New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 253—NO. 65
TUESDAY, APRIL 7, 2015

FEDERAL E-DISCOVERY

Court Opens Dangerous Door To Compulsory 'Quick Peek'

By **H. Christopher Boehning** And **Daniel J. Toal**

Given the sheer volume of electronic information stored by organizations today, modern civil litigations now involve the production of thousands, if not millions, of documents.[1] As the breadth and volume of discovery increase, parties' ability to effectively and efficiently conduct privilege review—identifying and excluding privileged information from a document production—becomes vastly more difficult. As one court succinctly put it, "[w]here discovery is extensive, mistakes are inevitable."[2]

Federal Rule of Evidence (FRE) 502 seeks to address the problem of inevitable mistakes and the considerable costs that parties incur attempting to avoid them. In effect since 2008, FRE 502 attempts to reduce the costs of litigation by lowering the stakes of production. Specifically, the rule, inter alia, resolves conflicting common-law doctrine, whereby the inadvertent disclosure of documents could result in the automatic waiver of privilege in some jurisdictions.[3] FRE 502(b) harmonizes the common-law rule and specifies that a party who inadvertently produces privileged material does not waive privilege with respect to these documents, provided that the party who produced them took "reasonable steps" to prevent their disclosure.[4]

BIGSTOCK

FRE 502(d) is even more sweeping. Under that provision, parties may ask a court to enter an order specifying that the parties' production of privileged material does not constitute waiver, even if the parties *fail* to take reasonable steps to prevent its disclosure.[5] In other words, by seeking the entry of an FRE 502(d) order, parties can override the default rule set forth in FRE 502(b) and "claw back" any privileged documents disclosed without the need to show the reasonableness of the parties' privilege review.[6]

The enactment of FRE 502(d) has encouraged the use of so-called "quick peek" agreements. Under these agreements, parties to a litigation may produce documents after little to no privilege review, subject to the understanding that any privileged documents disclosed will be returned to the party who produced them free from the recipient's assertion of waiver.[7] Quick peek agreements can speed up discovery because parties can reduce the amount of privilege review they conduct before a production, knowing that any privileged documents disclosed will be returned to the producing party without objection.

As courts and commentators have observed, a court may enter an FRE 502(d) order over a party's objection.[8] But can a court require parties to enter into a quick peek arrangement when one of the parties objects? This was the issue presented in *Good v. American Water Works Company*,[9] a recent decision by Judge John T. Copenhaver of the Southern District of West Virginia. Based on the facts of the case, the court in *Good* declined to impose a compulsory quick peek arrangement over defendants' objection. It nonetheless suggested that such an arrangement may be appropriate under certain cir-

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP.* ROSS M. GOTLER, *e-discovery counsel, and* WILLIAM E. O'NEIL, *an associate, assisted in the preparation of this article.*

cumstances—particularly if the court expects a slow, drawn-out discovery process. This suggestion raises troubling concerns about a litigant's ability to keep privileged communications out of the hands of its adversary. One can only hope that going forward, courts adopt a limited reading of *Good*.

'Good v. American Water Work'

In *Good*, the parties sought the assistance of the court in refereeing a dispute over the structure of a proposed FRE 502(d) order. As the court explained, both plaintiffs and defendants sought the protection of FRE 502(d) to guard against the waiver of the attorney-client privilege and other privileges should the parties mistakenly disclose protected information. The parties disagreed, however, as to the extent to which they should be allowed to conduct a privilege review before turning over documents.

Under plaintiffs' approach, the parties would be allowed to engage in a cursory privilege review before making their productions. Specifically, the parties would be allowed to use "time-saving computer-assisted … review" to identify privileged materials, but more extensive "human due diligence" would not be allowed.[10] According to plaintiffs, extensive pre-production review was unnecessary because if the parties turned over privileged materials, the FRE 502(d) order would allow them to claw back these documents without the other side asserting a claim of waiver.

Defendants' approach called for a more rigorous review. Emphasizing that they "ha[d] every incentive" to use "computer-assisted review to quickly and efficiently identify candidates for protection," defendants sought a protective order that, at the same time, would allow them to conduct a manual, or "eyes on," review.[11] Defendants argued that the discovery software they used could not be assured to identify all privileged materials, and thus, additional review was necessary. Defendants acknowledged that an FRE 502(d) order would allow them to claw back any privileged material disclosed, but they argued that significant damage could still be done if plaintiffs were simply to learn of privileged information.

> Under "quick peek" agreements, parties to a litigation may produce documents after little to no privilege review, subject to the understanding that any privileged documents disclosed will be returned to the party who produced them free from the recipient's assertion of waiver.

The court sided with defendants. In doing so, the court was persuaded by two arguments. First, it noted that nothing in the text of FRE 502(d) precluded a rigorous, pre-production privilege review. To the contrary, the text of the rule simply provides that a federal court may enter an order specifying that the production of privileged materials does not constitute waiver. Thus, per the terms of the rule, it is up to the court and the parties to determine what conditions, if any, apply to an FRE 502(d) order.

Second, and critically, the court found that an order allowing for defendants' manual privilege review was appropriate because defendants "appear ready to move expeditiously in producing documents in the case."[12] Indeed, the court went so far as to *condition* the entry of the FRE 502(d) order on defendants' speedy production of documents. To that end, the court stated that if defendants' more rigorous review "thwart[ed] the progress of the case," plaintiffs should file a motion requesting that a quick peek arrangement be adopted. The court agreed to hear such a motion "on a priority basis."[13]

Compulsory Quick Peek

The *Good* court's rejection of plaintiffs' attempt to impose a compulsory quick peek arrangement accords with scholarly commentary. As e-discovery think tank The Sedona Conference argues, FRE 502(d) was designed to protect parties against inadvertent waiver, "not to be used as a weapon impeding a producing part[y's] right to protect privileged material."[14] Thus, according to The Sedona Conference, "although a court may enter a Rule 502(d) order *allowing* the parties to engage in a 'quick peek' process, the court cannot *order* a quick peek process over the objection of the producing party."[15]

As practitioners and scholars point out, imposing a compulsory quick peek arrangement may implicate due process concerns.[16] It is a well-established rule that a court may not compel the disclosure of privileged communications absent a party's waiver of privilege or the application of some other exception. In *In re Dow Corning*,[17] the Second Circuit criticized a district court for ordering a defendant to turn over materials to plaintiffs after the court explicitly found these materials to be covered by both the attorney-client privilege and the work-product doctrine. Similarly, in *United States v. Zolin*,[18] the U.S. Supreme Court held that a court could not require a party to turn over attorney-client communications for in camera review, absent a showing that the communications fell within the crime/fraud exception. *Zolin*'s prohibition would seem to be even stricter in the FRE 502(d) context, where parties would be exchanging documents not with the court, but with each other.[19]

Good, however, suggests that the reach of FRE 502(d) might be a matter

of dispute. Although the court in *Good* ultimately rejected plaintiffs' request to impose a compulsory quick peek process, the decision goes on to suggest that the court would be willing to impose such an arrangement under different facts. Indeed, in its opinion, the court in *Good* states that if defendants' privilege review does not proceed quickly, it may elect to impose plaintiffs' desired arrangement over defendants' objection.

The *Good* court does not specify the source of its authority to impose a compulsory quick peek arrangement, although it is widely recognized that courts have discretion to manage discovery in their cases. At the same time, this type of discretion is not boundless. It is one thing for a court to exercise its authority to resolve a novel discovery dispute that is not directly governed by a rule or statute. It is another for a court to exercise its discretion to tread upon a party's due process or common-law rights. As the court in *Good* acknowledges, nothing in the text or history of FRE 502(d) indicates that parties cannot or should not guard against the disclosure of privileged information. Accordingly, given the considerable stake parties have in protecting privileged material, FRE 502(d) should not be used as an instrument to impose a compulsory quick peek arrangement.

Conclusion

Ultimately, we believe that The Sedona Conference has the correct view: FRE 502(d) should be used as a shield, not as a sword, and courts should refrain from using their authority to grant protective orders as a means to force parties to turn over privileged materials. Although an FRE 502(d) order can allow a party to claw back privileged documents inadvertently disclosed, opposing counsel cannot unlearn information mistakenly shared. Background legal principles recognize this reality and protect against the compelled disclosure of privileged information. Because FRE 502(d) does not overturn these principles, courts and parties should continue to adhere to them.

As the court in 'Good' acknowledges, nothing in the text or history of FRE 502(d) indicates that parties cannot or should not guard against the disclosure of privileged information.

More generally, it is important that decision-makers remember the dual purposes of FRE 502(d). Although the rule certainly attempts to achieve a speedier and more streamlined discovery process, it also seeks to afford parties greater flexibility in conducting discovery. It is axiomatic that parties to a litigation are in the best position to evaluate the most efficient and effective way to produce electronically stored information.[20] As such, FRE 502(d) should be used as a tool to empower parties to tailor the discovery process to their needs, not to compel them to adopt off-the-rack procedures ill-suited to their goals. If a court is concerned that a party's desired approach will slow down discovery, it can impose a sanction on that party for missing a deadline. FRE 502(d), however, should not be used as a mechanism to curtail a party's rights without its consent.

That said, *Good* demonstrates that there is lingering confusion about the purpose and effect of FRE 502(d). Absent controlling authority from courts of appeal, magistrate and district court judges might impose a compulsory quick peek arrangement as a means to speed up discovery. Given this possibility, it is especially prudent for parties to try to work through issues like pre-production privilege review as part of the meet-and-confer process. If parties are on the same page about the topic, they may approach the court together and request an FRE 502(d) order that expressly details the extent and timing of privilege review. By proactively negotiating, parties can ensure that they achieve an FRE 502(d) order that accords with the needs of the litigation as well as their concerns about the disclosure of privileged information.

1. In a recent study of 57 civil litigations, the RAND Institute for Civil Justice found that the median cost of electronic document production was $1.8 million. See Nicholas M. Pace & Laura Zakaras, RAND Inst. for Civil Just., "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery" 17 (2012).

2. *Judson Atkinson Candies v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008).

3. Compare *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (holding that any document produced, even if unintentionally, loses its privileged status), with *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996) (adopting multi-factor test to determine whether documents produced lose their privileged status).

4. Fed. R. Evid. 502(b).

5. Fed. R. Evid. 502(d).

6. Id. at advisory committee's note, subdivision (d); see also *Rajala v. McGuire Woods*, No. 08-2638-CM-DJW, 2013 WL 50200, at *5 (D. Kan. Jan. 3, 2013) (*Rajala II*) (explaining that an FRE 502(d) order "is designed to allow the parties and the Court to defeat the default operation of Rule 502(b)").

7. The Sedona Conference, The Sedona Conference Commentary on Protection of Privileged ESI, Nov. 2014 Public Comment Version, at 17.

8. Id. at 16; see also *Radian Asset Assurance v. Coll. of Christian Bros. of N.M.*, No. CIV 09-0885, JB/DJS, 2010 WL 4928866, at *8-9 (D.N.M. Oct. 22, 2010); *Rajala v. McGuire Woods*, No. 08-2638-CM-DJW, 2010 WL 2949582, at *5 (D. Kan. July 22, 2010) (*Rajala I*).

9. No. 2:14-01374, 2014 WL 5486827, at *1 (S.D. W.Va. Oct. 29, 2014).

10. Id. at *1-2.

11. Id. at *1.

12. Id. at *3.

13. Id.

14. The Sedona Conference, supra note 8, at 18.

15. Id. (emphasis in original).

16. Id. at 18-19; Martin R. Lueck & Patrick M. Arenz, "Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions," 10 Sedona Conf. J. 229, 230-31 (2009).

17. 261 F.3d 280, 284-85 (2d Cir. 2001).

18. 491 U.S. 554, 572 (1989).

19. Id. ("In fashioning a standard for determining when in camera review is appropriate, we begin with the observation that in camera inspection is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure. We therefore conclude that a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege." (internal quotation marks, citation, and alteration omitted)).

20. The Sedona Conference, "The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production," June 2007 Second Edition, at 38.