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FEDERAL E-DISCOVERY

Federal Rule of Evidence 502: 'Rajala' Returns


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A recent case confirms that the structure of Federal Rule of Evidence (FRE) 502 continues to confound litigants (and that lawyers can argue any side of an issue, even within the same case). FRE 502 governs inadvertent disclosure of privileged materials and permits court-ordered clawback arrangements by which litigants may clearly establish and tailor the conditions under which privilege will be deemed waived by inadvertent disclosure. In *Rajala v. McGuire Woods*,[1] a party profited from the existence of an order issued pursuant to FRE 502(d) that it had actually *opposed* at an earlier stage of the case.

FRE 502

FRE 502 was adopted for two reasons: to resolve conflicting case law and assist in reducing litigation costs.[2] First, the evidence rule served to address a continuing conflict among federal courts regarding the effects of inadvertent disclosure of materials subject to attorney-client privilege and work product immunity. Before FRE 502, certain courts applied a strict accountability approach under which inadvertent production would almost always result in a waiver of privilege, while other courts were more lenient or used a balancing test to determine whether the inadvertent production was to be deemed excusable.[3] With the adoption of FRE 502(b), the general rule:

> [D]isclosure does not operate as a waiver in a federal or state proceeding if (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).[4]

Second, FRE 502 was intended to help bring down the costs incurred by parties in discovery. It is in part the risks related to inadvertent production of privileged and protected materials that drive parties to expend significant time and effort in instituting comprehensive pre-production privilege review procedures in discovery. Though parties will likely still want to conduct document reviews prior to production, both for responsiveness and for privilege, the hope was that a clear (non)waiver rule would allow parties to more efficiently structure such reviews.

In practice, FRE 502(b) has been only moderately successful in clarifying when inadvertent disclosures lead to waiver. This is mainly because reasonable people—and indeed courts—can

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still disagree about what exactly constitutes "reasonable steps to prevent disclosure." Because FRE 502(b) does not explain when steps are "reasonable," the courts continue to have considerable latitude in addressing the question of privilege waivers. Courts still determine the "reasonableness" of inadvertent disclosures by employing a multi-factored test that is based on case law dating from before FRE 502(b)'s adoption and the advisory note to FRE 502.[5] Because the outcome of an analysis under FRE 502(b) is still dependent on the facts of individual cases and court determinations of reasonableness, litigants still face considerable uncertainty about possible privilege waivers.

FRE 502(d) can mitigate that uncertainty. This subparagraph 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 provision should be read in conjunction with FRE 502(e), which allows parties to enter into a nonwaiver agreement (or specific clawback arrangement) and ask the court to confirm the agreement in a court order. The court order will thereupon ensure that the litigants are protected against third parties who would not otherwise be bound by the contractual arrangement between the parties.[6] Importantly, subsections (d) and (e) do not require that "reasonable steps" be taken to prevent disclosure. Thus, parties are able to stipulate to different, clearer rules on inadvertent disclosure than that provided by FRE 502(b).

'Rajala I'

One would expect parties to make generous use of FRE 502(d). However, as was recently noted during a symposium on FRE 502, there seems to be a lack of awareness regarding the opportunities provided by FRE 502(d).[7] Parties seem to rely on the general rule of FRE 502(b). This is surprising, all the more because courts have concluded that FRE 502(d) grants a judge the authority to enter into a nonwaiver arrangement *without* party agreement.[8] One might have expected this development to have created an incentive for litigants to try and agree on the details of a FRE 502(d) order before one is imposed upon them by court order.

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In fact, the first federal court to assert the power to enter an FRE 502(d) order against the wishes of one of the litigants was the court in the *Rajala* case (a 2010 decision, hereinafter referred to as *Rajala I*).[9]

In *Rajala I*, the plaintiff (as bankruptcy trustee) brought suit against the defendant, law firm McGuire Woods, alleging that one of its partners committed securities fraud. During discovery, the defendant proposed a joint protective order that contained a clawback provision to deal with inadvertent production of privileged or protected data. McGuire Woods argued that the proposed clawback was necessary to prevent contentious, costly, and time consuming discovery disputes. The firm highlighted that the case would include the production of a large volume of electronically stored information (ESI) and that it had a duty to protect attorney-client privileged communications.

The plaintiff objected, arguing that there was no justification for a clawback arrangement and that its existence would serve only to shift the burden of privilege review to the plaintiff by permitting the defendant to "dump" documents secure in the comfort that any privileged documents would have to be returned. The plaintiff also argued that FRE 502(b) provided an adequate, stricter standard to determine whether inadvertent disclosure should lead to a privilege waiver.

The court decided that—with some minor amendments—the clawback proposed by the defendant was acceptable in spite of the arguments of plaintiff. The court based this decision on a thorough analysis of FRE 502, and in particular the intent of Congress to allow for clawback provisions in order to avoid excessive costs of pre-production review for privilege and work product. The protective order was thus signed by the judge over the plaintiff's objections. The court noted, however, that if the plaintiff "should find evidence that McGuire Woods is abusing the clawback provision by engaging in a 'document dump' and making no effort whatsoever to review for privilege or protected documents," the plaintiff could seek "appropriate relief from the Court."[10]

'Rajala' Returns

Proving that turnabout is fair play, the plaintiff in *Rajala* recently found itself in need of the protections of the court's order when it inadvertently disclosed a privileged document to the defendant. The document was used by the defendant as Deposition Exhibit 818 during a deposition on July 17, 2012. Plaintiff's counsel objected on privilege grounds and requested the exhibit be returned, citing the clawback order entered on July 22, 2010. McGuire Woods returned the exhibit, and agreed to not make further use of it, but only until a ruling on whether the clawback provision should apply.

And, borrowing from the plaintiff's playbook, the defendant argued that the clawback order should not govern because plaintiff had engaged in a "document dump" with no pre-production review at all and that it had therefore failed to take the "reasonable steps" required under FRE 502(b). Plaintiff responded by arguing that FRE 502(b) was inapplicable given the presence of an order under FRE 502(d).

The court sided with the plaintiff. After referring extensively to its earlier decision (*Rajala I*) and the text of the

"Protective Order Containing Clawback Provision," it went on to decide the issue in three straightforward steps. First, as a threshold matter, it determined that the relevant exhibit was indeed a privileged and confidential attorney-client communication. Second, the court determined that the disclosure was "inadvertent." This was established based on an affidavit by plaintiff's counsel, who confirmed that he was unaware that privileged communications were contained in the production by which the Deposition Exhibit was turned over to the defendant. Third, the court confirmed that "reasonable steps" need not be proven: The terms of the Protective Order, and not the default provisions of the FRE 502(b), govern the handling of inadvertent productions when there is an order under FRE 502(d). Because the defendant presented no additional evidence to suggest that there was a document dump, the plain language of the Protective Order could apply and the inadvertent production of privileged information did not constitute a waiver.

Lessons Learned

The return of *Rajala* is interesting for two reasons. First, the case illustrates that all litigants should seriously consider clawback arrangements, even when the brunt of discovery is on the other side. In *Rajala*, the plaintiff surely expected that the proposed clawback would offer more benefit to the defendant, but as it turns out the clawback was of value for the plaintiff as well. The reality is that it is almost impossible for legal counsel to guarantee that there will be no inadvertent disclosure of privileged information, especially in cases involving large volumes of ESI, which is to say: In almost all cases nowadays, the sheer volume of discovery will almost ensure that some privileged or protected information falls through the cracks. It has in fact been argued that because of this reality, a failure to provide for a court order based on FRE 502(d) can be at odds with the professional, ethical responsibilities incumbent on attorneys.[11]

Second, the case illustrates the importance of proper drafting. The Protective Order Containing Clawback Provision as entered by Judge David J. Waxse was quite clear on the conditions under which a clawback is possible, but it is easy to imagine a situation in which the arrangement is not clear-cut and a question arises whether a "reasonableness" test should still govern any clawback request. Parties drafting clawback arrangements may wish to review the recent model draft 502(d) agreement.[12] Parties should of course carefully consider the demands of the individual case when consulting the model agreement, but the model can at least serve as a guide.

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It should be stressed that the freedom of parties to manipulate the language of the clawback is not unlimited. Although one expects the courts to give a certain amount of deference to arrangements agreed upon between parties, any proposed FRE 502(d) order will eventually need to be accepted by the court. And there is case law suggesting that there are limits to what courts will accept. For example, in *Potomac Electric Power v. United States*[13] the court reasoned that the plaintiff PEPCO could not get a court order that would allow it to claw back intentional disclosures. The court agreed with the defendant:

> [U]nder the plain language of FRE 502(d), the other-forum protection offered by a court order pursuant to this provision is expressly limited to disclosures which have not resulted in waivers of privilege for the purpose of the current proceedings—which simply cannot be the case with any intentional waivers made in the course of, for example, an advice-of-counsel defense.[14]

Although *Potomac Electric Power* involved a situation in which the litigants did not reach agreement about the clawback (similar to *Rajala*), the language used by the court suggests that even if parties were able to agree, it would not have accepted a clawback of voluntarily disclosed privileged data. (Of course, others have argued that FRE 502 permits purposeful disclosure of privileged information.[15])

Conclusion

FRE 502(d) provides litigants with a powerful tool to simultaneously protect privileged information (and protected work product) and help keep the costs of litigation in check. Even if attorneys are not bound by any professional responsibility to make use of FRE 502, the clear advantages provided by the evidence rule should drive litigants to do so.

1. *Rajala v. McGuire Woods*, No. 08-2638-CM-DJW, 2013 WL 50200 (D. Kan. Jan. 3, 2013).
2. Advisory Committee Notes to Fed. R. Evid. 502.
3. *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 235-36 (D. Md. 2005); 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. Rev. 141, 158-59 (2013).
4. Fed. R. Evid. 502(b).
5. See, e.g., *Mt. Hawley Ins. v. Felman Prod.*, 271 F.R.D. 125 (S.D.W.Va. 2010). Generally the factors considered include: (i) the reasonableness of the precautions taken to prevent inadvertent disclosure; (ii) the number of inadvertent disclosures; (iii) the extent of the disclosures; (iv) any delay in measures taken to rectify the disclosures; and (v) overriding interests of justice.
6. Fed. R. Evid. 502(e) ("Controlling Effect of a Party Agreement. 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.").
7. Panel discussion, "Reinvigorating Rule 502," 81 Fordham L. Rev. 1533 (2013).
8. We dealt with the *Rajala* case in an earlier article. H. Christopher Boehning and Daniel J. Toal, "Broad Federal Court Powers Under Evidence Rule 502(d)," NYLJ, April 5, 2011.
9. *Rajala v. McGuire Woods*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010).
10. Id. at *7.
11. John M. Barkett, "Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era," 81 Fordham L. Rev. 1589 (2013).
12. Model Draft of a Rule 502(D) Order, 81 Fordham L. Rev. 1587 (2013).
13. *Potomac Elec. Power v. United States*, 107 Fed. Cl. 725, 731 (Fed. Cl. 2012).
14. Id. at 731.
15. Paul W. Grimm et al., "Federal Rule of Evidence 502: Has it lived up to its potential," 17 Rich. J. L. & Tech. 8, 96 (2011).