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Guarding Against Privilege Waiver In Federal Investigations

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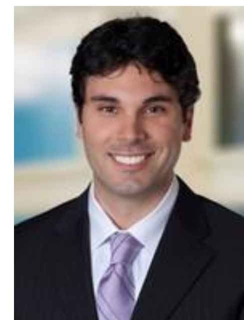
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It has been well over a year since Judge Andrew Peck gently excoriated the legal community for underusing the not-so-new privilege waiver protections of Federal Rule of Evidence 502(d). He has fondly referred to it as the "Get Out of Jail Free Card" and offered that "it is akin to malpractice not to get [a Rule 502(d)] order."[1] It is a powerful hand indeed: a Rule 502(d) order can protect litigants against privilege waiver without having to prove that they have taken reasonable steps to prevent an inadvertent production of privileged documents. While Judge Peck's remarks may have raised awareness of the rule's novel and expansive protections for litigants in federal court, Rule 502 as a whole, together with any potential federal agency regulations concerning privilege waiver, offers little peace of mind to parties subject to government investigations.

Buckets of judicial ink have been spilled lamenting the mounting costs of discovery obligations in the dawn of email and big data. To be sure, technological advances in e-discovery, like predictive coding and advanced analytics, have made great strides in alleviating the pain that technology itself has inflicted on litigants. But technology is no panacea for our discovery system's ills — the solution lies in its marriage with legal innovation.

Yet the latter is still not carrying its weight as lawyers continue to fear the prospects of waiving privilege in the 275,801st document of last March's production. Without a doubt, Rule 502 (and the 2015 revisions to the Federal Rules of Civil Procedure) has marked a solid start in the right direction: it was enacted in 2008 in part to "respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney — client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information."[2]

While Congress may have enacted Rule 502 to replace the patchwork of federal common law governing privilege waiver in litigation,[3] agencies are left to decide on an individual basis whether, and to what extent, to adopt the rule's provisions in their own administrative proceedings or investigations.

Even though the Rules Advisory Committee acknowledges that "[t]he consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation,"[4] textually, the thrust of Rule 502 governs the existence and reach of privilege waiver only in federal or state proceedings, to the exclusion of agency

proceedings or investigations,[5] even in cases where the privileged documents have been produced to a federal office or agency. Put differently, the rule may govern privilege waiver in cases where parties are subject to parallel (or sequential) federal investigation and civil litigation, but it does not address the scope of waiver — or the threshold question of whether there has been a waiver — with respect to the federal agency itself.

This is not an indictment of Rule 502 itself — it is not designed to govern privilege waiver with respect to agency investigations.[6]

Unfortunately, federal agencies have not faced a corresponding amount of pressure and scrutiny to reform their investigative rules concerning privilege waiver to bring them in line with the Federal Rules of Evidence: after all, judicial ink rarely splashes on agencies' investigative turf. As a result, the law on privilege waiver continues to evolve almost exclusively in the context of litigation.

While courts — and Congress — have been experimenting and tweaking the Rules of Evidence and their application in the dawn of the information revolution, agencies have been slower in making parallel adjustments. This leaves investigated entities with fewer clear protections against privilege waiver, despite the astounding amount of information that is produced in a typical government investigation.

Even if an agency has taken a step toward harmonization, investigated parties may be marching to a muted tune. For example, the Consumer Financial Protection Bureau has adopted Rules 502(a) and (b) (discussed below) nearly verbatim as part of its investigative procedures,[7] providing investigated parties with protections against subject matter waiver and inadvertent disclosure. But the bureau's rules do not include the broader protections of Rule 502(e), which allow parties to enter into voluntary agreements governing privilege waiver. Furthermore, the broad protections of Rule 502(d) court orders are usually out of reach for most investigated parties. In some cases, the lack of uniformity in approach as to privilege waiver may also result in conflicts between federal agencies, potentially complicating one's response in the course of multi-agency investigations.

On the plus side, to the extent that federal agencies may have adopted parts of Rule 502,[8] investigated parties may not only rely on those protections in nonpublic government investigations, but may also cite to developing case law interpreting Rule 502 provisions to government enforcement lawyers and administrative law judges alike, at least as persuasive authority.

Rule 502(A): ROBUST Protections Against Subject Matter Waiver

The prospect of subject matter waiver — the proposition that a waiver of privilege as to a disclosed document may also be extended to undisclosed privileged documents if they concern the same subject matter — has long rattled lawyers, especially in cases involving electronic discovery.[9] Rule 502(a) significantly allayed that anxiety: subject matter waiver now can be found only where privilege has been waived intentionally (such as for strategic reasons), and fairness dictates that the undisclosed information also be produced if it relates to the same subject matter.[10] The committee notes reiterate that subject matter waiver is reserved only for "unusual situations" and that "an inadvertent disclosure of protected information can never result in a subject matter waiver."[11]

The protections against subject matter waiver do apply when the disclosure of privileged information is "made in a federal proceeding or to a federal office or agency,"[12] but, as discussed above, the rule does not govern with respect to the agency itself.

While courts differ as to what constitutes an intentional waiver, or in what cases fairness would require disclosure, the overwhelming trend has been to deny subject matter waiver unless a party selectively disclosed privileged material in order to gain a strategic advantage.[13] As a result, investigated parties may be able to take comfort in knowing that inadvertent disclosure will not lead to a broader subject matter waiver in a future or parallel federal proceeding, and — if an investigating agency has promulgated a parallel rule governing its investigations — with respect to the agency itself as well.

Rule 502(b): Weaker Protections in Cases of INADVERTENT Disclosure

Subject matter waiver protections aside, Rule 502 does not provide the same level of comfort as to the consequences of inadvertent disclosure. The effect of inadvertent disclosure of privileged information in federal proceedings (including in cases where the disclosure was made to federal agencies) is governed by Rule 502(b), and potentially by parallel agency regulations governing the waiver as to the agency investigation itself. The rule provides that "[w]hen made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding" if (i) the disclosure was "inadvertent," (ii) the holder of the privilege took "reasonable steps to prevent disclosure," and (iii) "the holder promptly took reasonable steps to rectify the error."

For one, Rule 502(b) does not define, and the comments to the rule do not clarify, what "inadvertent" means. Inadvertence should mean the opposite of the "intentional" standard set by Rule 502(a). But not all courts agree, with some injecting a reasonableness inquiry as part of the inadvertent element. Judge Grimm has argued, in contrast, that a reasonableness inquiry ought to belong only to the second element — the one concerning the reasonableness of precautions.[14] Second, Rule 502(b) purposefully does not define what "reasonable steps" means — an understandable necessity in order to provide flexibility in application by the courts.

For the seasoned litigator, this lack of clarity can be easily circumvented, for Rule 502(b) represents but a fallback provision for those who have not taken advantage of the "Get Out of Jail Free Card" under Rule 502(d), or at the very least entered into a well-drafted voluntary agreement governing waiver with the opposing party under Rule 502(e).

Unfortunately, the potential for inadvertent disclosure does not bode that well for parties producing to a federal agency. In most cases, agencies serve not only as the requesting party, but also as the judge, the fact finder, and the initial appellate forum, thereby placing them in a position to make the fact-intensive analysis as to whether an investigated party has taken reasonable steps to prevent disclosure. While one may have the option to raise the issue in federal court, few may choose to air it in a public forum due to the confidential nature of most investigations and the fact that investigated parties often take a highly cooperative posture during the investigation phase. This may lead investigated parties to continue down the path of using the most conservative (read: expensive) approach to privilege review with the hope that the steps it takes will be deemed reasonable by the requesting agency.

Rule 502(e): Privilege Waiver Agreements with Government Agencies

Litigants may circumvent the inherent ambiguities of Rule 502(b) by entering into a Rule 502(e) agreement: it provides a vehicle for parties making disclosures in a federal proceeding or to a federal office or agency to enter into voluntary clawback agreements, which generally are binding only on the parties to the agreement.[15]

But as before, the scope of Rule 502(e) does not extend to agency investigations. This limitation could

be easily cured by the federal agency itself.[16] Yet some government agencies, even those who have adopted the provisions of Rule 502(a)-(b) as part of their own investigative process,[17] may choose not to enter into privilege clawback agreements,[18] potentially forcing investigated parties instead to rely on the fuzzier “reasonableness” standard set under the agency rules mirroring Rule 502(b), if at all promulgated.

Such reluctance is out of step with the drive toward risk mitigation in light of inevitable mistakes that plague modern day discovery. If agencies are concerned about the time and cost of complying with a government subpoena, they should freely enter into clawback agreements with the same eagerness and frequency as litigants do in civil litigation. Forcing parties to rely exclusively on the protections of Rule 502(b), and any applicable agency equivalent, should be the exception and not the rule.

It may appear on the surface that any federal agency inherently lacks the incentive to enter into clawbacks: (i) document productions in investigations roll only on a one-way street, unlike in litigation, (ii) the agency is in the unique position as a requesting party to determine whether the investigated party has undertaken reasonable precautions against inadvertent disclosure, and (iii) investigated parties are often highly cooperative anyway.

Yet agencies are not entitled to receive privileged information in the course of their investigations, and privilege clawback agreements should be viewed as a default win-win: the investigated party (i) saves on resources that were previously directed at refortifying permeable barriers to guard against the inevitable and (ii) redirects part of those resources to speed up the document production efforts without obsessing over privilege issues, ultimately speeding up the agency’s investigation.

Rule 502(d) and Government Investigations: Stuck in Jail

Perhaps the biggest disappointment of them all is that investigated parties have little chance of being dealt the “Get Out of Jail Free Card.” Rule 502(d) provides, “A federal court may order that privilege … 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 theoretical protections here are much greater than those afforded by an agreement between the parties under 502(e), for the court order is effectively binding on any party and in any proceeding. But yet again, the reality is that investigated parties often take a cooperative posture during an investigation and would rarely consider seeking a court order during the course of a nonpublic investigation.

Practice Tips

In many government investigations, the most meaningful protections against privilege waiver may be beyond reach. If available, the optimal protections may be afforded by a carefully drawn clawback agreement: the agency benefits in receiving the documents more quickly, the producing party minimizes risk and review cost, and the confidentiality of the investigation is not jeopardized by seeking a court order. But if the investigative agency is unwilling to consider a clawback agreement, a cooperative party may be left with only the default protections provided by agency-specific rules (if promulgated).

In such sub-optimal scenario, the responding party may need to memorialize the minimum steps that it plans to take to review documents for privilege, and perhaps whether the agency, if willing to opine, considers the planned steps to be reasonable precautions in preventing disclosure of privileged information before document production begins (vs. in hindsight after privileged documents are

inadvertently produced). But in the absence of such an acknowledgment, a cooperative party may have to consider engaging in a full and expensive linear privilege review (assisted by technology, of course), despite the fact that such efforts could still result in the disclosure of privileged information.

At this junction, the key is communicating early and often. Investigated parties have ample opportunities to discuss and negotiate e-discovery challenges and parameters early during the meet-and-confer conference with agency staff.[19] Quite simply, the issue of privilege waiver ought to be raised as early as possible in order to gauge the agency's expectations up front and calibrate the privilege review process accordingly. In the end, one might find that an agency is willing to mirror the cooperative posture of the investigated party.

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[1] J.P. Midgley, 'Get out of jail free' card in e-discovery, Buffalo Law Journal, Buffalo Business First (July 8. 2015), 09:00 AM), http://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2015/07/get-out-of-jail-free-card-in-e-discovery.html (last visited Aug. 8. 2016)

[2] Fed. R. Evid. 502 Advisory Committee's note.

[3] For an in-depth discussion regarding trends in judicial interpretation of privilege waiver after the enactment of Rule 502, see Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, Federal Rule of Evidence 502: Has It Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8, 18 (2011), http://jolt.richmond.edu/v17i3/article8.pdf. (quoting Fed. R. Evid. 502 Advisory Committee's note) (analyzing conflicting judicial interpretations and noting that "[c]ourts called upon to interpret Rule 502 should be especially diligent in construing it in a manner that is consistent with its purpose. Otherwise, its goal of 'provid[ing] a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney–client privilege or work-product protection' cannot be achieved.").

[4] Fed. R. Evid. 502 Advisory Committee's note (emphasis added).

[5] See Fed. R. Evid. 502(f), 101(a), and 1101.

[6] Id.

[7] 12 C.F.R. § 1080.8(c).

[8] E.g., 16 C.F.R. § 3.31(g) and 74 FR 20205-01, 20207 ("The [Federal Trade] Commission concludes that [certain Rule 502] provisions are equally appropriate for its administrative proceedings whether the disclosure occurs during a Part 3 proceeding or during a Commission precomplaint investigation.").

[9] Fed. R. Evid. 502 Advisory Committee's note.

[10] Fed. R. Evid. 502(a).

[11] Fed. R. Evid. 502 Advisory Committee's note (emphasis added).

[12] Fed. R. Evid. 502(a).

[13] David D. Cross & Nathiya Nagendra, The Demise of Subject Matter Waiver: Federal Rule of Evidence 502(a) Five Years Later, Digital Discovery & e-Evidence, Bloomberg BNA (2013).

[14] Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, Federal Rule of Evidence 502: Has It Lived Up to Its Potential?, XVII RICH. J.L. & TECH. 8, 30 (2011), http://jolt.richmond.edu/v17i3/article8.pdf.

[15] Fed. R. Evid. 502(e).

[16] It remains unclear whether Rule 502(e) will resolve a circuit split as to whether a voluntary clawback agreement with an agency protects the party against privilege waiver as to third parties in future litigation in the absence of a court order. See e.g. In re Natural Gas Commodities Litig., 232 F.R.D. 208, 211 (S.D.N.Y. 2005) (acknowledging circuit split and noting that "courts in this district have held [under the minority view] that voluntary disclosure to government agencies pursuant to an explicit non-waiver agreement does not waive the attorney or representative work product or attorney-client privilege.")

[17] See 12 C.F.R. § 1080.8(c).

[18] See http://www.law360.com/articles/619051/doj-chiefs-share-the-wrong-way-to-respond-to-a-subpoena (quoting a senior DOJ lawyer, "the DOJ is not in the business of granting mulligans to lawyers who have failed to cover their bases and are hoping to negotiate a clawback agreement…. 'Sometimes the government will entertain them, sometimes they won't, but the terms of those clawback agreements are closely looked at because there may be other investigations going on that you don't know about, . . . [s]o in many instances we may not be amenable to having our hands tied in that respect, and making sure that you're doing your due diligence on the front end and looking at your processes before privilege flies out the door is very important.'")

[19] See Caitlin M. Kasmar, The Butterfly Effect: eDiscovery in Government Investigations and Why Small Tweaks May Have Great Impacts, Digital Discovery & e-Evidence, Bloomberg BNA (2016).

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