First Cases Under Federal Rule of Evidence 502 Reflect Variety of Approaches, Underscore Importance of "Clawback" Orders

By Colleen M. Kenney and Marc E. Raven

The electronic age has vastly expanded the scope of document discovery in complex litigation. This expansion has led to an increase in the number of inadvertent disclosures of privileged and work-product documents, and the time needed for privilege review of voluminous electronic documents in order to prevent such inadvertent disclosures has contributed significantly to skyrocketing discovery costs. In some instances, these burgeoning costs have deterred parties from litigating nonmeritorious claims brought against them or pursuing valid claims themselves.

Rule 502 of the Federal Rules of Evidence was enacted recently with the goals of establishing a uniform rule for handling inadvertent disclosures and of protecting parties from the startling costs of e-discovery.[1] The first several cases decided under the new rule suggest that it may be some time before the type of predictability envisioned by its drafters is achieved. Courts applying Rule 502(b),[2] which establishes criteria for determining when inadvertent disclosure of privileged documents will operate as a waiver of privilege as to those documents,[3] may consider a number of different factors and may assign varying weights to those factors. Thus, before discovery starts, it is important to obtain a court order pursuant to Rule 502(d) with "clawback" provisions specifying realistic terms and conditions for recovering inadvertently-produced documents.[4] Although some of the recent cases seem to signal a shift away from finding waivers of privilege or work-product protection through inadvertent production, not all courts are moving in this direction at the same pace.

Background and Purpose of Rule 502

Federal Rule of Evidence 502 – which applies to hard-copy as well as electronic documents but is likely to have greater implications for the latter – adopts a balancing approach. Rule 502(b) states that disclosure of privileged documents in a federal proceeding or to a federal office or agency will not constitute a waiver in a federal or state proceeding where (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including, if applicable, following Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. The rule does not codify any one of the specific balancing tests delineated by courts in analyzing the reasonableness of discovery practices, but the Advisory Committee cited approvingly several cases applying such tests and stated that "the rule is flexible enough to accommodate any of those listed factors."[5]

The Advisory Committee Notes to Rule 502(b) identify "the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness" as relevant factors[6] but stress that none of the factors is dispositive. The Notes add that "[o]ther considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production."[7] The Notes also state that a producing party's use of "advanced analytical software applications and linguistic tools in screening for privilege and work product *may*" lead a court to conclude that the party has "taken 'reasonable steps' to prevent inadvertent disclosure," "*[d]epending on the circumstances*."[8] This suggests that the drafters did not intend for such techniques to become mandatory, nor for their use necessarily to be deemed sufficient to show reasonable diligence, regardless of the producing party's other actions, the suitability of the techniques chosen, or the skill, thoroughness, and timeliness with which they are applied. The flexibility of the rule suggests that the first cases applying it may be indicative of how the rule will work in practice.

Multifactor Waiver Analysis Under Rule 502(b)

The first reported case to apply Rule 502 after it took effect was *Rhoads Industries, Inc. v. Building Materials Corp*.[9] There, plaintiff had inadvertently disclosed 800 privileged documents in a production of 78,000 documents. Of the 800, 120 were not listed on any privilege log. Before applying Rule 502, the court concluded that privilege had been waived for these first 120 documents because the failure to log the documents violated Federal Rule of Civil Procedure 26(b)(5). Regarding the other privileged documents, the court held that it first had to determine whether the producing party had established minimal compliance with the three factors listed in Rule 502(b): the disclosure was inadvertent, the party had taken reasonable steps to prevent the disclosure, and the party reasonably attempted to rectify the error. The court then stated that, where the party shows minimal compliance with Rule 502 but there is a dispute over whether its actions were reasonable, the court should apply the five-factor test from *Fidelity & Deposit Co. of Md. v. McCulloch*.[10] This test weighs the reasonableness of actions taken to prevent inadvertent disclosure; the number of documents inadvertently disclosed; the extent of the disclosures; any delay and measures taken to rectify improper disclosures; and the overriding interests of justice.

In its analysis, the *Rhoads* court found that the first four *Fidelity* factors supported a finding of waiver. Among other things, the court opined that in several respects plaintiff did not do enough, particularly given the size of its damages claim, to prevent the inadvertent disclosures that occurred. The court found, for example, that the responsible associate had no prior privilege-review experience and was inadequately supervised; that the keyword searches plaintiff used to screen for potentially privileged documents should have contained additional terms and were not run against the bodies of e-mail messages; and that plaintiff did not do any testing of the reliability or comprehensiveness of the searches. The court admonished, "[a]n understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents."[11] At the same time, the court cautioned that "application of hindsight . . . should not carry much weight, if any, because no matter what methods an attorney employed, an after-the fact critique can always conclude that a better job could have been done."[12] Moreover, the court minimized the impact of plaintiff's lapses by heavily emphasizing the fifth *Fidelity* factor, the overriding interests of justice, observing that defendants had no right to expect to obtain privileged information and that waiver was a severe sanction that would substantially harm plaintiff. The court thus held that no waiver had occurred, even though four of the five factors weighed in favor of such a finding.

A week after *Rhoads* was decided, Rule 502(b) was applied again in *Laethem Equipment Co. v. Deere & Co.*[13] In *Laethem*, plaintiffs produced two disks of electronic information that contained privileged material and learned of the disclosure during a deposition a few weeks later. In assessing the reasonableness of plaintiffs' conduct, the court did not expressly adopt the same five-factor balancing test applied in *Rhoads*, but it did consider several of the same factors. The court noted that only the two disks had been inadvertently disclosed "despite the voluminous discovery" in the case.[14] It also found that their disclosure had occurred during a production that had not followed the "inspect and copy" procedures agreed upon by the parties, and thus plaintiffs had been deprived of a final review that might have enabled them to prevent the disclosure.[15]

In the *Laethem* court's analysis of whether plaintiffs took reasonable steps to rectify their error, it was persuaded by the speed and extensiveness of plaintiffs' response upon learning of the disclosure. The court noted that plaintiffs lodged an objection immediately during the deposition in which the disclosed documents were used, sent a follow-up letter the same day, and offered repeated objections at later depositions. Plaintiffs also successfully petitioned the court within three weeks to order return of the information. Notably, the court assumed the relevant time period for this inquiry began when defendants were notified of the disclosure. This reflected the intent of the Advisory Committee Notes, which state that Rule 502(b) does not create a requirement for parties to conduct a post-production review for privileged documents.[16]

The *Rhoads* and *Laethem* cases illustrate the tension between the flexibility of Rule 502(b) and the drafters' goal that it provide a "uniform" rule on the effects of inadvertent disclosures.[17] As the *Rhoads* court acknowledged, Rule 502(b) establishes minimum standards for reasonable conduct on the part of producing parties but allows courts to select the factors upon which to judge reasonableness and to choose which factors should weigh heaviest. The *Rhoads* court ultimately decided that one factor – the interests of justice – outweighed four countervailing factors and compelled a finding that no waiver had occurred.[18] The *Laethem* court, for its part, did not expressly adopt a test incorporating any specific set of factors, nor did it compare the facts of any other case in determining the reasonableness of plaintiff's response to the erroneous disclosure.[19] These somewhat divergent approaches suggest at the very least the potential for disagreement among courts applying Rule 502(b) that would be similar to the split that existed before the rule's adoption, with some courts effectively imposing a stricter standard by virtue of the way they balance particular factors in assessing reasonableness, other courts arriving at a more lenient outcome by striking the balance differently and still other courts taking intermediate positions.[20]

Notwithstanding the flexibility of Rule 502(b), however, these cases do seem to suggest that many courts will be influenced by the stated intent behind the rule, namely, to protect parties from losing privilege or work-product protection because of reasonable measures taken to contain the cost of electronic discovery. Significantly, in both *Rhoads* and *Laethem*, the courts held that no waiver had occurred. The *Rhoads* court's analysis emphasizing "the interests of justice" suggests both that this factor may be of paramount importance and that receiving parties are apt to face an uphill battle in attempting to show that "the interests of justice" weigh in their favor.[21] The *Rhoads* court stressed that waiver is a "severe sanction" that would substantially prejudice the producing party and that the receiving party could not reasonably expect access to privileged documents.[22] These considerations presumably will almost always favor the disclosing party, although they may be outweighed in certain cases by evidence of gamesmanship on the part of the producing party, *e.g.*, where the party has been inappropriately selective in claiming privilege or work product. The *Laethem* decision, though offering little guidance on what are reasonable steps to prevent disclosure, interpreted Rule 502(b) as requiring the producing party to take prompt and diligent actions, but not extreme or instantaneous measures, to recover inadvertently-disclosed materials.

On the other hand, another early case applying Rule 502 demonstrates the range of possible outcomes that still exist notwithstanding the new rule's enactment. In *ReliOn, Inc. v. Hydra Fuel Cell Corp.*,[23] plaintiff ReliOn moved to compel the return of two e-mails it claimed were privileged and had been produced inadvertently. The Magistrate Judge cited Rule 502(b) as providing "that an inadvertent disclosure does not constitute a waiver if the holder of the privilege took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error."[24] The Magistrate Judge concluded, however, "that Reli[O]n did not pursue *all* reasonable means of preserving the confidentiality of the documents produced to Hydra, and therefore that the privilege was waived."[25] The Magistrate Judge noted that ReliOn's counsel had not detected the presence of the e-mails in question, which its attorney-declarant stated had been "misfiled," either during their pre-production inspection or before furnishing hard and electronic copies of the items Hydra had selected for copying, further observing that this failure was not attributable to any "surprise or deception on the part of Hydra's counsel."[26]

Interestingly, although the Magistrate Judge acknowledged that ReliOn predicated its motion on a stipulated protective order, the protective order's contents do not appear in the opinion. The Magistrate Judge further did not cite Rule 502(d), under which "[a] Federal court may order that the privilege or protection [attached to a document] 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 *ReliOn* protective order expressly stated that inadvertent production of privileged material will not result in a waiver "provided that the producing party notifies the receiving party in writing promptly after discovery of such inadvertent production."[27] According to the declaration of one of ReliOn's attorneys, although four months elapsed between

production of the e-mails and ReliOn's first assertion (made in writing) that they were privileged, the declarant did not become aware of their inadvertent production until three days before ReliOn made that claim, when Hydra's counsel cited the e-mails in a letter.[28] The Magistrate Judge made no finding that ReliOn had failed to notify Hydra promptly after discovering the inadvertent production.

"Clawback" Orders Under Rule 502(d)

A fourth case handed down shortly after Rule 502 took effect was, unlike *ReliOn*, decided straightforwardly based on section (d) of the new rule and underscores the importance of that particular provision. In *Alcon Manufacturing, Ltd. v. Apotex, Inc.*,[29] as in *ReliOn*, the parties stipulated to the court's entry of a protective order governing inadvertent disclosures. The parties agreed that, if the producing party represented in good faith that production was inadvertent and took "prompt remedial action to withdraw the disclosure upon its discovery," the receiving party would be required to return or destroy the privileged information.[30] Under Rule 502(d), a federal court order incorporating an agreement of the parties regarding inadvertent disclosure will govern the waiver ramifications of such disclosure. Importantly, the court did not engage in the same type of balancing exercise performed in *Rhoads* and *Laethem*. The court did, however, refer to the intent behind Rule 502 in concluding that plaintiffs' remedial actions to withdraw the disclosure in question, though not immediate, had been sufficiently "prompt."[31] It noted:

> [p]erhaps the situation at hand could have been avoided had Plaintiffs' counsel meticulously double or triple-checked all disclosures against the privilege log prior to any disclosures. However, this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid.[32]

The opportunity Rule 502(d) gives litigants, as illustrated in *Alcon*, to avoid, through procurement of appropriate court orders, waivers that might otherwise stem from inadvertent disclosures is especially important given the significant limitation embodied in section (e) of the rule. Rule 502(e) states, "[a]n agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, *unless it is incorporated into a court order*."[33] Thus, litigants should recognize that, absent a court order entered pursuant to Rule 502(d) endorsing an agreement of the parties, Rule 502 will not bar anyone who is not a party to the agreement from claiming waiver in a contemporaneous or subsequent federal or state proceeding. Moreover, as the Advisory Committee Notes to Rule 502(d) explain, "a confidentiality order is enforceable *whether or not it memorializes an agreement among the parties* to the litigation."[34] Finally, as the Notes also explain, "the court order may provide for return of documents without waiver *irrespective of the care taken by the disclosing party*."[35]

Key Lessons from First Wave of Rule 502 Cases

Although the first cases decided under Rule 502 suggest that, where inadvertent disclosures occur, some courts will now be less prone to find waivers of privilege or work-product protection, these cases also highlight the continued importance of anticipating and safeguarding against problems of this nature. Three basic lessons emerge from these early rulings.

First, any litigant facing a substantial production of electronic documents potentially containing privileged communications or work product as to which a waiver could prejudice the litigant should give careful consideration both to the various factors identified in the cases and Advisory Committee Notes (and any other relevant circumstances) and to the different processes and techniques that might reasonably be used to prevent, detect, or remedy inadvertent disclosures. It is important, moreover, that these matters be assessed by counsel with sufficient e-discovery experience to be able to recognize, for instance, what types of burdens courts are likely to deem excessive and what types of actions they are likely to find reasonable in the context of a given dispute.

Second, the producing party generally will want to seek – whether by stipulation with its opponent or, if need be, unilaterally – the entry of an order under Rule 502(d) specifying circumstances in which inadvertent disclosure will not result in a waiver. With or without a prior stipulation, the party or parties requesting such an order should be prepared to show why one is needed and why the specific provisions proposed to the court are appropriate.

Third, even if the court agrees to enter the requested order, the producing party typically will not want to rely solely on the order to prevent waivers, especially where it foresees that a waiver as to certain materials could be fatal or highly detrimental to its position in the case or in other proceedings. In most cases having any substantial degree of complexity and risk, a party will not want to carry out its production without using at least minimal safeguards (which typically are not cost-prohibitive) in place to prevent or detect inadvertent disclosures, regardless of the court's willingness to enter an order providing for return of privileged documents no matter how little care was taken with them. This is especially true given the absence at this early stage of state-court decisions on the enforceability of orders entered by federal courts under Rule 502(d).

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[1] Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules (revised Nov. 28, 2007) at Introduction, *available at* http://www.uscourts.gov/rules/evidence502.html (follow "Letters to Congress Transmitting Rule 502, as Approved by Judicial Conference: September 26, 2007" hyperlink), [hereinafter *Advisory Committee Note*]. The new rule was enacted September 19, 2008, and applies "in all proceedings commenced after September 19, 2008, and, insofar as is just and practicable, in all proceedings pending on that date." STAFF OF H. COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE X (Comm. Print. 2008).

[2] Rule 502(b) states as follows:

> (b) **Inadvertent disclosure.** – When 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:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

[3] Although Rule 502(a) provides that disclosure of privileged communications or work product will not give rise to a subject-matter waiver unless it is intentional and not inadvertent, in many cases the potential prejudice stemming from a waiver as to the documents disclosed will be sufficiently serious that this provision will have little or no bearing on the manner in which litigants choose to have their documents reviewed for possible production. The extent to which the diminished risk of a subject-matter waiver might enable litigants in certain other cases to adopt less rigorous review procedures is beyond the scope of this article.

[4] Rule 502(d) states as follows:

> (d) **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.

[5] *Advisory Committee Note*, *supra* note 1, at Subdivision (b), citing *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985).
[6] *Id.*
[7] *Id.*
[8] *Id.* (emphasis added).
[9] 254 F.R.D. 216 (E.D. Pa. 2008).
[10] 168 F.R.D. 516 (E.D. Pa. 1996).
[11] *Rhoads*, 168 F.R.D. at 227.
[12] *Id.* at 226.
[13] 2008 BL 290231 (E.D. Mich. 2008).
[14] *Id.* at *9.
[15] *Id.*
[16] *See also Heriot v. Byrne*, 2009 BL 58296 at *13-14 (N.D. Ill. Mar. 20, 2009) (applying Rule 502(b) and holding that plaintiffs took reasonable steps to prevent inadvertent disclosure and thus did not waive privilege as to documents produced, notwithstanding the possibility that a re-review by plaintiffs of their production after they delivered it to their vendor for processing would have detected the vendor's erroneous inclusion of the documents; "FRE 502(b) does not require a post-production review" inasmuch as re-review would be "duplicative, wasteful, and against the spirit of FRE 502" and requiring it "would chill the use of e-vendors").
[17] *Advisory Committee Note*, *supra* note 1, at Introduction.
[18] *Rhoads*, 254 F.R.D. at 227.
[19] *Laethem*, 2008 WL 4997932, at *8-10.
[20] *See Victor Stanley Inc. v. Creative Pipe, Inc.*, 06-mg-2662, 2008 BL 117051 (D. Md. May 29, 2008) (summarizing the strict, lenient, and intermediate tests applied by various courts in prior cases). The *Victor Stanley* opinion, although issued before Rule 502 was enacted, also is noteworthy for its extensive discussion of keyword searching, and particularly its statement that parties whose choice of a search method to screen documents for privilege and work product is challenged in court as unreasonable "should expect to support their position with affidavits or other equivalent information from persons with the requisite qualifications and experience, based on sufficient facts or data and using reliable principles or methodology." *Id.* at 260 n.10. The court elaborated that such support could come from "an affidavit from a qualified expert, a learned treatise, or, if appropriate, from information judicially noticed." *Id.*
[21] *Rhoads*, 254 F.R.D. at 227.
[22] *Id.*
[23] 2008 BL 270238 (D. Or. 2008).
[24] *Id.* at *2.
[25] *Id.* at *3 (emphasis added).
[26] *Id.*
[27] *ReliOn v. Hydra Fuel Cell Corp.*, No. 06-00607, at ¶ L.4 (D. Or. Sept. 11, 2007) (*Amended* Stipulated Protective Order).
[28] *ReliOn***,** 2008 WL 5122828, at *3.
[29] No. 06-cv-01642 (S.D. Ind. 2008).
[30] *Id.* at *4.
[31] *Id.* at *6.
[32] *Id.*
[33] FED. R. EVID. 502(e) (emphasis added).
[34] *Advisory Committee Note*, *supra* note 1 (emphasis added).
[35] *Id.* (emphasis added).