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Proper Interpretation of Federal Rule of Evidence 502(d) May Lead to Cost Savings

Federal Rule of Evidence 502[1] ("Rule 502"), enacted in 2008, was intended to validate claw-back rules, which are now standard issue in most protective and confidentiality orders, and to address the growing concern about litigation costs.

The Advisory Committee's Note to Rule 502 articulates two major purposes:

1) To resolve disputes about the effect of certain disclosures of privileged or work product materials, specifically those involving inadvertent disclosures; and
2) To respond to widespread complaints about litigation costs related to protecting against waiver of attorney-client privilege or work product, especially in cases involving electronic discovery.

Since 2008, very few courts have interpreted Rule 502(d) and, surprisingly, some have failed to interpret it in the way it was intended. For example, some courts include the reasonableness standard from Rule 502(b) as part of the analysis, even when there is a court order containing a claw-back provision under 502(d). See *Kandel v. Brother Int'l*, 683 F. Supp. 2d 1076 (C.D. Ca. 2010). Other courts have completely ignored Rule 502(d) and required Rule 502(b) compliance, despite the presence of a protective order. See *ReliOn v. Hydra Fuel Cell*, 2008 WL 5122828 (D. Or. Dec. 4, 2008). These early interpretations are incorrect when the language of the rule and its history are considered.

Recently, however, federal courts in Kansas and New York have acknowledged the true purpose of Rule 502(d) by allowing the disclosing parties to take back privileged and work product materials, regardless of the circumstances that lead to their production. *Brookfield Asset Management, Inc. v. AIG Financial Products, Corp.,* 2013 WL 142503 at *1 (S.D. N.Y. Jan. 7, 2013); *Rajala v. McGuire Woods, LLP,* 2013 WL 50200 at *2 (D. Kan. Jan. 3, 2013). Reliance on this interpretation of Rule 502(d) may relax the need for expensive and time consuming privilege reviews.

The *Brookfield* Court recognized that because the parties had entered into a Rule 502(d) stipulation that was memorialized by Court Order, the inadvertent production was not a waiver. The Court held that the Order allowed the disclosing party to claw back the privileged documents, "no matter what the circumstances giving rise to their production were." *Brookfield* at *1.

The *Rajal*a Court acknowledged the superseding effect of Rule 502(d) stating, "The terms of the Protective Order, and not the default provisions of Federal Rule of Evidence 502, govern the handling

[1] Controlling Effect of a Court Order. 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. Fed. R. Evid. 502(d).

of inadvertent productions in this case." *Rajala* at *5. As part of its analysis, the Court heavily weighed evidence of the intent behind Rule 502, citing the Advisory Committee's Note on subsection (d), which states in part, "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product." *Id.* at *3.[2] In addition, based on its analysis of the Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, the *Rajala* Court held that Rule 502(d) allows courts, "to fashion an order, upon a party's motion or its own motion, to limit the effect of waiver when a party inadvertently discloses attorney-client privileged information or work product materials." *Id.*[3]

The true sentiment of Federal Rule of Evidence 502(d) is promoted through the *Brookfield* and *Rajala* cases. The widespread trend to allow non-waiver claw back of privileged and work product materials seems inevitable based on growing concerns over the cost of litigation. However, there may be a greater concern that will preempt the use of Rule 502(d) even if courts begin to consistently interpret it properly. Whether attorneys will rely on the rule instead of engaging in costly privilege and work product reviews, because forgoing such reviews may end in a tactical advantage for the opposing party, remains to be seen.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.

[2] See also Fed. R. Evid. 502(d), ADVISORY COMMITTEE NOTE, (2008).

[3] The Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence states in relevant part, "This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege." Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence.