

6 Years In, Why Haven't FRE 502(d) Orders Caught On?

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Substantively enacted on Sept. 19, 2008, Federal Rule of Evidence 502 resolved a conflict among the courts whether an inadvertent disclosure of a communication or information otherwise protected as privileged or work product constitutes a waiver. Rule 502(b) codified the intermediate approach to waiver and set forth a three-pronged test, establishing that a disclosure that was inadvertent and for which the producing party took reasonable precautions prior to production and reasonable steps to rectify the error post-production would not operate as a waiver in a federal or state proceeding.

Importantly, Rule 502(d) went a step further, permitting federal courts to enter confidentiality orders that conceivably could be more forgiving than 502(b)'s three-prong test and could provide litigants a veritable "get out of jail free card" regardless of the care taken in producing documents during discovery. In such a case, the confidentiality order's provisions would govern. And, similar to 502(b), the court order would protect against waiver not only in the pending litigation but also in any other federal or state proceeding. So, why is it that more litigants aren't using 502(d) orders and affording themselves this basic protection of their arguably most sensitive information? Or, if they are moving for such orders, why are they doing it wrong?

FRE 502(d) in the E-Discovery Era

The proliferation of electronically stored information (ESI) and the need for litigants to collect, search and produce ESI have dramatically increased the costs and other burdens associated with discovery. This was true in 2008, when FRE 502 was enacted, but the burdens are even greater now as data is stored more regularly in an ever-changing and increasing number of media and platforms. The proliferation and acceptance of predictive coding has lessened that burden, but with it comes the increased stress of protecting one's privileges and confidences. FRE 502(d) can alleviate that stress.

But are litigators requesting such orders on behalf of their clients? Anecdotal evidence would suggest not as much as they should. The Honorable Andrew J. Peck, US Magistrate Judge for the US District Court for the Southern District of New York is perhaps best known for authoring the opinion *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 102 (S.D.N.Y. 2012), which endorsed the use of predictive coding. Judge Peck routinely polls audiences when speaking at panels and conferences, and the responses reportedly are disquieting: use of FRE 502(d) orders by attorneys appears to be the exception, not the rule.

Why aren't attorneys regularly requesting FRE 502(d) orders on behalf of their clients? Theories abound. Perhaps there is a fear among litigants that judges will use entry of 502(d) orders to demand broader ESI productions. Or perhaps litigants want to preserve their traditional multi-tier privilege reviews and fear that judges will limit their time and ability to do so much, thus risking production of privileged or confidential records. Sure, an adversary would have to return those documents and they would be unusable in litigation, but the notion of giving an adversary a peek behind the proverbial curtain is itself a repugnant thought to many litigants. Or, maybe, attorneys are not requesting 502(d) orders more because they are wedded to their tried and true form confidentiality orders and have not abandoned their boilerplate language in favor of the potential protections offered under the current rules.

Whatever the reason, they are misplaced. It appears that courts are generally in tune with the realities of today's e-discovery burdens and balancing them with the need for efficiency. For example, in a 2012 opinion out of the Western

District of Virginia (*Adair v. EQT Prod. Co.* (W.D. Va. June 29, 2012)), the court grappled with a clawback order entered by the magistrate “to facilitate discovery and avoid delays” and that authorized parties to produce documents “without a prior privilege review” without risking a privilege waiver. The defendant then moved for an order finding that a production of emails and other ESI was unnecessary or, in the alternative, shifting the review and production costs to the plaintiff, arguing that defense counsel still needed to review collected documents for both privilege and responsiveness. The court spent considerable time in its opinion discussing the proliferation of ESI and its real-world implications on discovery.

Pointedly, the court held that defendant’s position that only a human privilege review was reasonable was untenable. (Indeed, studies reviewing the accuracy of predictive coding suggest machines may be better than human reviewers in that regard.) But, respecting defendant’s concerns with production of potentially privileged documents, the district judge permitted a human privilege review of documents based on an expanded list of attorney names and words (like “privileged”). Thus, the court crafted a facially palatable remedy that aimed to be efficient, reasonable and fair.

You’re Doing It Wrong—When the Courts Won’t Save You

It is clear from the Advisory Committee Explanatory Note to FRE 502 that a 502(d) order “may provide for return of documents without waiver irrespective of the care taken by the disclosing party” and that FRE 502(d) “contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements.” But what if the order does not expressly and clearly capture a “quick peek” arrangement? After all, all “quick peek” arrangements may be clawback agreements, but all clawback agreements are not “quick peek” arrangements. Litigants need to be careful that what they have in a court order comports with how they are conducting discovery. Otherwise, their carelessness or lack of procedural safeguards may result in a waiver of privilege or otherwise protected work product.

The quintessential case in this regard may be *Mt. Hawley Ins. Co. v. Felman Production Inc.* (S.D. W.Va. May 18, 2010). In that case, the plaintiff produced otherwise privileged documents despite using search terms to identify potentially privileged documents for review. The culprit in the production of privileged documents, argued the plaintiff, was a software error. Though the parties previously had entered an ESI stipulation with a clawback provision for inadvertently produced documents, the stipulation was silent as to whether the three-part test for waiver in FRE 502(b) otherwise applied. Because the ESI stipulation provided insufficient guidance, the court reverted back to FRE 502(b) and concluded that plaintiff failed the second prong—reasonableness of precautions taken—because plaintiff and its counsel “failed to perform critical quality control sampling to determine whether their production was appropriate and neither over-inclusive nor under-inclusive.” Put simply, plaintiff accidentally produced hundreds of privileged documents, and the court did not accept that a reasonable methodology would have yielded so many mistakes.

I have worked on a matter in federal court where a sophisticated plaintiff waived privilege over a handful of documents produced by its former counsel and did not have a claw-back order of the “quick-peek” variety to save it from its unreasonable precautionary measures. The narrative was as follows. Because plaintiff was recalcitrant in discovery, depriving defendants of basic documents relating to breach of contract claims and counterclaims, defendants subpoenaed plaintiff’s former counsel, who had been replaced in the early stages of litigation years earlier. Plaintiff and its then-current litigation counsel took no meaningful precautionary measures to protect plaintiff’s privileges—e.g., no pre-production review of the small batch of documents former counsel eventually produced, no request that former counsel provide a privilege log or otherwise explain which documents it was producing and those it was withholding. Indeed, it took months before plaintiff even requested a courtesy copy of said production. The court correctly held that plaintiff had not satisfied all of the FRE 502(b) factors and, therefore, privilege claims were waived.

In our case, the parties had agreed to, and the court had entered, a confidentiality order with a generic clawback provision. The relevant provisions in that broader order stated that (i) pursuant to Fed. R. Evid. 502(d), the inadvertent disclosure of any document would not waive the attorney work product protection or the attorney-client privilege for either that document or for the subject matter of that document and (ii) the requesting party could maintain a copy of a disputed document for the “purpose of seeking judicial determination of the matter pursuant to Fed. R. Civ. P. 26(b)(5)(B) and Fed. R. Evid. 502.” During the course of extensive briefing, which included a motion for reconsideration to the magistrate and an objection to the district judge, the plaintiff abandoned any argument that the clawback provision itself superseded the three-part test under FRE 502(b). One can see why; where the order was silent as to the applicable standard of care and otherwise broadly incorporated FRE 502 for disputes as to privilege waiver, one would be hard-pressed to argue that the basic three-part test no longer applied. Add to that the fact that the parties otherwise engaged in lengthy pre-production privilege reviews, and it was clear that the parties never intended for their confidentiality order to operate as a license for “quick peeks,” which would have absolved plaintiff of its lack of precautionary measures.

So What Is a Party to Do?

Like all things with e-discovery these days, the keys are transparency and cooperation among litigants and their counsel. Indeed, the Sedona Conference—the nation’s leading nonpartisan, nonprofit law-and-policy think tank—has been a bellwether for cooperation in discovery since 2008, when it issued its “Cooperation Proclamation” to which numerous leading jurists and attorneys are signatories. And recent case law concerning predictive coding portends that courts will require parties to put cooperation and transparency at the forefront of their e-discovery efforts. See *Progressive Cas. Ins. v. Delaney* (D. Nev. May 20, 2014). So, when it comes to FRE 502(d) orders, parties are best served by collaborating early on about the system they want—i.e., will they follow the FRE 502(b) three-prong test, part of it, or none of it?

Because FRE 502(b) already provides an intermediate approach to waiver, Judge Peck provides parties appearing before him a form FRE 502(d) order, one that altogether removes a standard of care by which to judge a production and even the producer’s intent—because who wants to argue whether something actually was or was not inadvertent?—but permits parties to still conduct pre-production reviews for responsiveness and privilege. The language of his form order is elegantly simple:

1. The production of privileged or work-product protected documents, electronically stored information 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.

Admittedly, this approach might not be for everyone. But, for those litigants who want a foolproof, no-questions-asked clawback arrangement, this structure should work. If a document should not have been produced because of privilege or work product protections, it comes back, plain and simple. And if a party is recalcitrant in discovery, using its purported review of documents to drag out proceedings and drive up costs and frustrations, well, let’s face it, judges know how to sniff out and deal with gamesmanship.

Ultimately, it would be a rare occurrence where litigants and their attorneys would not want the protections of an FRE 502(d) order of some kind, especially in this e-discovery era. Like health insurance, one hopes to never need to use it but would be foolhardy to proceed without it. So, next time you are in federal court, ask yourself, are you sufficiently protected?

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