LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, AUGUST 26, 2019

PERSPECTIVE

MCLE

MANAGING REGRET

Rule 502, the disclosure of privileged material and clawbacks

By Anthony Pacheco and Nate Wright

Shutterstock

You have reviewed terabytes of electronic data for production in response to a government subpoena. It is now 3 a.m. and dread suddenly consumes you. You realize that your team has produced countless pages of attorney-client privileged communications in its haste to comply with unappeasable prosecutors. The lyrics of Cher's song, "If I Could Turn Back Time," repeat over and over and over in your head. You wish that you had effectively made use of Federal Rule of Evidence 502. You wish that you had a confidentiality agreement with clawback provisions in place. You wish that you did not regret producing privileged materials to your adversary who could jail your client and take all of your client's money.

How do you manage the risk of producing privileged material to an adversary? Federal Rule of Evidence 502 is often used by civil and criminal litigators to mitigate risks involved in producing documents that may include privileged material. If you only had a Rule 502 order in place, you could get the lyrics to stop. Below we explain how Rule 502 is used and how you can manage the risk of producing privileged materials, especially in large electronic data reviews.

Effective Use of Rule 502 to Respond to Government Inquiries

Rule 502 allows parties who inadvertently produce material covered by attorney-client privilege or work product protections to avoid the disclosure being considered a waiver if the holder tried to prevent such materials from being produced and immediately sought to rectify the error once it was discovered. Some parties go further and enter into agreements to protect potentially privileged material even if no privilege review was done before production. For example, in the interest of providing discovery expeditiously, one party might allow another to review a production where the documents were not yet culled for privilege. This is often referred to as a "sneak peek." If the producing party later learns that there was privileged material in the production, that party might require the receiving party to return or destroy any such documents in what is often referred to as a "clawback." While sneak peeks and clawbacks were effective ways to help parties manage discovery costs and protect privileged information, outside of Rule 502 parties using them risked that doing so would be deemed waiver in other proceedings.

In 2008, Congress revised the Federal Rules of Evidence to permit parties entering into sneak peek and clawback agreements to obtain a court order protecting that arrangement. Today, courts sometimes guide parties in complex commercial litigation to consider the benefits of jointly entering into such agreements because they provide additional protections when a party may produce privileged material. *See, e.g., Ranger Constr. Indus. v. Allied World Nat'l Assur. Co.*, 2019 U.S. Dist. LEXIS 17603, *6 (S.D. Fl. 2019) (noting the parties "could have quickly resolved this matter themselves with a simple" Rule 502 agreement). While commonly used in civil litigation, the rule also provides potential benefits for companies facing government investigations, particularly when there may be parallel proceedings.

Background of Rule 502

Two of the rule's provisions operate regardless of whether the parties invoke its protections before disclosure. Rule 502(a) limits the scope of waiver if a privileged document is disclosed in a federal proceeding or to the federal government. Rule 502(b) offers litigants a means to retrieve privileged materials if the disclosure was inadvertent, the holder of the privilege took reasonable steps to prevent disclosure, and the holder promptly took reasonable steps to rectify the error.

Two additional provisions in the rule must be invoked, however, before disclosure. Rule 502(e) allows parties to enter into a confidentiality agreement that limits the effect of disclosure. The agreement is binding only on the parties. Rule 502(d) allows a court to order that a privilege is not waived by disclosure, including by adopting the parties' confidentiality agreement. If the court adopts such an order, it is binding on all other federal and state proceedings.

Rule 502(e) and Rule 502(d) have generally been used by parties and endorsed by courts to enforce "clawback" or "sneak peek" arrangements. However, because these provisions do not rely on whether the disclosure was inadvertent, they also allow for the deliberate disclosure of privileged information. This possibility may be attractive for parties responding to government inquiries where there is often a tension between fully cooperating, one the one hand, and managing and protecting privilege from potential future parallel proceedings, on the other hand.

Tension Cooperating and Waiving Privilege

Government agencies often require parties provide relevant facts regardless of privilege considerations. The U.S. Department of Justice, for example, has long stated that companies are not required to waive attorney-client and work product protections to be viewed as cooperative during a government investigation. Justice Manual Section 9-28.710. Eligibility for cooperation credit is predicated, however, on the company disclosing relevant facts. JM Section 9-28.710. In practice, it can often be difficult to disclose facts learned during a privileged investigation without

potentially waiving the privilege. Attorneys have tried a variety of approaches — such as proffering the information in the form of a hypothetical — but these tactics also have risks. As a way to disclose the underlying facts without waiving the privilege, Rule 502 offers a potential solution. However, before using Rule 502 to provide information to the government, parties should heed lessons learned from civil litigation.

Considerations Before Using Rule 502

First, a party should consider whether it may find itself subject to proceedings outside of the United States. While a court order broadly protects disclosure "in any other federal or state proceeding," it does not apply to courts outside of the United States, which may view even a protected disclosure as waiver. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d. 558, 564-65 (S.D.N.Y. 2015). If there are potential parallel proceedings in other jurisdictions, it may be prudent to seek protections under Rule 502, but a party may still want to take measures to withhold privileged information from any production.

Second, where possible, a party should obtain the court order protecting the privilege before disclosing. A confidentiality agreement alone may not be enough to protect the privilege. *See, e.g., Pac. Pictures Corp. v. United States Dist. Court*, 679 F.3d 1121 (9th Cir. 2012). Further, courts have discretion when adopting the order and may fashion more restrictive protections than are available under the rule or that are outlined in any confidentiality agreement between the parties. Parties should have a clear understanding of what protections are being afforded before disclosing.

The order is to be issued by a court where the litigation is pending. Court have generally interpreted the authority to grant such orders broadly. For example, in the grand jury context, such an order can be sought by the prosecution and issued by the court overseeing the grand jury. *Id.* at 1129. Where obtaining a court order is not possible before disclosure, the parties should agree in writing to seek one as soon as the matter is pending before a court.

Third, establish appropriate procedures to withhold any privileged documents that should not be seen by the government. While Rule 502 protects privileged material from waiver, it does not bar the other side from reviewing and using the information. Although courts prevent the privileged material from being entered into evidence, they have not prevented parties from derivatively using it. For example, courts have allowed parties to inquire into relevant, nonprivileged facts, even if those facts were learned from privileged documents. *See, e.g., Arconic Inc. v. Novelis Inc.*, 2019 U.S. Dist. LEXIS 29206 *7 (W.D. Pa. 2019) ("[I]f a document was produced and later clawed back, opposing counsel are not entitled to probe into the nature of the legal advice or work product contained in the document. ... [but] [o]pposing parties are entitled to inquire into relevant, nonprivileged facts, even if they learned about those facts from an inadvertently produced document.").

Fourth, enter into a confidentiality agreement with the government. This agreement should affirm that the party does not waive the right to conduct a pre-production review of documents and to withhold documents containing privilege. Some courts have allowed litigants to use Rule 502 to force the other party to allow a "sneak peek" of privileged materials. *See, e.g., Fairholme Funds Inc. v United States*, 134 Fed. Cl. 680, 682 (Fed. Cl. 2017). While there are strong arguments against interpreting Rule 502 to force disclosure of potentially privileged materials, s*ee Winfield v. City of New York*, 2018 U.S. Dist. LEXIS 79281 *15 (S.D.N.Y. 2018), it is worth having both parties agree in advance against such use. It is unclear whether and how courts might enforce such agreements, but parties may be less inclined to use Rule 502 in an attempt to force disclosure if they previously agreed that such use was improper.

The agreement should specify how parties will subsequently assert privilege over any documents disclosed and how such claims will be resolved. Generally, the disclosing party will be obligated to raise a timely assertion of privilege the first time the government indicates an intent to use a document. *See, e.g., Arconic Inc.*, 2019 U.S. Dist. LEXIS 29206 at *5 ("If a disputed document is used during a deposition or otherwise identified by the opposing party as a document in which it may rely ... the producing party must raise a timely assertion of privilege."). The agreement should also outline that any clawed back documents are returned to the producer automatically, even if there is a dispute over whether or not it is privileged. Once clawed back, the producing party will be expected to redact the document to remove privileged information and reproduce the redacted version of the document. *Id.* at *7. To the extent that disagreement may linger, the producing party should offer to maintain and not destroy the document during the matter and any subsequent litigation.

Finally, as a general consideration in crafting any agreements, parties should be reluctant to allow Rule 502 to erode the underlying principles of attorney-client privilege and the work product doctrine. The rule may offer parties responding to government inquiries a means to provide privileged material without waiver. But there is a real danger that such use may convert the Rule from a shield to a sword. Without clear limitations in the agreement that are incorporated into a court order, a party entering into a Rule 502 agreement risks that doing so will render all of the documents on the party's privilege log subject to a disclosure because providing them would no longer risk waiver and the producing party could always claw them back if they are in fact privileged. Rule 502 should not give way to an unthinking release from the confidentiality of the attorney-client privilege and work product materials.

Conclusion

A party facing a government investigation and potential parallel proceedings should consider whether Rule 502 offers a means to manage the risk of disclosure of privileged materials — to stop Cher's "If I Could Turn Back Time" from playing on an endless loop. The rule might allow a party to lower the costs of a pre-production privilege review or even deliberately disclose privileged information without waiving the privilege. Even if the decision is not to invoke the rule, parties may be asked to defend that decision. As the use of Rule 502 becomes common in government investigations, parties may be expected to use it to expedite productions or even disclose privileged material. Understanding the rule, its benefits and limitations, and potential dangers will help parties more effectively respond to these expectations, and manage the perilous risk of proceeding without even having considered Rule 502.

Anthony Pacheco *is a shareholder and* **Nate Wright** *is an associate in Vedder Price's Los Angeles office. Both are members of the firm's Government Enforcement and Special Investigations practice.*