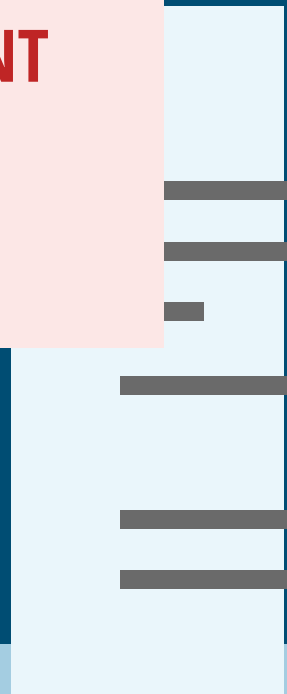
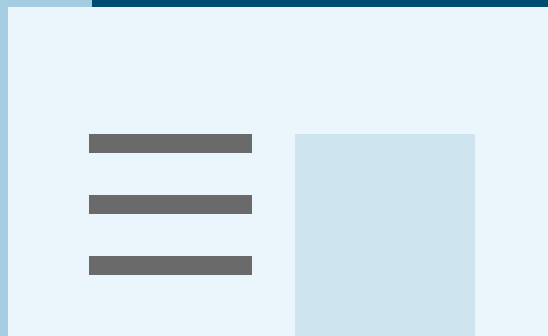




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# Put FRE 502 Clawbacks into Action with Everlaw

**PRIVILEGED  
DOCUMENT**



# Put FRE 502 Clawbacks into Action with Everlaw

For nearly ten years, Federal Rule of Evidence 502 has been available to protect against the inadvertent waiver of privilege in discovery. The protections that FRE 502 offers were long sought by lawyers and hailed by experts. One of ediscovery's [most influential figures](#), according to the 2018 New York Law Journal, Former Magistrate Judge Andrew Peck has even referred to FRE 502(d) as a lawyer's "Get out of Jail Free Card."

Yet, disappointingly, FRE 502—and particularly 502(d)—is not often used by lawyers. Judge Peck has been known to [highlight this problem](#) at the conferences and events at which he appears, famously asking lawyers to raise their hands if they use 502(d) orders regularly. When, typically, just a few lawyers raise their hands, Judge Peck then infamously tells the rest of the audience that they are committing malpractice.



There are many possible reasons that lawyers do not use FRE 502 to the extent that they should:

- They're unaware of the new rule
- They mistakenly think it is unnecessary
- They are worried that judges will force them to forego a full privilege review

**Another reason may be that FRE 502 is difficult to put into practice with early-generation ediscovery technology.** You can draft orders or party agreements in an attempt to protect privilege, but someone would need to monitor for post-production privilege issues and then modify your prior productions, because your ediscovery software could not.

Until now.

Everlaw gives you another, better option for identifying and correcting privilege problems before getting ambushed with an inadvertently produced document at a deposition. Everlaw's "Production Modifications" tool not only lets you modify a production, it helps you monitor a production, to be informed of potential privilege issues before they become embarrassingly public. **The Production Modifications tool allows you to replace privileged documents with placeholders designated with the respective privileges.**

Let's take a closer look at how this tool can help you put your clawbacks into action.

## Begin with a Clawback Order or Agreement

As mentioned above, the ideal scenario is to get an FRE 502(d) order entered by the judge. A properly drafted 502(d) order lets each party claw back inadvertently produced privileged documents, without any further tests, for reasonableness or otherwise. Even better, a 502(d) order applies to all parties and even related cases, whether federal or state.

The most important thing in drafting a proper 502(d) is to remain concise. Any discussion of reasonableness could prompt a judge to analyze the order under FRE 502(b), which offers less protection precisely due to the need to assess reasonableness. At the same time, the right to conduct a full privilege review must be preserved. The good news is that a template for an FRE 502(d) order is available, drafted by Judge Peck, at his official Southern District of New York site:

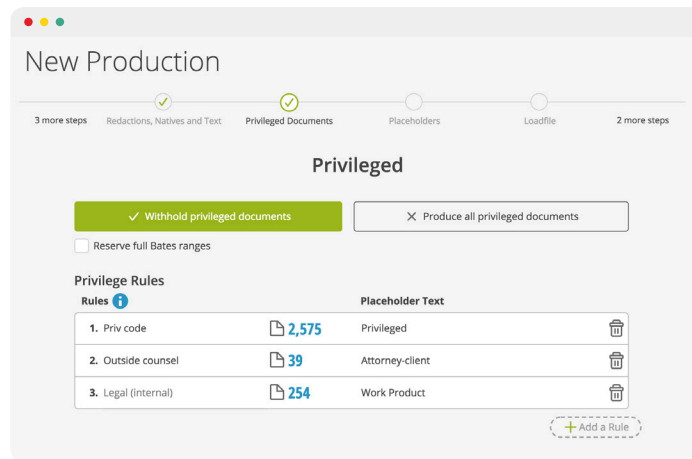
- 1 *The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).*
- 2 *Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.*

And that's it! Get to this point and stop, before you add anything that could convince a reviewing judge to default to using FRE 502(b) to determine whether to allow the clawback.

If you cannot avail yourself of a 502(d) order—whether because the other side won't agree, the judge won't support it, or some other reason—502(b) is always a fall-back option. You will need to carefully draft the agreement to set up the requirements for a reasonable process. Our recent white paper [“Conducting Privilege Review with Everlaw”](#) provides a useful example of a 502(b) agreement and the reasonableness factors that courts typically test against in deciding whether to grant a clawback. Additionally, making sure that your FRE 502(d) protected privilege review is fully reasonable is always a good idea.

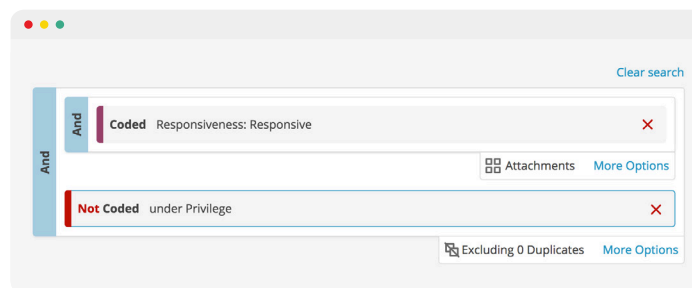
## Set up Your Privilege Criteria and Run Your Production

Once you have completed your review, you can use the productions tool to set up the Privilege Rules that will control which documents are designated as privileged by the system and withheld from production. Of course, you will want to make sure that all privileged documents are properly coded within Everlaw as well.



You can set the system to consider documents to be privileged based upon any search query, including searching by content or metadata. You can use the Production system to test and combine as many privilege designations as you need.

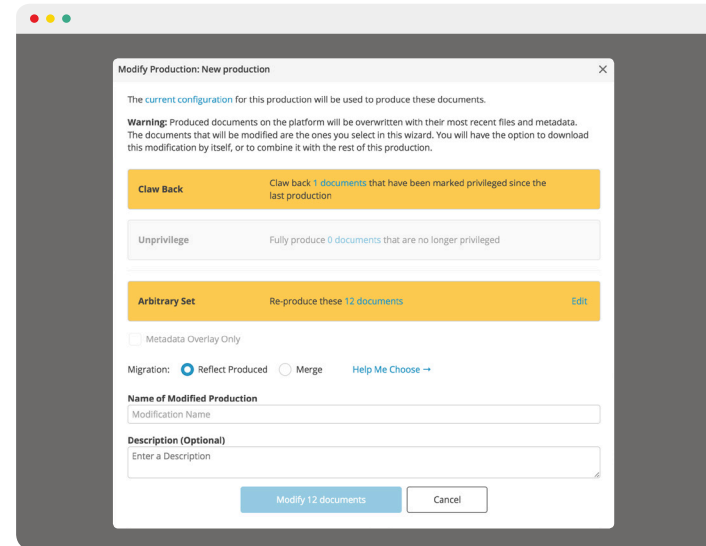
In addition, the Everlaw June 22, 2018 release updated the pre-production search capability, so that you can prepare document families for production while making sure that nothing has been skipped over during review. You can run a search for all documents, including attachments, that have been coded responsive, and have not been coded privileged.



## Everlaw's Production Modification Tools Help You Respond to Inadvertent Production of Privileged Documents

Once you have set up your privilege criteria and produced your documents, Everlaw's [Production Modification tool](#) monitors for any subsequent changes within the document corpus that match your privilege rules. If your review team makes any changes to the privilege codes on any previously-produced documents, you can use the Modify Production tool from the production card to see if any documents that were not previously marked privileged have now been marked as such. You will also see if any privilege designations have been removed.

Everlaw makes it easy to then prepare and send out a new production with the corrected document set. For details on how to do this, please see the Everlaw support guide "[Production Modification Tools](#)."



You should send the other side your own clawback request for any documents that were inadvertently produced, along with a Rule 26(b)(5) notice to segregate any such documents until they are returned—or if any subsequent judicial determination needs to be made. Sending notice to the other side helps to immediately limit any potential damage from an inadvertent production, as it keeps the documents from being used against you during that time and limits the number of people who can see them. In addition, requesting the return of any inadvertently-produced privileged documents is one of the reasonableness factors that courts consider for FRE 502(b). And as we will see, it's always a good idea to make sure that all of your actions to protect privilege are reasonable, whether before or after review.

## Everlaw Provides an Ounce of Reasonable Prevention to Help Avoid a Pound of Cure

A careful privilege review will keep your client happy as well. Clients expect their counsel to avoid producing privileged documents, even if those documents can be clawed back, because once the other side has them, their contents is known. As said in one recent case *Fairholme Funds, Inc. v. United States*, No. 13-456C, (Fed. Cl. Oct. 23, 2017), it is a "bell that cannot be un-rung."

Even if you have a 502(d) order in hand, there's still good reason to be thorough with your privilege review. Indeed, surveys show that many attorneys refuse to use 502(d) for fear that some judges aren't familiar enough with the Rule, and will instead apply 502(b), which takes you back to square one: being required to perform a reasonable privilege review. In fact, the Sedona Conference Commentary on Protection of Privileged ESI recommends this type of careful approach:

Comment 3(d): Parties and counsel should identify and implement "reasonable" steps to prevent disclosure of privileged ESI during the collection, identification, and review process.

Everlaw productions, when combined with the production modifications tool, can give you additional protection against your privilege review process being found unreasonable. Testing and setting up layers of multiple privilege designations gives you an additional, documentable process to prevent your review from missing privileged documents—just the kind of reasonable process to present to the judge if needed.

The production modifications tool also helps prevent repeating any prior inadvertent production of privileged documents in subsequent productions, something that occurs surprisingly often.

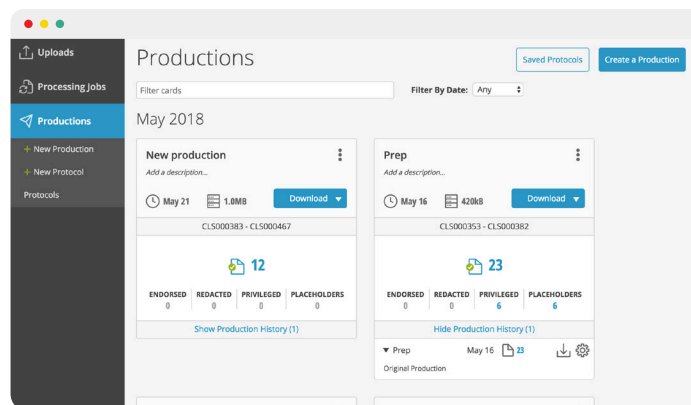
## Don't Make the Same Mistake Twice (Or More!)

The author, Steven Denn, once wrote “You can never make the same mistake twice because the second time you make it, it’s not a mistake, it’s a choice.” That might not seem fair to some, but it’s certainly how the courts often see things. One would think that few parties seeking to force the return of privileged documents that they claim were inadvertently produced would make a mistaken prior production look like a choice, but it happens all too often.

Recently in *Irth Solutions LLC v. Windstream Communications LLC*, No. 2:16-CV-219 (S.D. Ohio Aug. 2, 2017), the defendant was seeking the return of 43 privileged documents that it claimed were produced inadvertently when its lawyers once again produced the documents to the other side—during the middle of the dispute. Despite claims by the outside counsel partner in charge of the case that a miscommunication between an associate and litigation support staff has caused the staff to use an old production folder with the privileged documents included instead of the newer, purged folder, the court certainly treated this mistake like a choice:

*“Thus, in the midst of arguing to this Court that it should protect Defendant’s attorney-client communications and award it fees and costs, defense counsel again produced the privileged documents.”*

To prevent you from making the same mistake twice, we’ve set up Production Modifications in a way to prevent mistaken re-productions from ever happening. Consider how the firm that messed up in *Irth Solutions* went wrong. In the midst of a contentious ediscovery process, their litigation support personnel reproduced the incorrect, old set of folders instead of the new, corrected ones. We know that processes under great pressure can sometimes go wrong, so we’ve gone to great lengths to make our technology as foolproof as possible. The production card for a modified production will have a green “Package” button—for the newly-packaged modified production—instead of the standard “Download” button to access the package for the new production. You can access the old, uncorrected production by clicking on the “Show Production History” link at the bottom of the production card, but otherwise prior productions will be safely hidden from view—and from mistaken re-production.



## Use FRE 502(d) Orders to Protect Your Clients—and Yourself

If you are still not using FRE 502(d) orders to protect your clients—and yourself—from inadvertent productions of privileged documents, there’s no time like the present to heed the words of Judge Peck and avoid committing malpractice. And if you are not using ediscovery solutions that make it easy for you to detect problems early and claw back documents effectively, now is the time to make the switch to a better system.