MEMORANDUM

TO: United States District Court for the Western District of Missouri

FROM: ESI Committee

DATE: August 9, 2016

RE: Proposed Fed. R. Evid. 502(d) Model Order and Related Local Rule Change

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The ESI Committee recommends that the Court consider adopting the attached proposed model Fed. R. Evid. 502(d) Order and changing its local rules to encourage parties to consider such orders in the context of L.R. 16.1.

This recommendation was vetted through the Federal Practice Committee and positively received with no further changes suggested.

Background of Fed. R. Evid. 502(d)

Fed. R. Evid. 502 was adopted in 2008 to resolve conflict among the courts about whether inadvertent disclosure of privileged information waived the privilege. Fed. R. Evid. 502(b) codified the view that inadvertent disclosure was not a waiver as long as the producing party took reasonable steps to prevent the disclosure in the first instance and took reasonable steps to rectify the disclosure after the fact. Most lawyers and judges are familiar with the concepts embodied in Fed. R. Evid. 502(b).

However, many lawyers and judges are less familiar with Fed. R. Evid. 502(d). This subsection permits courts to enter an order stating that disclosure of privileged information does not result in waiver regardless of inadvertence or the care taken to prevent disclosure. An order under 502(d) protects against waiver both in the pending litigation and any other federal or state court proceeding. Party agreement is not required.

Specifically, Fed. R. Evid. 502(d) provides: "Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding."

Benefits of 502(d) orders

Most e-discovery commentators and experts recommend the routine entry of 502(d) orders in any federal case, and a model order in the Western District would promote the use of this underused cost-saving tool. The burdens associated with production of ESI in litigation, even in simple cases, have increased dramatically due to the large volume of ESI generated by businesses today. Page-by-page and line-by-line privilege reviews are no longer tenable in most cases, yet parties risk having to show inadvertence (a fact-intensive inquiry) through motion

practice if the party needs to claw back a document to avoid a finding of waiver. Entry of 502(d) orders tends to promote the "just, speedy, and inexpensive" determination of every action by allowing parties to design a privilege review that is efficient and proportional while keeping a client's privileged information privileged.

Specific language proposed

The ESI Committee suggests the specific language in the proposed model order because it is short, simple, and largely follows a model order used by Judge Peck in the Southern District of New York. Judge Peck has been regarded as a judicial thought leader in e-discovery and is a vocal proponent of the routine use of 502(d) orders. The second paragraph of the proposed model order makes clear that by having a 502(d) order in place, parties are not waiving their right to review the documents for privilege before production.

The ESI Committee recommends the proposed change to L.R. 16.1 to encourage parties to consider whether a 502(d) order may be beneficial in their case.

It should be noted that the Committee also considered an additional change to L.R. 16.1 that would have stated: "If one or more parties objects to the entry of a 502(d) Order, those parties shall concisely state the reasons why a 502(d) Order is not appropriate for this particular case." The general view of the Committee was that this language did not materially add to the proposal but views were not strong for or against its inclusion. Ultimately, the Committee determined to advise the Court of the additional language should the Court have a different view.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
_____ DIVISION

_____,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. _____**
	)	
_____,	)	
	)	
Defendant.	)	

RULE 502(d) ORDER

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).

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.

IT IS SO ORDERED.

Date: /s/_____
District Judge/Magistrate Judge

16.1 CIVIL ACTIONS-SCHEDULING

(a) **General Principles.** Unless otherwise ordered, this Local Rule is applicable to all civil actions pending in this district, except for the actions exempted by Rule 16.1(c). Counsel are responsible for completing discovery in the shortest time reasonably possible with the least expense and without the necessity of judicial intervention.

Rule 16(b), Federal Rules of Civil Procedure, requires that a scheduling order be entered in every action, except those specifically exempted, limiting the time (1) to join other parties and to amend the pleadings; (2) to file motions; and (3) to complete discovery. A scheduling order shall be entered within the time set out in Rule 16.1(b). Counsel should have the initial responsibility for suggesting reasonable dates for the scheduling order.

Upon completion of discovery, post-discovery pretrial procedures will be scheduled pursuant to Rule 39.1 and the action will be set for trial. Post-discovery pretrial procedures and the trial setting will be coordinated whenever possible.

(b) **Scheduling Order Deadline; Method of Calculation.** A scheduling order shall be entered no later than 90 days after the appearance of a defendant or 120 days after the complaint has been served on a defendant, whichever is earlier.

The following guidelines apply to the calculation of the scheduling order deadlines:

1. The 90-day period begins to run on the date on which any defendant files any paper in the action.

2. The 120-day deadline applies if no defendant has appeared within 30 days after the complaint was first served on a defendant and begins to run on the date the complaint was first served on any defendant.

(c) **Actions Exempt From These Procedures.** Categories of actions exempted from compliance with these procedures are specified in Rule 26(a)(1)(B), Federal Rules of Civil Procedure. Exemptions in particular cases are further subject to orders of the Court.

(d) **Proposed Scheduling Order/Discovery Plan Required; Plaintiff's Counsel Shall Take Lead in Preparation of Proposed Scheduling Order/Discovery Plan.** The parties shall file a proposed scheduling order complying with Rule 16.1(f), together with the discovery plan required by this Rule, 14 days after the meeting required by Rule 26.1(a). The discovery plan shall be included as part of the proposed scheduling order. After the meeting required by Rule 26.1(a) of these Rules, counsel for plaintiff is responsible for preparing a draft of the

proposed scheduling order/discovery plan. The draft prepared by plaintiff's counsel shall be presented to counsel for all other parties for additions and modifications. In pro se cases not exempt under Rule 26(a)(1)(E), Federal Rules of Civil Procedure, counsel for defendant(s) shall take the lead in preparing the proposed scheduling order/discovery plan. Counsel should fully and openly communicate with each other so that a joint proposed scheduling order/discovery plan is submitted. If all counsel do not agree on a proposed scheduling order/discovery plan, separate proposed scheduling orders/discovery plans should not be filed. Disagreements concerning a proposed scheduling order/discovery plan, if unresolved by the good faith efforts of counsel, should be stated in the proposed scheduling order/discovery plan.

(e) **Sanctions for Failing to Cooperate in Preparing a Proposed Scheduling Order/Discovery Plan.** The failure of a party or a party's counsel to participate in good faith in the framing of the proposed scheduling order/discovery plan may result in the imposition of appropriate sanctions. *See* Rules 16(f) and 37(g), Federal Rules of Civil Procedure.

(f) **Content of the Proposed Scheduling Order.** The proposed scheduling order referred to in Rule 16.1(d)) shall:

1. Propose a date limiting joinder of parties;

2. Propose a date limiting the filing of motions to amend the pleadings (It is suggested that counsel consider in most actions a date approximately 180 days after the filing of the complaint.);

3. Propose a date limiting the filing of motions [It is suggested that counsel in most actions consider proposing that (a) all discovery motions be filed on or before the date proposed for the completion of discovery; and (b) subject to the provisions of Rule 12(h)(2), Federal Rules of Civil Procedure, all dispositive motions be filed within 30 days after the date proposed for the completion of discovery.];

4. Propose a discovery plan for the completion of all discovery, as required by 16.1(d) of these Rules, including the date by which all discovery shall be completed. Counsel should not propose a date for the completion of discovery which is known to be without any reasonable basis. *See* Rules 26.1(c) and 26.1(d); and

5. Estimate the number of days necessary to try the action with reasons supporting the estimate.

6. Suggest an agreeable trial date for the court's consideration.

7. State whether any party anticipates requesting a protective order. In the meeting required by Rule 26(f), Federal Rules of Civil Procedure, the parties shall discuss specific areas of written discovery and deposition testimony which may be the subject of a request for protective order. Any party which anticipates requesting a protective order shall serve on every other party a proposed protective order and a proposed stipulation for its entry no later than the date of serving initial disclosures required in Rule 26(a)(1), Federal Rules of Civil Procedure. Any party seeking a protective order without first having followed the requirements of this Local Rule shall state the cause within any motion for protective order later filed with the Court.

8. State whether any party requests the entry of a Fed. R. Evid. 502(d) Court Order.

26.1 DISCOVERY

(a) Meeting of the Parties; Initial Disclosures. The meeting of the parties required by Rule 26(f), Federal Rules of Civil Procedure, should take place as soon as practicable, but not fewer than 30 days before the Court's scheduling order is to be entered under Rule 16.1(b) of these Rules. The initial disclosures required under Rule 26(a)(1), Federal Rules of Civil Procedure should be made at this meeting, but must be made no later than 14 days after the meeting. Counsel who fail to investigate their actions and who fail to make initial disclosures as provided by these Rules may be subject themselves to sanctions.

(b) Discovery Shall Commence After Meeting of the Parties; Filing of Motions Does Not Automatically Stay Discovery or Disclosure Requirements.

1. Parties required to meet and confer may not seek discovery from any source before such meeting, except by agreement or by order of the Court.

2. Absent an order of the Court to the contrary, the filing of a motion, including a discovery motion, a motion for summary judgment, or a motion to dismiss, does not excuse counsel from complying with this Rule, with any disclosure requirement under this Rule or the Federal Rules of Civil Procedure, or with any scheduling order entered in the action.

(c) Content of Discovery Plan. The discovery plan required by Rule 16.1(d) shall:

1. Propose a date by which all discovery will be completed, and state the facts, such as the complexity of the issues, which counsel considered in arriving at the proposed deadline for the completion of all discovery;

2. State the subjects on which discovery may be needed, the status of all discovery to date, a description of all discovery each party intends to initiate prior to the close of discovery, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

3. State the date by which the initial disclosures required by Rule 26(a)(1), Federal Rules of Civil Procedure, were made or will be made, and propose what changes, if any, should be made in the timing, form, or requirement for disclosures under Rule 26(a), Federal Rules of Civil Procedure, these Rules, or a standing order. *See* Rule 26(f)(1), Federal Rules of Civil Procedure.

4. Propose, if necessary, any additional limitations on discovery that should be imposed, or any changes to the limitations on discovery imposed by these Rules or the Federal Rules of Civil Procedure. *See* Rule 26(f)(3), Federal Rules of Civil Procedure.

5. Propose, if necessary, any other orders that should be entered by the Court. *See* Rule 26(f)(4), Federal Rules of Civil Procedure.

The information furnished pursuant to subsections 1, 2, and 3 should be sufficiently detailed to inform the Court why the period of time proposed for completing discovery is believed necessary. The specificity of the information furnished pursuant to subsections 1 and 2 shall increase in direct relation to the extent to which the deadline for completion of discovery exceeds 180 days after a defendant has been served. In other words, the longer the time proposed for discovery, the greater detail counsel shall furnish in support of the request. Consideration should be given to proposing dates prior to the close of discovery for the completion of specific phases of discovery. Counsel should keep in mind the general principles governing discovery set forth in the Federal Rules of Civil Procedure and Rule 16.1(a).

(d) **Preliminary Discovery Plan.** The Court recognizes that in some actions it may be impossible for the parties to file a realistic discovery plan when it is due under Rule 16.1(d). If the parties believe that it is impossible to propose a date for the completion of discovery which has a reasonable basis, the parties should file a preliminary discovery plan which conforms to Rule 26.1(c). Date for completion of all discovery should be suggested and a date should be proposed by which a plan will be filed fully complying with Rule 26.1(c).

Counsel proposing a preliminary discovery plan shall explain in detail why a deadline for completion of all discovery cannot be proposed. Only in extraordinary situations and upon a showing of good cause will a preliminary plan be accepted.

Comment [A1]: This reference to Fed. R. Civ. P. 26(f)(3) incorporates and includes "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 under Federal Rule of Evidence 502." *See* Fed. R. Civ. P. 26(f)(3)(D) (2016).

Note – the proposed changes to the Local Rules that are currently under revision still include this reference to Fed. R. Civ. P. 26(f)(3). As proposed, L.R. 26.1(c) states, "Specifically, the discovery plan must: … 1. Conform with Fed. R. Civ. P. 26(f)(3)."

(e) **Discovery Conference.** If requested prior to or at the time a proposed scheduling order is filed, or if ordered by the Court on its own motion after reviewing a proposed scheduling order, a discovery conference pursuant to Rule 16(a), Federal Rules of Civil Procedure, will be held before entering a scheduling order.

(f) **Limits on Stipulations.** Parties may not eliminate by stipulation any of the disclosures required by Rule 26, Federal Rules of Civil Procedure, this rule, or any General Order of this Court. Parties who want to eliminate a particular disclosure requirement shall file a joint written motion setting forth the proposed change and showing good cause for such change.