The Effective Use of Rule 502(d) in E-Discovery Cases

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Used properly, Federal Rule of Evidence 502, and particularly Rule 502(d), can be one of the most valuable assets available to e-discovery counsel in dealing with the attorney-client and attorney work product privileges during review and production of electronically stored information (ESI). Carefully crafting a comprehensive electronic discovery process, and memorializing the process in a court order issued pursuant to Rule 502(d), can effectively minimize the time and expense associated with privilege review and virtually eliminate the potential for waiver of the privileges resulting from disclosure during the production process. Moreover, the privilege protection extends not only to the pending litigation, but also to any other federal or state proceeding.

The current Federal Rule of Evidence 502, which applies only to the attorney-client and attorney-work-product privileges, was passed by Congress on Sept. 8, 2008, and signed into law by the president on Sept. 19, 2008. Rule 502 specifically addresses the circumstances under which the disclosure of privileged information in the course of production in a federal proceeding will, or will not, effect a waiver of the privilege and the scope of the waiver.

The cornerstone of privilege protection under Rule 502 is Rule 502(d), which 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." The protections available under Rule 502(d) do not depend on whether the disclosure was inadvertent. In fact, the Advisory Committee Note to Rule 502(d) establishes that a court order issued under the authority of Rule 502(d) may provide for non-waiver regardless of the care taken by the disclosing party.

A Rule 502(d) order may be issued by the court upon motion of one or more of the parties, or sua sponte, pursuant to the court's authority under Federal Rule of Civil Procedure 26(c)(1)(B) to issue an order to protect a party from undue burden or expense. In addition, Rule 502(e) provides that an agreement between the litigants as to the effect of the disclosure of privileged information may be incorporated by the court into a Rule 502(d) order, essentially extending the protections of the agreement beyond the litigants in the pending proceeding to all other federal or state proceedings. Therefore, if e-discovery counsel negotiate a Rule 502(e) agreement, they should seek court approval of the agreement under Rule 502(d). If the court refuses for any particular reason, counsel become aware of the critical issues at the outset of discovery and can tailor their actions accordingly.

In seeking a 502(d) order, either by prior agreement under 502(e) or directly upon motion to the court, e-discovery counsel must first determine whether ESI will be reviewed for privilege prior to production. Generally speaking, there is no obligation to conduct any pre-production privilege review whatsoever in order to receive the benefits of Rule 502(d). However, clients are often reluctant to produce privileged information (which then becomes known to the opposing counsel), even if it can be clawed back. If counsel cannot agree on whether to preserve privileges without review, and the issue is raised by motion, the court's decision will depend largely on the extent to which prompt production may be necessary to further the goal of Rule 502 to make discovery more efficient, timely and cost effective, in which case counsel would be well advised to direct the court's attention to the proportionality considerations in Federal Rule of Civil Procedure 26(b)(2)(C)(iii).

If pre-production privilege review will take place, the review process should be detailed in the 502(e) agreement and 502(d) order, and there should be an explicit recognition consistent with Rule 502(b) that: (1) the disclosure of any privileged information through implementation of the process is deemed to be inadvertent; and (2) the process constitutes a reasonable step to prevent disclosure. This is especially true if the process is automated and involves something less than eyes-on review of every document. Courts have had a tendency to read Rule 502(b) considerations into Rule 502(d), even though reasonableness has no bearing on Rule 502(d). As Magistrate Judge Paul W. Grimm of the U.S. District Court for the District of Maryland observed: "If a nonwaiver agreement is ambiguous ... , the court may take a formalist view and resort to analysis under Rule 502 if the agreement doesn't explicitly govern resolution of the dispute." (See http://jolt.richmond.edu/v17i3/article8.pdf). Describing the privilege review process in the 502(d) order will prevent a court from resorting to extraneous provisions of Rule 502. Expressly acknowledging that the process meets the requirements of 502(b) will reasonably protect the disclosure of privileged information from being considered a waiver, even if the court does go outside the limitations of Rule 502(d).

When a 502(d) order details a privilege review process, e-discovery counsel must ensure that the process is followed consistently, for the same reasons. If a privileged document is produced by failing to follow the process, the court could easily look outside the 502(d) order to evaluate privilege considerations. And, almost by definition, the failure to abide by the privilege review process specified in the 502(d) order would constitute a failure to take "reasonable steps to prevent disclosure" under Rule 502(b), resulting in a waiver of the privilege.

Regardless of whether ESI will or will not be reviewed for privilege before production, the Rule 502(d) order should: (1) state that it addresses any disclosure, whether inadvertent or not; and (2) parrot the rule, and explicitly state that disclosure does not effect a waiver in either the litigation pending before the court, or any other federal or state proceeding. No privilege review process will ever be perfect, especially in large electronic discovery projects, and privileged information may well be disclosed. To avoid any potential ambiguity, especially in the context of a separate proceeding in which a different judge may be called upon to interpret the waiver issue, the scope and effect of the Rule 502(d) order should be unequivocal.

In addition to addressing the relationship between disclosure and waiver, e-discovery counsel should also ensure that the Rule 502(d) order defines the procedure for asserting and managing

privilege claims after information is produced. In the first instance, counsel should determine the extent to which post-production review may be required to identify any privileged information that may have been produced. As the advisory committee note suggests, there is generally no obligation to engage in affirmative post-production review. If that is to be the case, it should be so stated in the 502(d) order, to ensure that the court does not resort to Rule 502(b)(3) to determine whether "reasonable steps [were taken] to rectify the error."

The Rule 502(d) order should certainly contain a claw-back provision to circumscribe the process for sequestration, review and return or destruction of privileged materials once identified during the litigation. In order to be effective, the entire procedure must be as specific as possible. For example, the 502(d) order should address the scope of the right to object to the use of privileged information after production, and the extent to which the failure to object may result in waiver. Otherwise, the court is likely to resort to Rule 502(b)(3), which generally requires the holder of the privilege to take reasonable steps to rectify the error (i.e., object immediately), or risk waiving the protections of Rule 502.

This is a complicated issue that requires serious consideration and, perhaps, negotiation between e-discovery counsel. Clearly, an e-discovery process that contemplates only limited pre-production review with no post-production review obligation may well result in the use of privileged information, at a deposition or in a motion, before it is recognized by the disclosing party as being privileged, and perhaps before the document has even been reviewed. In that situation, it would be unreasonable to expect counsel to immediately recognize and voice all potential privilege concerns, upon threat of waiver. That is precisely what the Rule 502(e) agreement and the Rule 502(d) order are intended to avoid. However, it would be equally unreasonable to permit counsel to object months later, after evidence has been gathered and theories advanced on the basis of the presumably appropriate use of information. It is incumbent upon e-discovery counsel to create a process that effectively addresses all of these types of potentialities and to ensure that the process is incorporated into the Rule 502(d) order.

It is also important to define the claw-back procedure itself, even though Federal Rule of Civil Procedure 26(b)(5)(B) provides a general right to claw back privileged information. Again, regardless of the extent to which the balance of any Rule 502(e) agreement or Rule 502(d) order may imply the right to claw back privileged information, the absence of a provision specifically addressing the issue can result in a finding that clawback was not intended, potentially resulting in waiver. The need to address both pre-production and post-production procedures, and ensure that the scope of a Rule 502(d) order (or a Rule 502(e) agreement incorporated into an order) is comprehensive, cannot be overstated.

It is also important for e-discovery counsel to recognize that a comprehensive Rule 502(d) order is available not only to the litigants, but also to third-parties producing information in the litigation, such as subpoena respondents. If counsel anticipates the need to obtain third-party information by subpoena, the Rule 502(d) order should provide complete protection to the third party. If production pursuant to subpoena is insulated from waiver concerns, information will likely be available more quickly, as privilege review can be streamlined and expedited. Similarly, counsel to the respondent should ensure that a Rule 502(d) order is in place to protect disclosure, regardless of the extent to which the information will be reviewed for privilege. If

not, counsel should seek a protective order pursuant to Rule 502(d) to obtain the full protections of the rule in the pending litigation, as well as any other proceeding.

In sum, Federal Rule of Evidence 502(d) can be a valuable asset if used properly. By comprehensively addressing the privilege review process, and the implications of review, either directly by motion to the court under Rule 502(d), or by seeking approval of an agreement pursuant to Rule 502(e), e-discovery counsel can effectively minimize the time and expense associated with privilege review, and insulate a client from waiver of the attorney-client and attorney work product privileges in the pending litigation, as well as any other federal or state proceeding.

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