cut costs. In-house counsel at large institutional clients also drive such decisions to some extent, but often rely on the advice of outside counsel to make recommendations about overarching decisions like those involving a discovery plan.<sup>68</sup> Utilizing Rule 502(d) to limit attorney privilege review in a case involving large-scale ESI production requires reliance on outside document review vendors to do the software search necessary to perform an electronic review.<sup>69</sup> A dramatic paradigm shift to this form of privilege review alone involves outsourcing a staple component of law firm business to the technology industry.<sup>70</sup>

At a time when the legal market has suffered considerably as a result of the downturn in the economy, swift adoption of a measure that further

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66. See Buffmire, *supra* note 4, at 154.

67. Of course, the cost-benefit analysis of privilege review costs from the client's perspective requires assessment of the value of the interests at stake in the instant litigation and any subsequent litigation on related matters.

68. While it appears that some organizational clients are becoming more involved in discovery planning, there remains a great deal of reliance on outside counsel in directing the “review” phase of the discovery process. PACE & ZAKARAS, *supra* note 53, at xiv (noting that review of ESI remains “largely the domain of outside counsel”).

69. *Id.* at xv, tbl. S.1 (demonstrating that outside vendors take primary responsibility for the collection and processing phases of e-discovery).

70. *Id.* at xvii–xviii (discussing significant cost savings achieved through replacement of eyes-on review of all ESI pre-production with a method relying heavily on “predictive coding” and eyes-on review of small samples).

minimizes the need for attorney billable hours in litigation may be a tough pill to swallow.<sup>71</sup> Although attorneys will undoubtedly need to consult with document review vendors as a component of ESI review, they may be unwilling to outsource this function entirely through reliance on Rule 502(d).<sup>72</sup> Notwithstanding their professional role, lawyers are human beings and it may be unrealistic to expect them to serve as the spear-carriers for the Rule 502(d) revolution to their own financial detriment. While most lawyers will not consciously pursue inefficient methods for selfish reasons, it is noteworthy that the Rule 502 “self-help” provisions ask attorneys to make the choice that may cut against self-interest for the overall benefit of clients and the system.

Billable-hour incentives aside, lawyers may legitimately fear ethical sanctions or malpractice liability as a result of inadequate pre-production privilege review, further maintaining satisfaction with traditional methodology.<sup>73</sup> While malpractice liability and ethical sanctions may be available for breaches in client confidentiality occasioned by shoddy privilege review practices, it is difficult to imagine such consequences for *excessive* privilege review expenditures.<sup>74</sup> Indeed, some courts have deemed technology-assisted review procedures “unreasonable” in considering inadvertent production under Rule 502(b).<sup>75</sup> Conversely, it seems implausible that a client could demonstrate certain harm from over-review absent extreme circumstances involving smoking gun evidence of file churning. In other words, the safe and traditional choice from a lawyer exposure standpoint is also the most lucrative one.<sup>76</sup>

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71. *Id.* at 46 (“Recent economic woes, along with rising numbers of law school graduates, have indeed produced a glut of attorneys, many of whom have found themselves in a situation in which contracted review has become one of the few viable options for maintaining a steady income stream.”).

72. *Id.* at xix (noting that “[a]nother barrier to widespread use [of electronic review of ESI] could well be resistance to the idea from outside counsel, who would stand to lose a historical revenue stream.”).

73. Panel Discussion, *supra* note 1, at 1555 (comments of Chilton Varner, Esq.) (“[T]here is an inbred reluctance to say that what would have been five years ago the gross negligence of not looking for privileged documents before they were produced is now a get-out-of-jail-free card . . . and it’s especially hard when the client is a lawyer . . . brought up to believe that waiving a privilege was . . . maybe the worst thing you could do as a lawyer.”).

74. See Murphy, *supra* note 25, at 233 (discussing the ethical obligation to maintain client confidentiality under ABA Model Rule 1.6 and possible malpractice liability for disclosure of privileged documents). See generally Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need To Revise Professional Conduct Rules*, 69 MD. L. REV. 195 (2010).

75. See Grimm et al., *supra* note 21, at 36–38 (discussing the *Mt. Hawley* case and noting that “[i]f courts find waiver in cases where parties use computer analytical tools properly, . . . lawyers and clients never will transition away from the burdensome and very expensive [privilege review] methods”).

76. See PACE & ZAKARAS, *supra* note 53, at xix (“Few lawyers would want to be placed in the uncomfortable position of having to argue that a predictive coding strategy reflects reasonable precautions taken to prevent inadvertent disclosure, overproduction, or underproduction, especially when no one else seems to be using it.”).

Against this backdrop of incentives, it would be irrational for lawyers to flock to use Rule 502(d) to dispense with traditional privilege review. Indeed, the negligence standard is specifically set to require actors to take into account societal interests in establishing a standard of care, rather than purely selfish considerations.<sup>77</sup> In order to achieve efficient levels of protection for all, liability attaches to the selfish choice if it fails to account for other values. Companies are typically required to *spend* resources to ensure societally optimal safety. The incentives for lawyers in connection with adoption of Rule 502(d) to minimize e-discovery costs are currently calibrated in the opposite direction. The more they *charge* to conduct painstaking eyes-on privilege review for the protection of client confidentiality, the *less* likely they are to suffer ethical sanctions or malpractice liability. Such concerns may be instrumental in maintaining lawyer satisfaction with traditional privilege review, notwithstanding mounting costs.

In light of the foregoing realities, it appears that it will take *client* dissatisfaction with traditional privilege review methodology to drive conceptual change toward a Rule 502(d) model. As the stakeholders with the most to gain from computer-assisted review of ESI, clients awarding business to lawyers based upon a sliding scale of cost and skill must push attorneys toward change. Once clients become dissatisfied with traditional privilege review, law firms will be forced to compete for business through adoption of cheaper alternatives aided by the Rule 502 “self-help” provisions. Indeed, pressure from clients to reduce discovery costs has already been brought to bear. Recent downturns in the economy have led to client demands for lower rates and law firms have had to respond to avoid losing business.<sup>78</sup> Such pressure has not necessarily led to abandonment of page-by-page privilege review, however. Some firms have responded with efforts to bring cheaper review alternatives in-house, developing internal document review centers, employing IT professionals, as well as less expensive contract lawyers to provide large-scale ESI review at lower cost to clients.<sup>79</sup> So long as clients remain satisfied with the costs associated with review methodologies like these, law firms are unlikely to pursue less-costly alternatives.

Additional education may be necessary to generate client dissatisfaction with existing privilege review techniques that remain significantly more expensive than the technology-assisted review made possible through Rule 502. Conferences and publications like this Symposium may be critical in

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77. See generally RESTATEMENT (SECOND) OF TORTS § 291 (1965) (“Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”).

78. Changes in the economic climate for lawyers may drive this type of competition. See PACE & ZAKARAS, *supra* note 53, at 39 (noting that “recent economic conditions” have resulted in “significant changes in . . . financial relationships with outside counsel” and noting “[p]ressure” from clients to reduce costs).

79. *Id.* at 41–55.

educating institutional clients who can be expected to consume such materials.<sup>80</sup> Including client representatives in scheduling conferences where they may gain exposure to cost-saving options and influence counsel to make a client-centered choice may also generate greater dissatisfaction with current privilege review methods. While this may not be a viable option for cases involving individual clients, it is certainly workable in federal litigation involving organizational clients served by sophisticated in-house counsel and executives. It is in these cases involving organizational clients that the prospect of extensive e-discovery is most pronounced.<sup>81</sup> To the extent that such increased client education causes some firms to begin competing for business by utilizing Rule 502(d) and touting reduced discovery costs, this change could drive the broader legal market to embrace such measures.

Before lawyers will utilize technology-assisted privilege review to compete for and retain clients, however, reliable protection from ethical sanctions and malpractice liability must be in place. This could involve alteration in ethical standards to account for disclosure without review.<sup>82</sup> Such changes to ethical standards and to prevailing privilege review practice could also serve to minimize malpractice exposure for disclosures without review. In addition, guidelines governing the adoption of such methods could encourage lawyers to utilize technology-assisted review techniques. Technology-assisted review guidelines could instruct lawyers to engage in a colloquy with a client regarding the costs and benefits of various ESI review options. Much like physicians in the context of informed consent, lawyers should allow clients to select the review methodology most consistent with client goals in a given case.<sup>83</sup> With express and informed client consent, attorneys would be largely insulated from ethical or malpractice exposure as a result of selected privilege review techniques.

Finally, some potential for malpractice liability or ethical sanctions for needlessly spending on privilege review would drive lawyers toward greater use of Rule 502(d) methods. In light of longstanding waiver law and

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80. *Id.* at 36–37 (noting that “in e-discovery generally, the interests of in-house counsel and their external law firm colleagues may not always be in precise alignment, with the potential for billing opportunities for review resulting in the law firms . . . viewing the company’s litigation demands as lucrative ‘cash cows,’ with each new e-discovery demand seen as ‘a bird’s nest on the ground.’”); *id.* at 38 (noting that allowing outside counsel to handle vendor choices for collection of ESI is not the most “cost-effective” approach).

81. As was pointed out during the Symposium, many of the institutional “clients” are themselves lawyers who may share the traditional attorney concerns with truncated privilege review discussed above. Panel Discussion, *supra* note 1, at 1554 (noting that the “client” is often a lawyer) (comments of Chilton Varner, Esq.).

82. See generally Murphy, *supra* note 25.

83. See Schaefer, *supra* note 74, at 247–49 (discussing proposed amendments to ethical rules requiring counsel to communicate with clients regarding privilege review protocol to be used to prevent disclosures). See generally Bang v. Charles T. Miller Hosp., 88 N.W.2d 186 (Minn. 1958) (describing a doctor’s duty to explain available alternatives to a patient to facilitate the patient’s choice and assessment of risk).



traditional privilege review methodology, it may be impossible currently to prevail in a malpractice case arguing that a lawyer excessively reviewed a production for privilege. As clients drive the culture of privilege review toward technology-assisted review, the possibility of sanction for failure to offer such a cost-saving option could develop to further incentivize attorney reliance on Rule 502(d). Much like a doctor who would be liable for failure to inform a patient of a viable healthcare alternative, lawyers could be held responsible for failing to alert clients to technology-assisted alternatives made possible by 502(d). In sum, existing data, methods, and incentives may be inadequate to generate widespread dissatisfaction with the traditional method of page-by-page privilege review among the lawyers who largely drive the use of Rule 502(d). This lack of attorney-based dissatisfaction with traditional privilege review may serve as a significant impediment to conceptual change. Client education and demand appears most likely to drive attorney adoption of this option, alongside protections from ethical and malpractice exposure.

*C. Does a Rule 502(d) Order Provide a “Viable” Alternative to Traditional Privilege Review?*

Attorneys who fail to recommend less expensive electronic privilege review through use of a Rule 502(d) order are likely not motivated purely by greed and fear. The second critical component of radical conceptual change demands an “intelligible” and “plausible” alternative paradigm that can readily replace the traditional model that is no longer functioning optimally.<sup>84</sup> In other words, lawyers must be able to grasp the operation of a 502(d) order and to appreciate its ability to resolve the existing problems of expensive privilege review. Due to ambiguities created by the overlapping authority of the Federal Rules of Civil Procedure and the Federal Rules of Evidence in this area, litigants may not have a firm grasp on the operation of the “self-help” provisions of Rule 502. Further, to truly change the nature of traditional privilege review and reduce costs accordingly, attorneys and litigants must perceive documented success in utilizing Rule 502(d). Where attorneys have yet to observe documented savings and success through the use of quick-peek and clawback arrangements, they may not perceive the viable alternative to traditional privilege review necessary to drive conceptual change.

1. Visibility of Evidence Rules

First, lawyers and judges may remain unaware of the self-help features of Rule 502(d) and (e), notwithstanding their enactment over four years ago, because of their placement in the Federal Rules of Evidence. Judges and lawyers engaged in discovery planning and practice at the federal level rightly consider the Federal Rules of Civil Procedure the discovery “Bible.”

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84. See Posner et al., *supra* note 10, at 214.

Indeed, Rule 502 was enacted as a supplement to the e-discovery amendments to Federal Rule of Civil Procedure 26 to make the clawback arrangement outlined therein protected from findings of privilege waiver.<sup>85</sup> Because those amendments predated Rule 502, they could not contain a reference to the evidentiary provision. Lawyers engaged in civil discovery rarely consult their evidence rules to determine their rights and obligations, and the same may be said of district and magistrate judges. In sum, many lawyers, litigants, and judges may not be aware of the existence of the Rule 502(d) and (e) alternatives. This obstacle to conceptual change could be easily remedied through both rulemaking and education. As has been suggested by commentators, the Federal Rules of Civil Procedure should be amended to add a specific reference to Rule 502.<sup>86</sup> This amendment would create prominent visibility in the resource most likely to be consulted in the discovery process, and it seems advisable in order to make the interaction between discovery procedures and evidentiary protections clear and accessible.

There are several possibilities for the placement of a Rule 502 reference in the Federal Rules of Civil Procedure. Rule 26(f)(3)(D) governing discovery plans could be amended to specifically direct the parties to address a potential 502(e) agreement regarding privilege review and waiver, as well as their desire for a Rule 502(d) order in their discovery plan. This would direct lawyers unaware of the protection afforded by Rule 502 to their Evidence Rules to investigate. Amendment of Rule 16(b)(3)(B) to include a Rule 502(d) order as a feature that judges “may” incorporate into a scheduling order also seems advisable.<sup>87</sup> Although the current version of Rule 16 directs courts to consider including party “agreements” with respect to the assertion of privilege, it does not expressly contemplate a sua sponte or contested order covering the same issues. Focusing the trial judge on the possibility of a court-driven measure also seems likely to increase use of Rule 502(d) orders. There could obviously be an educational component to overcoming any 502 information-gap as well. Educating district and magistrate judges about the benefits of Rule 502(d) and (e) for effective case management could encourage judges to utilize them sua sponte or to push parties to consider such arrangements supported by a court order.

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85. See GENSLER, *supra* note 14, at 531 (describing the origins of Rule 502 as part of e-discovery amendments to the FRCP).

86. See, e.g., Buffmire, *supra* note 4, at 146 (proposing amendment to FRCP 26(f)). Importantly, the FRCP already references Evidence Rules when there is a relevant interaction, which may create an expectation that the FRCP will point to the FRE where pertinent. See, e.g., FED. R. CIV. P. 26(a)(2)(A) (citing Federal Rules of Evidence 702, 703, and 705).

87. See Grimm et al., *supra* note 21, at 73 (noting that a federal judge may include a clawback provision in a Rule 16 scheduling order).

## 2. Rule 502(d) Standard

Second, even if litigants are aware that the “self-help” provisions in Rule 502(d) and (e) exist, they may be uncertain as to how they fit into the detailed Federal Rules of Civil Procedure framework governing discovery and as to the standards applicable to invoke them. Again, this potential obstacle to the use of Rule 502 stems from the interaction between the Civil Procedure Rules and the Evidence Rules. For the “self-help” provisions of Rule 502 to protect parties from waiver in other litigation, the court must enter an order under Federal Rule of Evidence 502(d).<sup>88</sup> Litigants and judges engaged in discovery planning are accustomed to utilizing court orders to deal with discovery issues under the Federal Rules of Civil Procedure and may be unclear as to where in that framework the Rule 502(d) order fits. In that context, courts enter scheduling orders under Rule 16(b). Under Rule 16(b)(3)(B), judges may include in such scheduling orders “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced.”<sup>89</sup> Due to the explicit reference to privilege issues, a Rule 16 order may seem the best vehicle for creating Rule 502(d) protection. Even assuming Rule 16 represents the proper vehicle, the standard applicable to a court’s decision to grant such protection in any given case remains unclear. On one hand, the language of Rule 16(b)(3)(B) may suggest that trial judges should include a Rule 502(e) agreement in a scheduling order automatically without any additional findings by the trial judge or showing by the parties. On the other hand, Rule 16(b) specifically provides that trial judges “may” include such items in the scheduling order and that they are “permissive” rather than “required.”<sup>90</sup> This may suggest that the trial judge retains discretion to enter a Rule 502(d) order as part of a scheduling order, but Rule 502(d) fails to provide a clear standard for exercising that discretion.<sup>91</sup> Furthermore, Rule 16(b) specifically describes only situations in which the parties reach an “agreement” as to privilege protection and waiver.<sup>92</sup> The Advisory Committee notes to Rule 502(d) make clear that courts have the power to enter an order protecting the parties from waiver even in the

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

89. FED. R. CIV. P. 16(b)(3)(B)(iv).

90. Compare FED. R. CIV. P. 16(b)(3)(A) (stipulating items that “must” be included in a scheduling order), with FED. R. CIV. P. 16(b)(3)(B) (outlining the contents of a scheduling order that are merely “permitted”).

91. Even assuming a liberal standard for an initial decision to include a nonwaiver agreement as part of a scheduling order, modification of a scheduling order to add a nonwaiver order requires “good cause.” See Grimm et al., *supra* note 21, at 60 (noting that a court may modify a scheduling order to limit waiver for “good cause” pursuant to FRCP 16(b)(4)).

92. FED. R. CIV. P. 26(f)(3) (requiring parties to develop a discovery plan and to “state the parties’ views and proposals on . . . any issues about claims of privilege or of protection as trial preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order.”). It is at this Rule 26(f) conference and during the development of a discovery plan that parties must explore the possibility of a Rule 502(e) agreement.

absence of party agreement, but are silent as to the standard a trial judge should use in deciding to enter such an order without party consent.<sup>93</sup>

On the other hand, the commentary to Rule 502 discusses entry of a “confidentiality order,” which may seem to point to entry of a “protective order” under Federal Rule of Civil Procedure 26(c).<sup>94</sup> Indeed, one of the aims of this Symposium was to create a model “protective order” to guide litigants seeking to utilize Rule 502(d).<sup>95</sup> Protective orders are designed to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.”<sup>96</sup> A 502(d) order is most certainly directed at protecting a party from “undue burden” and “expense.”<sup>97</sup> The Federal Rules of Civil Procedure require “good cause” to support entry of a protective order, however, and the party seeking such an order bears the burden of demonstrating such “good cause.”<sup>98</sup> Courts and litigants may legitimately expect that a “good cause” standard applies to entry of a contested or sua sponte order under Rule 502(d) and that such protection will not be freely given absent the requisite showing.

In *Rajala v. McGuire Woods*,<sup>99</sup> the court utilized a “good cause” standard pursuant to Rule 26(c) in granting an opposed request for a Rule 502(d) order.<sup>100</sup> In that case, the defendant law firm successfully argued that an order protecting against waiver was “necessary” due to extensive ESI production and the high volume of client confidences contained in firm records.<sup>101</sup> Where Rule 502(d) is silent with respect to a controlling standard, judges and litigants may legitimately expect that a Rule 502(d) order should only be granted upon a showing of “good cause.” Although some commentators have suggested the use of a Rule 502(d) order as a standard best practice in every federal case, judges and litigants may hesitate to utilize Rule 502(d) absent some compelling and demonstrable case-specific need.<sup>102</sup>

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93. FED. R. EVID. 502(d) (“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.”); *see also id.* advisory committee’s note (“Party agreement should not be a condition of enforceability of a federal court’s order.”).

94. *Id.* advisory committee’s note (describing a 502(d) order as a “confidentiality order”).

95. *See generally Model Draft of a Rule 502(d) Order*, 81 *FORDHAM L. REV.* 1587 (2013); *see also* Grimm et al., *supra* note 21, at 69 (Rule 502 encourages courts “to approve such agreements by issuing a protective order if requested to do so, or on their own volition.”).

96. FED. R. CIV. P. 26(c)(1).

97. *See* FED. R. EVID. 502 advisory committee’s note (identifying one purpose being to prevent wasteful privilege review costs).

98. *See* GENSLER, *supra* note 14, at 559–60 (noting that “[a] party seeking a protective order may not rely on vague or speculative claims of such harm but instead must give specific reasons and facts supporting the protective order.”).

99. No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).

100. *Id.* at \*6.

101. *Id.* at \*2.

102. *See* Buffmire, *supra* note 4, at 172 (suggesting the routine use of Rule 502(d) orders).

Conversely, litigants that have an agreement or a protective order in place that addresses inadvertent disclosure and waiver may expect that they are protected under Rule 502 even absent express reference to the evidentiary rule. Judicial refusal to uphold waiver protection under such circumstances undermines the viability of the Rule 502(d) order as an alternative to traditional privilege review. Litigants, uncertain as to the magic words necessary to invoke meaningful 502(d) protection, may reject it as a reliable solution to costly pre-production privilege review.<sup>103</sup> In sum, the necessity of having waiver protection embodied in the Evidence Rules separate and apart from the discovery framework outlined in the Federal Rules of Civil Procedure may create uncertainties regarding the procedures, standards, and terminology necessary to invoke the protection. Such uncertainties may undermine the perceived viability of limited privilege review as an alternative to traditional lawyer review. Without a viable alternative that lawyers can readily grasp and access, conceptual change theory suggests that they will cling to their central commitment to traditional privilege review practices.

This barrier to conceptual change can be remedied through amendments to either or both the Civil Procedure Rules and the Evidence Rules. Due to the need for congressional alteration of Rule 502, an amendment to the Federal Rules of Civil Procedure seems more plausible.<sup>104</sup> If the intent of Rule 502(d) is to vest the trial judge with broad authority to enter a nonwaiver order in any case where she deems it appropriate without “good cause” or other particularized findings—whether it is agreed upon, opposed, or ignored by the parties, an amendment to Rule 16(b)(3)(B) appears most appropriate. The amendment could allow trial judges to “include an order pursuant to Rule 502(d) protecting the parties from a finding of waiver of privilege or work product protection, irrespective of the care taken in pre-production review.”

Where Rule 16(b)(3)(B) confers upon trial judges “clear authority to enter comprehensive scheduling orders addressing the timing and conduct of virtually any aspect of the pretrial phase of the case,”<sup>105</sup> placement of an express reference to Rule 502(d) in that provision of the Civil Rules should

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103. *See, e.g.*, *Cnty. Bank v. Progressive Cas. Ins. Co.*, No. 1:08-cv-01443-WTL-JMS, 2010 WL 1435368, at \*3 (S.D. Ind. Apr. 8, 2010) (rejecting counsel agreement documented in correspondence concerning the return of inadvertently produced documents as insufficiently formal to bind the parties); *Luna Gaming-San Diego, L.L.C. v. Dorsey & Whitney L.L.P.*, No. 06cv2804 BTM (WMc), 2010 WL 275083, at \*4 (S.D. Cal. Jan. 13, 2010) (finding a waiver of privilege through inadvertent disclosure notwithstanding a protective order providing that such disclosures “shall not constitute a waiver of any privilege”); *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. CV06-607-HU, 2008 WL 5122828, at \*3–4 (D. Or. Dec. 4, 2008) (ignoring a protective order in finding waiver of privilege).

104. Whether an amendment to clarify the standard for entering a nonwaiver order constitutes a “privilege” amendment that *must* go through Congress is beyond the scope of this Essay. It appears likely, however, that the original authority granted in 502(d) may be a sufficient congressional blessing and that a clarification of the standard remains well within the purview of the FRCP.

105. GENSLE, *supra* note 14, at 328.

signal to courts and litigants *when* to consider a Rule 502(d) order, as well as the broad discretionary standard applicable to its entry. To the extent that there could be continuing uncertainty, committee notes to the amendment could expressly clarify that such an order is purely at the discretion of the court and requires no particularized showing from the litigants. Further, reference to a “Rule 502(d) order” in Rule 16 could lead judges to make express reference to the evidentiary protection in styling scheduling orders, thus eliminating ambiguity with respect to the applicable authority for the waiver protection.

Conversely, to the extent that the intent of Rule 502(d) is to treat such an order like a protective order given its purpose to protect from undue burden and expense, an alternative amendment could be made to Rule 26(c). Such an amendment could clarify that courts should enter Rule 502(d) orders pursuant to the authority granted to them therein and using the well-recognized “good cause” standard to choose the cases in which to allow them. Regardless of the standard adopted, courts and litigants would receive clearer direction as to how the Rule 502(d) order fits into the complex discovery framework of the Federal Rules of Civil Procedure.

### 3. The Rule 502(d) Endgame

Another obstacle to the perceived viability of reduced privilege review may be concern about the “endgame” with a 502(d) order in place. At some point in the pretrial phase, parties need certainty that they may utilize the materials produced by an adversary in preparing a case for trial. To be certain, many ESI-heavy cases may be “settlement” cases, but even to negotiate a settlement, litigants need to have a handle on the evidence available to pursue a claim or defense. If produced materials may be “clawed back” at any time, both sides may legitimately feel hampered in their trial preparation by uncertainty as to which produced materials will ultimately be “off-limits.” Such uncertainty may undermine the perceived viability of a 502(d) order.

In *Luna Gaming-San Diego L.L.C. v. Dorsey & Whitney, L.L.P.*,<sup>106</sup> the parties entered into a protective order, approved by a magistrate judge, providing for nonwaiver as a result of disclosure and allowing the parties to clawback any inadvertently produced privileged documents.<sup>107</sup> The agreed-upon order did not specify the procedures to be utilized in exercising the right to clawback privileged documents, however. Following disclosure, plaintiff failed to object to defendant’s use of privileged materials during one deposition and failed to follow up and demand return of privileged materials after objecting to their use in a later deposition.<sup>108</sup> Ultimately, plaintiff failed to timely object to defendant’s use of privileged materials in

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106. No. 06cv2804 BTM (WMc), 2010 WL 275083 (S.D. Cal. Jan. 13, 2010).

107. *Id.* at \*1.

108. *Id.*

support of summary judgment motions.<sup>109</sup> When plaintiff later objected to the use of these materials, the district court found that plaintiff had waived privilege—not by disclosing the materials—but by failing to object promptly to their *use* by the other side.<sup>110</sup> Although the court in *Luna Gaming* arguably ignored the parties' ability to trump the default rule found in 502(b) by requiring prompt remedial action to reclaim privileged material, its holding reflects the real concern that ill-defined agreements and court orders may produce inefficiency and uncertainty that may impede the resolution of disputes.

This potential barrier to the viability of 502(d) orders may best be remedied through individual orders tailored to the needs of a particular case. Committee notes to the above-proposed amendments to the Federal Rules of Civil Procedure could encourage judges to include deadlines and procedures for “clawbacks” and “quick peeks” that require reasonably prompt notification of a privilege or work product claim once the producing party has “reason to know” of its disclosure of protected information. Such a “reason-to-know” standard would not require a producing party to engage in costly continuing review of its production. The standard would require notification of privilege if the producing party independently discovers its own privileged production *or* when the requesting party attempts to utilize a previously produced privileged document during the pretrial phase. If the requesting party attaches a produced document to a deposition, that party should have some assurance that it will not be “clawed back” months later. It would also be important to set an ultimate deadline for “clawbacks” and “quick peeks,” either by agreement or otherwise. While a “reason-to-know” standard could generate some discovery disputes in and of itself, providing some limit to prevent strategic misuse of the clawback arrangement could ultimately foster greater acceptance of Rule 502(e) agreements and 502(d) orders. Further, publication of model 502(d) orders, such as the one produced by this Symposium, may serve as important guidance to litigants and judges seeking to utilize this method to manage discovery.

#### 4. The Document Dump

Some cases reflect concern that a Rule 502(d) order will not reduce e-discovery costs, but will simply shift the burdens of ESI review from the producing party to the requesting party.<sup>111</sup> Without the specter of privilege

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109. *Id.* at \*4.

110. *Id.*

111. *See, e.g.,* *Rajala v. McGuire Woods*, No. 08-2638, 2010 WL 2949582-CM-DJW, at \*7 (D. Kan. July 22, 2010) (the plaintiff opposed a 502(d) order for this reason). The foregoing impediments to the viability of Rule 502(d) are somewhat party neutral. In other words, whether your client is the producing or requesting party, visibility and functionality may be a concern. Some perceived impediments to the viability of quick-peek or clawback arrangements are more party-specific and may be experienced depending on whether the party is the producing or requesting party.

waiver to motivate careful review, the producing parties in large-scale ESI cases may dump voluminous materials of limited relevance on requesting parties. This could be done strategically to create settlement leverage or simply as a cost-saving measure. Such concerns are most likely to arise in cases involving individual litigants with little ESI to produce suing organizational actors with significant amounts of potentially relevant ESI. This perceived cost-shifting potential for a 502(d) order may act as an additional barrier to conceptual change.<sup>112</sup>

Concerns about ESI dumping should not operate as an obstacle to greater use of Rule 502(d) orders, however. First, party agreement is unnecessary and a trial judge may institute 502(d) protection over a requesting party's objection.<sup>113</sup> Should a requesting party voice legitimate concerns about ESI dumping, the trial judge can utilize phased discovery to require targeted and sequential productions that are manageable.<sup>114</sup> Further, judges have inherent and enumerated sanctioning power to prevent and punish genuine abuse.<sup>115</sup> To the extent that requesting parties fear excessive production of materials under a 502(d) order, such fear could drive greater care in crafting proportional discovery requests. If the presence of a 502(d) order leads to more targeted discovery requests, this represents an added benefit of such orders and promises to further reduce discovery costs by narrowing the field of responsive ESI requiring review in the first place. Indeed, there has been some discussion in the ESI era of adding greater proportionality limits on the scope of discovery and explicit cost-shifting to curb tendencies to seek broad, expansive discovery requiring search, review, and production of voluminous ESI.<sup>116</sup> Rule 502(d) may naturally create similar incentives for the requesting party without express cost-shifting or proportionality limits. If appropriately managed by the trial judge, therefore, the specter of document dumping on the requesting party should not serve as a legitimate obstacle to 502(d) orders.

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112. See Jessica Wang, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1848 (2009) (noting concern that nonwaiver agreements "could potentially offload the cost to the other party because the receiving party must spend its time reviewing the produced documents.").

113. See *supra* note 35 and accompanying text.

114. See *supra* note 65 and accompanying text.

115. See GENSLER, *supra* note 14, at 576 (discussing the increasing judicial use of FRCP 26(g) sanctioning power to encourage litigants to "stop and think" about responsible discovery practices); *id.* at 579 (discussing the judicial sanctioning power under FRCP 37 and 28 U.S.C. § 1927, as well as "inherent powers").

116. See Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice & Procedure 9 (Dec. 2, 2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2011.pdf> (noting that "[s]ome advantage might be found in adding a proportionality limit to the broad scope provisions in Rule 26(b)(1) . . . . It also might help to add explicit cost-shifting provisions . . .").



## 5. Fruit of the Poisonous 502 Tree

Another obstacle to the use of 502(d) to reduce privilege review costs is concern that protection from *waiver* is inadequate to protect a client from other negative consequences of sharing privileged information with an adversary. A producing party utilizing technology-assisted privilege review may be concerned that an opponent may glean helpful information or a valuable strategic advantage simply from viewing privileged information produced under a 502(d) order.<sup>117</sup> Even if an opponent is barred from using that privileged information, he may pursue other avenues of investigation and argument revealed by the privileged documents that otherwise would have remained unexplored. Without conducting an eyes-on privilege review, producing parties fear that the risk associated with this possibility will be unquantifiable until the litigation is resolved. Negative downstream consequences may even flow to related litigation if an adversary develops a viable strategy originating from privileged disclosures, but utilizing nonprivileged information. As it stands, there is no clear derivative use protection inherent in Rule 502 that could minimize such concerns.<sup>118</sup> This threat of derivative use of privileged information further impedes the adoption of cost-effective electronic ESI review and the acceptance of the Rule 502 self-help provisions by disclosing parties.<sup>119</sup>

There are two potential avenues to eliminating this obstacle to fuller use of Rule 502(d). First, judges and litigants could attempt to craft derivative use protection in individual 502(d) orders to prevent any strategic benefit to a requesting party arising out of privileged disclosures.<sup>120</sup> As discussed during this Symposium, this protection could be akin to the “use immunity” afforded criminal defendants in the context of the Fifth Amendment privilege against self-incrimination.<sup>121</sup> While the government bears a

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117. See Buffmire, *supra* note 4, at 153 (noting the concern that a “litigant might be harmed by an opposing party merely reading the information contained in a privileged document.”); Panel Discussion, *supra* note 1, at 1554 (comments of Chilton Varner, Esq.) (noting that “possession of that [privileged] information by the adversary or by third parties can generate additional discovery that would not have been done, additional claims that may not have been made, additional problems that have to be resolved.”).

118. See Panel Discussion, *supra* note 1, at 1566 (comments of Professor Daniel J. Capra, Moderator) (noting that “under the common law, it’s not absolutely clear that a recipient is barred from using the fruits of privileged information.”).

119. Relatedly, a producing party may perceive that technology-assisted review merely *delays* the cost of attorney review of a production, rather than truly *eliminating* that cost. Because lawyers must review responsive documents at some point in the course of litigation to develop strategies and arguments, some litigants may perceive inadequate cost savings to justify risks of damaging disclosures to an adversary. Front-loading lawyer review for privilege and strategy may seem preferable to producing without review only to conduct such review later in the litigation. See *id.* at 1554–55 (comments of Chilton Varner, Esq.).

120. See *id.* at 1567 (comments of Professor Daniel J. Capra, Moderator) (noting the possibility of “prohibiting use of fruits in a 502(d) order”).

121. See *United States v. Kastigar*, 406 U.S. 441, 448–49 (1972) (preventing the government from using information directly or indirectly derived from immunized testimony); *United States v. Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994) (noting that a “‘common understanding’ of the term ‘use immunity’ has arisen ‘in the criminal justice

“heavy burden” in the criminal context to prove that it has not used tainted evidence to build its case, the recipient of privileged disclosures in a civil context in which Rule 502(d) orders are most likely to be employed could be required to make some lesser showing of independent development of litigation strategies.<sup>122</sup>

This option appears unlikely to produce the certain protection necessary to convert litigants to the use of technology-assisted privilege review and threatens the efficiency objective of Rule 502, however. Constructing meaningful protection for the producing party that preserves requesting party opportunities to explore litigation strategies would be a drafting challenge to say the least. Further, because of the difficulty in identifying the source of litigation strategies with precision, derivative use protection would certainly lead to contentious pretrial disputes. Added litigation over the issue of derivative use creates costs and inefficiencies that run counter to the goals of Rule 502(d) to streamline the discovery process through greater party cooperation. Even more troubling, the incorporation of derivative use protection into Rule 502(d) orders could facilitate the use of privilege “as a sword” rather than “a shield.” Derivative use protection would arm the disclosing party with a new argument to defeat trial strategies of its adversary. As noted during discussion at the Symposium, derivative use protection could lead to party abuse, with litigants “inadvertently” revealing privileged information by design to invoke such protection as a litigation tactic. Such aggressive use of privilege is at odds with traditional privilege doctrine, as well as the goals of cooperation and efficiency embodied in Rule 502. The potential prejudice to a requesting party’s litigation position could further discourage party agreement to clawback and quick-peek arrangements and increase the likelihood of opposed motions for Rule 502(d) orders. In sum, constructing meaningful and fair use protection to prevent adversarial benefit from privileged disclosures appears somewhat unrealistic and fraught with peril.

The more promising alternative involves generating additional data to minimize fear of privileged revelations arising out of technology-assisted review. Lawyers maintain traditional review methodology because they assume that human review produces more accurate results and reduces the risk of unintended and damaging revelations to an adversary. This perceived risk to the producing party will continue to impede conceptual change in the area of privilege review absent evidence to the contrary.<sup>123</sup> Reliable data regarding the accuracy of technology-assisted privilege review could satisfy the second critical step in the conceptual change

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world’ expanding the term to encompass derivative use immunity.”) (citing *United States v. Plummer*, 941 F.2d 799, 804 (9th Cir. 1991)).

122. Although Rule 502 has application in the criminal context, the ability to use a 502(d) order to minimize discovery costs is most salient in the civil context.

123. *PACE & ZAKARAS*, *supra* note 53, at xviii (“Because this is nascent technology, there is little research on how the accuracy of predictive coding compares with that of human review.”).

process by demonstrating a viable alternative to the existing privilege review paradigm.

The studies that have compared human document review to electronic review suggest that the “gold standard” of attorney review is a “myth.”<sup>124</sup> To dismantle this myth once and for all and remove this obstacle to the adoption of electronic review techniques, lawyers and clients need reliable information regarding the actual risk of privileged revelations with the use of computerized review methods. Although some studies have been performed to pit the computer against the human reviewer, many of these comparisons have involved review for responsiveness rather than privilege. Importantly, however, these studies suggest that the accuracy of electronic review promises to be *superior*, rather than inferior, to traditional eyes-on review. If well-executed and highly publicized studies can be performed to compare technology-assisted *privilege* review to lawyer *privilege* review, they may similarly reveal fewer inadvertently disclosed privileged materials in connection with electronic review.<sup>125</sup> Research and education of this kind will eventually lead to abandonment of the myth of the gold standard of eyes-on privilege review. Once this is achieved, the specter of derivative use of inadvertently produced privileged materials will no longer plague the cost-effective technology-assisted review that Rule 502 aims to facilitate. Therefore, the more direct and efficient answer to disclosing party concerns regarding potential collateral use of disclosed privileged information appears to be research and education regarding the actual error rate inherent in electronic privilege review methodology. Should highly publicized studies reveal the superiority of computerized privilege review, they would generate dissatisfaction with the traditional model and unveil the existence of a superior alternative to drive a full conceptual change with respect to e-discovery.<sup>126</sup>

#### CONCLUSION

To a large degree, lawyer resistance to minimizing privilege review through the use of Rule 502 is simply a small piece of the larger struggle toward greater cooperation in the discovery process. As one commentator has noted:

At each stage, . . . the Federal Rules [of Civil Procedure] encourage—if not require—cooperation and responsible behavior . . . . Despite these

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124. *Id.* at xvii (noting studies documenting high rates of “human error” in page-by-page review for relevance). See generally Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011).

125. PACE & ZAKARAS, *supra* note 53, at xvii.

126. One recent publication proposes that “the best way to overcome these barriers and bring predictive coding into the mainstream is for innovative, public-spirited litigants to take bold steps by using this technology for large-scale e-discovery efforts and to proclaim its use in an open and transparent manner.” *Id.* at xix. Although organizational clients may engage in a purposeful strategy to create a precedent that generates long-term cost-savings, taking that bold first step may remain unrealistic in the absence of data about corresponding risks.

clear signals about how lawyers should behave in discovery, complaints about lack of cooperation, incivility, over-discovery, and obstructionism are as common today as they were twenty-five years ago, perhaps even more so.<sup>127</sup>

Litigators are zealous advocates. Indeed, some trial lawyers are sought out due to their reputation for “scorched earth” litigation that treats an opponent as the enemy and eschews all cooperation as a conscious strategy. Although the discovery system requires greater collaboration and cooperation to function efficiently, it is a component of an essentially adversarial process. No amount of exhortation to get along is likely to achieve genuine change in the relationship between opposing counsel. Sanctions, on the other hand, may. Controlling counsels’ worst combative tendencies through conferences, scheduling orders, and protective orders will also minimize obstructionist behavior.

Time-honored, lucrative, and safe methods of eyes-on privilege review present similar obstacles to change. Lawyers are unlikely to respond to sermons about minimizing privilege review costs. To drive true conceptual change and correspondingly drive down wasteful privilege review costs, litigants will require concrete data, methods, and incentives to facilitate movement in this direction. The ideas generated by this Symposium hold great promise to remove existing obstacles to conceptual change. With amendments to the Federal Rules of Civil Procedure to bring visibility and functionality to Rule 502, education in the form of draft 502(d) orders, and the continuation of important research to quantify the degree of risk involved in computerized review, litigants may be on their way to reduced privilege review expenditures through Rule 502.

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127. GENSLE, *supra* note 14, at 537.