

Outside Counsel

Expert Analysis

Strategic Use of Rule 502(d) In Civil and Criminal Proceedings

Federal Rule of Evidence 502 has become an important tool for civil litigators seeking to control discovery costs and risks. Yet savvy counsel also use the rule for more strategic ends. As reflected in the case law, Rule 502 permits parties in both civil and criminal proceedings, including grand jury matters, to exchange privileged information without risking broad subject matter waivers. This article suggests that both civil and criminal counsel should more frequently consider seeking Rule 502(d) orders to help resolve disputes, especially when faced with parallel proceedings and investigations.

Certainty as to Scope

Rule 502 of the Federal Rules of Evidence governs the scope of waiver of attorney-client privilege and work product protection—i.e., the extent to which disclosure of privileged information waives privilege over undisclosed information. Subsection (a) of the rule governs intentional disclosures; subsection (b) governs inadvertent disclosures. Federal common law continues to govern waiver following the use of privileged information (e.g., to establish a defense).

The rule enables parties and courts to limit the breadth of waivers triggered by disclosures of privileged information. The parties, under subsection (e) of the rule, may agree among themselves to limit the scope of any waiver.

More significantly, however, Rule 502(d) empowers the court to “order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.” A Rule 502(d) order governs the scope of waiver both in “the litigation pending

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before the court” and “in any other federal or state proceeding.”

The certainty promised by Rule 502 may offer tremendous value. Lawyers go to great lengths—and clients bear great expenses—to guard against prejudicial privilege waivers. Before the advent of Rule 502(d), parties that

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disclosed privileged information in one matter were at risk that the disclosure would trigger a subject matter waiver that would prejudice its position in another matter. This problem was particularly acute when the disclosing party confronted actual or potential future proceedings, including government investigations. Rule 502(d) promises to remove those risks, because parties will know the scope of resulting waivers in “any other federal or state proceeding” before they make disclosures.

Entry of a Rule 502(d) order should spare many clients from hearing worst-case scenario warnings about privilege waivers. Instead, with a Rule 502(d) order in place, clients may avoid the harsh consequences of inadvertent disclosures and consider the costs and benefits of intentional disclosures with certainty as to the resulting waiver scope.

Limiting Discovery Costs

The conventional use of Rule 502(d) is the one its drafters were most focused on—limiting the costs of privilege review and document retention, especially in the context of electronic discovery. The rule contemplates the enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privileged items and to avoid triggering privilege waivers through inadvertent production.¹

Courts thus routinely enter Rule 502(d) orders to permit parties to produce documents expeditiously, while reducing discovery costs and risks. U.S. Magistrate Judge Andrew J. Peck (S.D.N.Y.) offers, along with his individual rules, an illustrative form 502(d) order, which provides that production of privileged documents, “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.”² As many judges and practitioners have noted, such orders can dramatically reduce discovery costs and the risks of privilege waivers from an inadvertent production of privileged material.

Using Order Strategically

There is another use of Rule 502(d) that is gaining traction: advancing a party’s strategic interest by putting privileged information into another party’s hands. Strategically, a Rule 502(d) order can be vital, as it provides the disclosing party with sufficient comfort that its disclosure will not trigger a privilege waiver over prejudicial undisclosed information. This strategic use was not the focus of the advisory committee. Yet nothing in Rule 502(d) limits such usage, and a number of courts have now endorsed this approach.

This strategic use of Rule 502(d) order can be particularly crucial to parties under

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government investigation, as exemplified by *SEC v. Bank of America* and *In re MF Global Holdings*. In those cases, the parties under scrutiny wished to disclose privileged information to their regulators without jeopardizing privilege over undisclosed material. In both cases, the courts entered Rule 502(d) orders permitting the parties to do just that.

In *SEC v. Bank of America* in 2009, U.S. District Judge Jed S. Rakoff (S.D.N.Y.) entered a Rule 502(d) order to “allow the Bank of America to waive attorney-client privilege and work-product protection regarding certain categories of information material to [the government’s] case (and seemingly also relevant to certain ongoing state and federal inquiries) without thereby waiving such privilege and protection regarding other information that may be of interest in related private lawsuits.”³ Judge Rakoff explained that the order “comports with new Rule 502 of the Federal Rules of Evidence, amended in 2008, which permits such cabined waivers.”

In 2012, Judge Martin Glenn (Bankr. S.D.N.Y.) entered a Rule 502(d) order for a similar use in *In re MF Global Holdings*.⁴ The Rule 502(d) order permitted MF Global Holdings to disclose certain privileged information to the government and bankruptcy trustee without waiving privilege over undisclosed communications beyond the parameters set forth in the order. Judge Glenn explained that Rule 502(d) empowered the court to waive “privileges and protections relating to all documents, information, and communications related to [specified] Subject Matters during [a specified] Relevant Period, and not further.” The Rule 502(d) order did not waive privilege as to items outside the defined subjects and dates.

Like the order in *Bank of America*, Judge Glenn’s order allowed MF Global Holdings to use Rule 502(d) strategically to provide privileged information to the company’s regulators without risking an undefined privilege waiver over undisclosed material, whether in the litigation or elsewhere.

A Rule 502(d) order can also facilitate a horse trade: One party gets disputedly privileged records, and the other avoids a broad subject matter waiver. *General Motors LLC Ignition Switch Litigation* both illustrates this potential and serves as a powerful reminder that Rule 502(d) orders cannot foreclose all privilege attacks.⁵ There, the tort plaintiffs sought privileged material that General Motors had intentionally disclosed to the government. In a 2014 order, U.S. District Judge Jesse M. Furman (S.D.N.Y.) entered a Rule 502(d) order providing that General Motors’ disclosure of the material

would “not waive any privileges or work product protection as to any Undisclosed Information or...its subject matter.”

In so doing, the plaintiffs obtained the records they wanted (and which General Motors claimed remained privileged), and the company avoided (i) any adverse ruling on whether the materials remained privileged following disclosure to the government, and (ii) any argument that sharing the materials with the plaintiffs triggered a subject matter waiver of privilege over undisclosed material. Of course, the Rule 502(d) order did not stop the tort plaintiffs from attacking privilege on various other grounds. Nevertheless, it allowed General Motors to take one waiver argument off the table.

These three examples demonstrate that Rule 502(d) is not only an important tool for lowering the costs of discovery and protecting against prejudice following inadvertent disclosures, but that it can also be used strategically to advance a party’s interests. Parties should consider these strategic uses, especially during parallel proceedings and investigations.

Grand Jury Investigations

Defense counsel should also consider the strategic value of a Rule 502(d) order in criminal matters. To be invoked, the rule requires nexus to a disclosure in “litigation pending before the court.” The possible litigation includes criminal cases and proceedings.⁶ Moreover, unlike most of the Federal Rules of Evidence, Rule 502 also applies in grand jury proceedings, as stated in Federal Rule of Evidence 1101(d). Thus, criminal defense counsel should consider seeking Rule 502(d) orders in grand jury investigations and other criminal matters.

In grand jury investigations, Rule 502(d) orders may permit targets, subjects, or witnesses to share privileged information with the government without exposing themselves to the risk of a broad waiver over undisclosed privileged material. This is a risk that individuals and organizations often struggle with in criminal investigations. Seeking a Rule 502(d) order is an avenue for mitigating that risk.

Indeed, the U.S. Court of Appeals for the Ninth Circuit has criticized counsel’s failure to seek a Rule 502(d) order while disclosing a client’s privileged information to a grand jury. In *In re Pacific Pictures Corp.*, the grand jury subpoena recipient disclosed privileged information to the government.⁷ The Ninth Circuit ruled that such disclosure, without an appropriate Rule 502(d) order, triggered a broad subject matter waiver in related civil litigation. The court noted that, if the disclosing party had wanted to maintain

privilege over information related to the disclosures, the party should have first sought a Rule 502(d) order from the court supervising the grand jury.

As the Ninth Circuit suggested, a Rule 502(d) order should permit a party to disclose privileged information to a federal prosecution team or grand jury with confidence that the disclosure will not waive privilege over undisclosed material, as well. This certainty lowers the stakes of any debate over whether a client should waive privilege during a criminal investigation. For this reason, when privileged information is at issue, counsel should consider moving before the judge supervising the grand jury for a Rule 502(d) order.

Conclusion

Rule 502 holds great promise. As often discussed, Rule 502(d) orders can lower the costs and risks of discovery, and litigators should seek Rule 502(d) orders in document-production intensive cases. Although less often discussed, courts have also permitted parties to use Rule 502(d) orders strategically to facilitate the deliberate exchange of privileged information without the risk of a broad subject matter waiver. Thus, counsel in civil and criminal matters should consider whether entry of a Rule 502(d) order would allow their clients—whether as parties in litigation or as targets, subjects, or witnesses in grand jury proceedings—to share privileged information without the fear of a subject matter waiver.



1. See Fed. R. Evid. 502, Advisory Committee Notes; see also Robert L. Haig, Business and Commercial Litigation in Federal Courts §22:69 (3d ed. 2011) (discussing “quick peek” agreements).

2. See United States Magistrate Judge Andrew J. Peck, Rule 502(d) Order, available at http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=928.

3. See *SEC v. Bank of America Corp.*, 09 Civ. 6829 (S.D.N.Y. filed Oct. 14, 2009).

4. *In re MF Global Holdings*, Case No. 11-15059 (S.D.N.Y. Bank. March 7, 2012).

5. *In re General Motors LLC Ignition Switch Litigation*, 14-cv-02714-JMF (S.D.N.Y. filed Nov. 14, 2014).

6. See Fed. R. Evid. 1101(b); see, e.g., *United States v. Dagerdas*, S3 09 Cr. 5781 (S.D.N.Y. entered Oct. 12, 2010).

7. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1125, 1130 (9th Cir. 2012).