Privilege Insurance:

The 502(d) Order as Protection for the Attorney-Client Privilege and the Rising Costs of E-Discovery

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The one task that may be more difficult than finding a needle in a haystack is protecting it. In today's increasingly data-driven world, compliance with discovery requirements can mean production of hundreds of thousands of pages of documents, if not millions. Reviewing this data for privileged materials can be an arduous task, requiring a great deal of attorneys' time and thus increasing client costs.

Federal Rule of Evidence 502(d) was enacted to reduce the costs and risks associated with discovery, and to allow a federal court to protect the privilege of documents that have been inadvertently disclosed. Federal Rule of Evidence 502(d) provides that "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."

During the 2014 LegalTech conference in New York City, the issue of Rule 502(d) orders was a hot topic with several panelists and attendees devoting considerable time discussing the benefits of a Rule 502(d), order as well as some concerns with utilizing such orders. During the conference, Judge Andrew J. Peck of the United States District Court for the Southern District of New York advocated the use of Rule 502(d) orders as a way to reduce the time and costs associated with privilege reviews, calling a 502(d) order a party's "get out of jail free card." In fact, in a previous LegalTech conference, Judge Peck suggested that if you haven't been utilizing Rule 502(d) in connection with electronic discovery, you may have even committed legal malpractice.[1] Used properly, Rule 502(d) can be a valuable asset in discharging your duties and protecting the attorney-client and attorney-work product privilege through the discovery process.

Benefits of a Rule 502(d) Order

The sheer volume of discovery involved in complex litigation today has led some commentators to caution that the inadvertent disclosure is "inevitable."[2] Inadvertent disclosure is governed generally by Rule 502(b), which provides that disclosure waives the attorney-client privilege unless: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection takes reasonable steps to prevent disclosure; and (3) the holder promptly takes reasonable steps to rectify error. This analysis is fraught with uncertainty for the producing party, who must take pained efforts to ensure that a court finds any steps made to rectify an inadvertent disclosure to be "reasonable."

The Rule 502(d) order can help alleviate some of the uncertainty relating to the inadvertent disclosure analysis under Rule 502(b). Unlike the general rule relating to inadvertent disclosure, protections under 502(d) need not depend on whether disclosure was inadvertent.[3] In fact, the Advisory Committee Notes to Rule 502(d) provide that a court may provide for the return of documents pursuant to the rule, "irrespective of the care taken by the disclosing party." One court recently found that the 502(d) order provided certain documents with "heightened protection," and that waiver would be appropriate only if production of the privileged material was "completely reckless."[4]

Beyond the protection afforded in federal litigation, Rule 502(d) also expressly prevents waiver in other federal and state court proceedings. Unlike Rule 502(b), which does not provide for a non-waiver agreement outside of the subject litigation, Rule 502(d) is clear that a document inadvertently produced in one case will also not waive privilege in another case. Notably, Rule 502(e) provides that "an agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order." Thus, any agreement between the parties must be made part of a court order to give it full protection.

In addition, a Rule 502(d) order is also available to and binding on non-parties, such as subpoena respondents producing information in the litigation. Thus, if the need to subpoena third parties is contemplated, the Rule 502(d) order should be drafted to protect those parties. Alternatively, for those counsel representing subpoena respondents, counsel should negotiate

a 502(d) agreement and order to protect any inadvertent disclosure. This approach provides significant benefits to both the parties and non-parties by lowering costs and expediting privilege review.

Moreover, a court may issue a Rule 502(d) upon motion of one or more of the parties or may issue an order *sua sponte*.[5] Thus, a court may enter a Rule 502(d) order without agreement of the parties which may be beneficial in contentious negotiations regarding protective orders and claw-back provisions.

Concerns Regarding the Use of a 502(d) Order

Despite the clear benefits of a Rule 502(d) order, many practitioners and judges have not taken advantage of those benefits. Inconsistent application of the rule among courts may be partially to blame.

For example, although Rule 502(d) does not expressly require parties to take "reasonable" steps to protect documents (as compared to Rule 502(b)), some courts have analyzed the care taken in producing documents, even after finding that Rule 502(d) protection applies.[6] Other courts have found that if a Rule 502(d) order "does not provide adequate detail regarding what constitutes inadvertence, what precautionary measures are required, and what the producing party's post-production responsibilities are to escape waiver, the court will default to Rule 502(b) to fill in the gaps in controlling law."[7]

Some practitioners have also expressed concerns about a court requiring expedited production under the supposed protection of a 502(d) order.[8] Indeed, some courts have relied on 502(d) orders as a means to enforce tight discovery schedules.[9] Additionally, one court found that a party's refusal to enter into a 502(d) order weighed against costs being shifted to other parties.[10]

Other courts, however, have held that Rule 502(d) does not limit a party's ability to thoroughly review documents.[11] In response to this concern, Judge Peck has encouraged the use of the following language in 502(d) orders: "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." Judge Peck has created a proposed Rule 502(d) order, available online at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=928.

Practice Pointers

Despite the concerns regarding inconsistent application of Rule 502(d), the rule is undoubtedly one of the most valuable assets to counsel working on cases involving large volumes of electronically stored information ("ESI"). A carefully drafted Rule 502(d) agreement and order can help alleviate the concerns discussed above while at the same time minimizing the time, expense and risk of inadvertent waiver associated with large ESI reviews and productions. A few practice pointers:

- Include a statement that the parties' actions are presumed to meet the care requirements of Rule 502(b). Although the language of Rule 502(d) and the Advisory Committee Notes do not require a reasonability analysis, as discussed above, some courts conflate the Rule 502(b) analysis with the Rule 502(d) analysis.
- As an extra precautionary measure, it may also be beneficial to document the thoroughness employed in document production. This can help establish that Rule 502(b) reasonableness requirements are met in the event that a Rule 502(d) order is considered ambiguous.[12]
- Consider adopting language similar to that included in Judge Andrew Peck's proposed Rule 502(d) order, available on his website for the Southern District of New York. This should help alleviate concerns regarding a court requiring expedited production under the supposed protection of a 502(d) order.
- If opposing counsel will not agree to a claw-back agreement or if negotia-

tions over a claw-back agreement have become contentious, consider moving for an order unilaterally.

Conclusion

As one commentator has noted, "Rule 502(d) cannot unring the bell, but it can limit who hears it."[13] Thus, while on one hand "it may be damaging for an opposing party to learn such information," on the other hand, "it would be *more* damaging if a judge orders that the document is now admissible at trial."[14] Rule 502(d) orders are one of several tools that litigators and judges now advocate to reduce the cost and encourage efficiency throughout litigation. In today's litigation, where inadvertent disclosure is almost inevitable, lawyers would be wise to consider how a Rule 502(d) order can help mitigate the loss of inadvertent disclosure. The protection of Rule 502(d), coupled with well-planned privileged reviews, can help protect your clients' cases *and* their wallets.

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1 See *View from the Bench: Judges on E-Discovery at LegalTech Day Two*, Law Technology News, Evan Koblentz (Jan. 31, 2013).

2 Edwin M. Buffmire, *The (Unappreciated) Multidimensional Benefits of Rule 502(d):Why and How Litigants Should Better Utilize the New Federal Rule of Evidence*, 79 TENN. L.R. 141, 142 (2011).

3 See Brookfield Asset Mgmt., Inc. v.AIG Fin. Prods. Corp., 2013 U.S. Dist. LEXIS 29543, (S.D.N.Y. 2013) (permitting claw-back under a 502(d) order even if the defendant had "dropped the ball").

4 See Dover v. British Airways, PLC (UK), 2014 U.S. Dist. LEXIS 114121 (E.D.N.Y. 2014) (referencing New York district law) (declining to find waiver, even where documents inadvertently produced on two separate occasions.)

5 See Wellman v. United States, 2014 U.S. Dist. LEXIS 74456 (S.D.W.Va. 2014) (court "retains authority to issue a protective order governing production of the privileged information").

6 See Bd. of Trustees, Sheet Metal Worker's Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F.Supp.2d 845 (E.D. Mich. 2010) (noting that the court's protective order represented a 502(d) claw-back agreement, but still continuing to assess whether "defendants took reasonable steps to prevent disclosure").

7 U.S. Home Corp. v. Settlers Crossing, LLC, 2012 U.S. Dist. LEXIS 101778 (D. Md. 2012).

8 See Rajala v. McGuire Woods, LLP, 2013 U.S. Dist. LEXIS 1761 (D. Kan. 2013) (Rule 502(d) order "will permit the parties to conduct and respond to discovery in an expeditious manner, without the need for time-consuming and costly pre-production privilege reviews").

9 See Jicarilla Apache Nation v. United States, 91 Fed. Cl. 489 (requiring production within 16 days of court's order, noting that the defendant can seek relief under 502(d) if concerned that production would waive attorney-client privilege); United States v. Orian, 2011 U.S. Dist. LEXIS 152357 (D. Haw. 2011) (granting 502(d) order and requiring production from 72 hard drives "immediately and complet[ely]" within roughly 2 months of order); Progressive Cas. Ins. Co. v. Delaney, 2014 U.S. Dist. LEXIS 69166 (D. Nev. 2014) (where plaintiff advocated for some expediency, requiring plaintiff to produce 565,000 documents subject to Rule 502(d) order within 13 days).

10 Bell Inc. v. GE Lighting, LLC, 2014 U.S. Dist. LEXIS 56170 (W.D.Va. 2014).

11 See Fleisher v. Electronically Filed Phoenix Life Ins. Co., 2012 U.S. Dist. LEXIS 182698 (S.D.N.Y., 2012) (noting party "is, of course, free to engage in as exacting a privilege review as it wishes" despite 502(d) order).

12 See Mformation Technologies v. Research in Motion, Ltd., 2010 U.S. Dist. LEXIS 91714 (N.D. Cal. 2010) (finding documents protected, pursuant to parties' stipulated protective order, where defendant had taken pains to review "its entire document production (comprising…some 3.6 million pages) to identify any privileged materials that were inadvertently produced"); Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Palludium Equity Partners, LLC, 722 F.Supp.2d 845 (E.D. Mich. 2010) (party took reasonable steps to avoid disclosure where party had "reviewed 63,025 documents totaling an estimated 4.7 million pages; produced 56,846 documents totaling some 4.3 million pages; and prepared privileged logs for 1,306 documents" with the help of 16 supervised associates).

13 Buffmire, *supra* at note 2.

14 *Id.* at 185.