
Challenges in Protecting Attorney-Client and Work Product Privileges

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Overview

- Shifting Rules -- Unsettled Practices
 - Amended Federal Rules of Civil Procedure
 - Proposed Federal Evidence Rule 502
- Current State
 - Organizational Practices
 - Records Management Compliance Programs
- Practical Remedial Action Plans
- Questions and Wrap-up

Key Amendments to Federal Rules of Civil Procedure

Amendment

Summary

Rule 26(a); 34(a)
(Form 45)

Initial disclosures include a copy or description by category and location of ESI in support of claims or defenses

Rule 16(b); 26(f)
(Form 35)

“Meet and confer” before scheduling conference and develop discovery plan to facilitate discovery and stipulations for consideration by the court

Rule 26(b)(2)

Parties do not have to produce ESI from sources identified as not reasonably accessible due to undue burden or cost

Rule 26(b)(5)

Procedure for claw-back and quick-peek agreements with a design to prevent subject-matter privilege waivers

New Procedures for the Handling of Attorney-Client Communications and Work Product

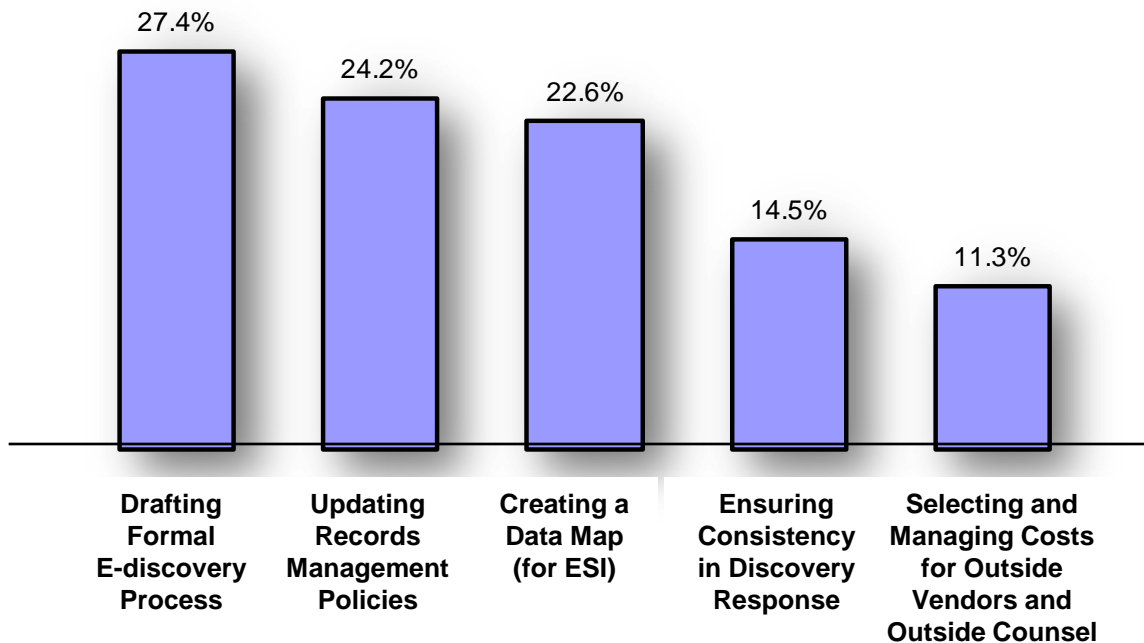
Rule 26(b)(5)(B) Procedure for recovering privileged data inadvertently produced

- *Subdivision (A) -- procedure for withholding information*
 - *Difficult with ESI unless you have a business process in place to segregate privileged data*

- **Subdivision (B) – procedure for getting it back (new)**
 - *Catch 22: Only can make this request if you know what you “inadvertently” disclosed (does not address privilege waiver)*

Quick Poll

What are the two most urgent challenges for your company when considering e-discovery?



Proposed Federal Evidence Rule 502

- Substantive proposed rule, not procedural, and requires affirmative congressional approval
- Advisory Committee on Evidence Rules
 - January 12 and 29, 2007 (testimony in Phoenix and New York)
 - February 15, 2007 (public comment period closed)
 - April 12-13, 2007 (Advisory Committee to review comments)
 - Judicial Conference → Supreme Court → Congress
 - Targeted for final adoption December 2008 (or later)
- Rule of Privilege Waiver by Disclosure (voluntary)
 - 502(a) disclosure results in waiver only to extent of information disclosed – subject matter waiver is the exceptional case where the disclosing party “*ought in fairness*” disclose further, related information (borrowing term in FRE Rule 106)

Proposed Federal Rule of Evidence 502(b)

Inadvertent Disclosure

Rule 502(b)

*“Disclosure does not operate as a waiver if “the holder of the privilege . . . took **reasonable precautions** to prevent disclosure and took **reasonably prompt measures**,” once the holder knew or should have known of the disclosure, to rectify the error. . . .”*

■ Problems

- ❑ Only fraction of all data contained in email is privileged
- ❑ Few organizations segregate as a standard operating procedure
- ❑ Too expensive to cull during constricted time frame under new FRCP

■ Recommendations

- ❑ Reasonableness should be based on subjective standard of good faith
- ❑ Temporal considerations: effective records management to sort data
- ❑ Totality of circumstances: time, scope and complexity

Possible Revision to Rule 502(b)

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver * * * is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions, technological or otherwise through effective records management compliance practices, to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

Claw-back and Sneak-Peek Agreements

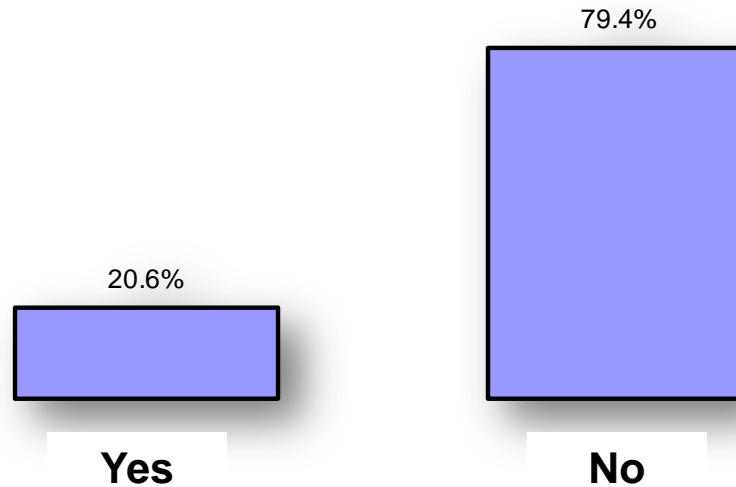
Saving money, or just time with added risk?

■ Rule 502(d)(e)

- Prevailing view: *claw-backs save money ...* but --
 - No savings per se if cost deferred or shifted (i.e., someone has to do privilege review)
 - Concept and term search technologies are largely untested and waiting for proper *Daubert* scrutiny
- Dubious applicability as to third parties or courts
- Once “cat out of the bag” -- hard to recapture
- How can the rule apply unless *some* process for segregation is done in advance?

Quick Poll

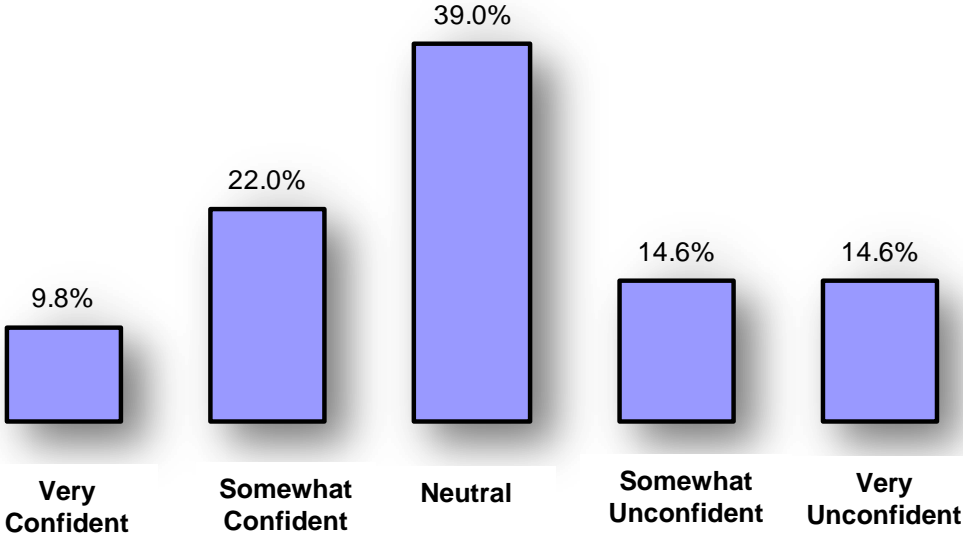
Do you segregate privileged communications from other email as a standard operating procedure?



Much more work before
we get there ...

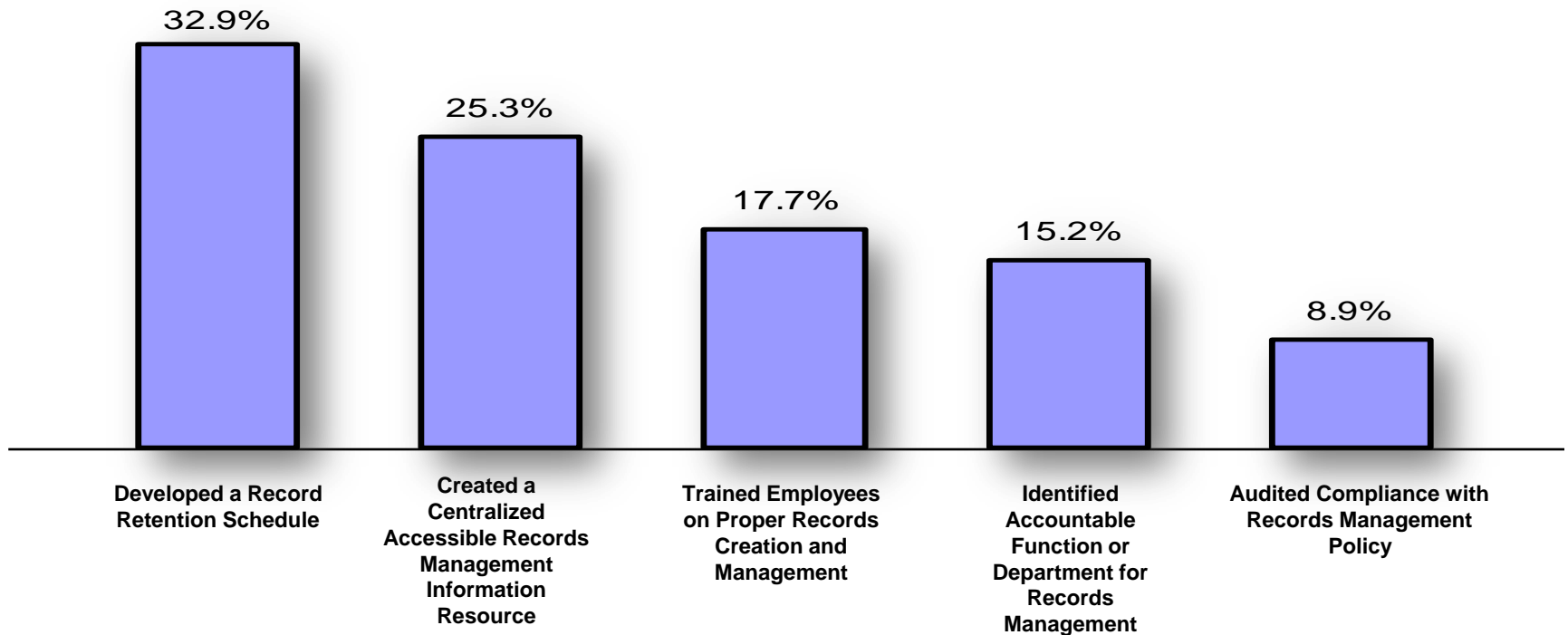
Quick Poll

How confident would you be defending your company's records management program in court?



Quick Poll

What steps has your company taken to create a records management program? (select all that apply)



n=79

Is Records Management Important to the Staff?

- **82%** rank records management as important or very important
 - **80%** rank “Improving companywide records policies, tools, and compliance” as important or very important
 - **75%** rank “Improving electronic discovery policies and preparedness” as important or very important
 - **80%** rank “Improving employee awareness of appropriate email use and tone” as important or very important

Source: Compliance and Ethics Leadership Council and
General Counsel Roundtable Research

Is Records Management Important to the General Counsel?

- **85%** rank records management as important or very important (versus 82%)
 - **80%** rank “Improving companywide records policies, tools, and compliance” as important or very important (same)
 - **80%** rank “Improving electronic discovery policies and preparedness” as important or very important (versus 75%)
 - **75%** rank “Improving employee awareness of appropriate email use and tone” as important or very important (versus 80%)

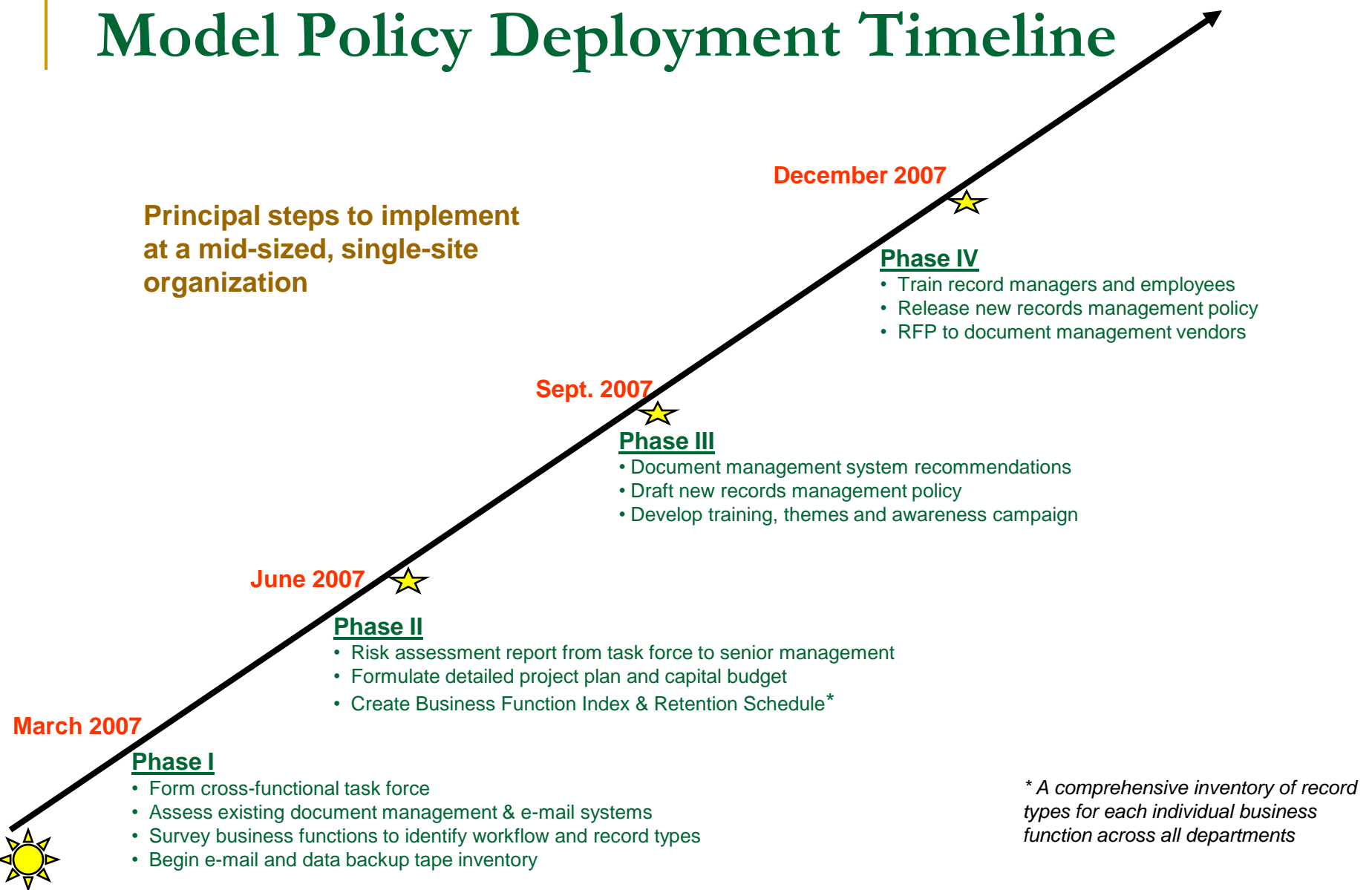
Source: Compliance and Ethics Leadership Council and
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A Road to Enterprise Content Management

- ✓ Make business case for support from a high-level officer and board committee
- ✓ Appoint an executive in charge (*legal, compliance, audit, risk management*)
- ✓ Form a standing task force with all corporate functions represented
- ✓ Establish records management policy with a training, awareness campaign and implementation plan (*you will need this for court*)
- ✓ Appoint e-discovery coordinator to maintain data map and cultivate IT department relations (*cultivate and promote a current employee*)
- ✓ Develop E-Document Request Process (*you will need this for court*)
- ✓ Use change management methods to gain and sustain buy-in and support from upper and middle management, and to develop ways to reduce email volume
- ✓ Reduce number of outside litigation firms (*consider dedicated e-discovery firm*)
- ✓ *Develop matter management system to track disputes from inception, improve litigation hold documentation, and segregate privileged data from email traffic*

Model Policy Deployment Timeline

Principal steps to implement
at a mid-sized, single-site
organization



* A comprehensive inventory of record types for each individual business function across all departments

General Counsel Top Objectives for 2007

1. Revise and streamline preferred network of external law firms
2. Improve consistency of enterprise compliance with records management policies
3. Track BU progress toward specified risk management objectives
4. Optimize legal department's management of internal resources through technology and process improvements
5. Identify underlying components of external legal spend to better direct work sent to outside counsel
6. Improve partnership and communications with BU clients
7. Improve alignment with law firms to obtain best value for cost
8. Expand legal department training to improve key subject matter and cross-functional skills

Rule 502(c) and Selective Waiver

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

“Culture of Waiver” – *Fact or Fiction?*

■ Enforcement Policies

- DOJ Holder/Thompson Memoranda (June 1999/Jan. 2003)
- SEC Seaboard Report (Oct. 2001)
- Federal Sentencing Guidelines for Organizations (May 2004)
- McNulty Memorandum (Dec. 2006) (new procedures for DOJ)

■ Legislative Activity/Reactions from the Bar

- Attorney-Client Privilege Protection Act of 2007, S. 186
 - Bar demand for waiver or cut-off of defense costs for officers and directors
 - CRS Report for Congress: *The Thompson Memorandum: Attorneys’ Fees and Waiver of Corporate Attorney-Client and Work Product Protection* (Jan. 2007)
- ABA Presidential Task Force on Attorney-Client Privilege
 - President Mathis Testimony Before House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (March 8, 2007)
- Association of Corporate Counsel and numerous others

Practical Considerations as to Why Blanket Opposition to Proposed Rule 502(c) Misplaced

- Corporations traditionally wanted this option – right?
- Is 502(c) an improvement on status quo?
- Limited disclosure should be last resort
 - Ethics and compliance programs
 - Measuring effectiveness and pulse of organization
- Over-reliance on waiver – who is at the negotiation table and raising waiver anyway?
- Coerced waiver is not waiver – must be “proper” exercise of prosecutorial discretion
- Consider protections extending to disclosure to auditors and outside directors (e.g. , FSAS 5, oversight duties, recent Second Circuit Ruling on accountant liability)

Questions and Comments

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