THE NATIONAL LAW JOURNAL

JUNE 4, 2012

An ALM Publication

The unwritten rule—get out of jail free

Some say an evidence rule allows a judge to find no waiver of privilege even if the disclosing party is utterly careless.

BY ROBERT L. BYMAN

ISTOCKPHOTO/ONLY59

Every baseball fan knows that the unwritten rules are the most important. Oh, there is a place for written rules, like Rule 1.10: "The bat shall be a smooth, round stick not more than 2.61 inches in diameter at the thickest part and not more than 42 inches in length." Good rule. Nice to know. But the really important rules, like "Never make the first or third out at third base," are not written. You have to know the game to play the game well.

I thought I knew the evidence game—but I'm not so sure any more. I thought, having read Federal Rule of Evidence 502, that I understood it. But I had the good fortune recently of being on a panel with Judge Lee Rosenthal of the Southern District of Texas, who chaired the Rules Advisory Committee which drafted the rule, and she put some pith in my epiphany.

THE PRACTICE

Commentary and advice on developments in the law

Now, I knew that Rule 502(d) allows litigants to save the time and cost of exhaustive privilege review by reducing the risk of waiver for a reduced review; but I didn't know, until Rosenthal clued me in, that it is much more. It is nothing less than a congressional pardon for gross negligence—a "get out of jail free" card that lets litigants forgo privilege review altogether without fear of waiving privilege.

Well, maybe.

Let's review. In 2008, to address the growing concern of the cost of privilege review engendered by electronic discovery, Congress enabled Rule 502.

Now, when we talk about waiver, there is a spectrum of possibilities. Waiver, like any other crime, can be intentional, knowing, negligent or reckless. Rule 502 expressly covers the intentional and knowing. Rule 502(a) provides that intentional waiver does not waive privilege for undisclosed material, unless the undisclosed material concerns the same subject matter and fairness dictates that the undisclosed material be considered together with the disclosed. Rule 502(b) provides that inadvertent (knowing) disclosure is not a waiver—so long as reasonable steps were taken before disclosure to prevent the disclosure and, once known, reasonable and prompt steps were taken to rectify the error. Rule 502(e) implicitly covers the negligent and reckless; the parties may agree on the effect of any disclosure, careful or careless, and that agreement will bind the parties. But only the parties. Not the legion of other litigants waiting to bring me-too suits.

But Rule 502(d)—wait for it, this is the really important part—provides that the court may, on motion or on its own, "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." Hah! Take that, legion.

But how far exactly does 502(d) go? Now, I thought I knew. You agree upon or litigate what is reasonable for the circumstances of your case; you have the court find that it is reasonable to run a focused search against your electronically stored information by filtering out terms for particular custodians and specific terms; you will do a privilege review of the documents culled by that process, but everything else will be produced without delay, with a right of clawback. You save the time and cost of looking at the majority of documents that are unlikely to contain privileged information, without waiving privilege if those steps fail to catch something. And once the court blesses that agreed-upon set of steps in the form of an order, the privilege is maintained, not only in your case but as to all other litigants in all other litigation. Pretty good deal.

I got that. But Rosenthal opened my mind to greater possibilities. I had thought, it turns out unreasonably, a 502(d) order

ROBERT L. BYMAN, *a partner at Chicago's Jenner & Block and a regent of the American College of Trial Lawyers, can be reached at rbyman@jenner.com.*

had to be consistent with 502(a) and (b)—had to be based upon reasonable steps; that is, I assumed that the court had to find that the steps to be taken to prevent disclosure were reasonable, and then enter an order that would prevent other litigants from relitigating what is reasonable. But Rosenthal directed me to the phrase in the Advisory Notes: "[T]he court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party."

I hadn't appreciated that. Rule 502(d), it seems, doesn't merely protect the intentional and inadvertent; it also shelters the negligent and wantonly reckless.

Now, the written rule does not expressly say that the court is free to enter a 502(d) order that eviscerates 502(a) and (b), but that is what the notes appear to say—or at least what some pretty smart judges think they say. Paul Grimm, chief magistrate judge for the District of Maryland and a prolific legal scholar, writes that Rule 502(d) "clearly contemplates" that the court "can approve procedures that would not otherwise pass muster" under the rest of the rule. Paul W. Grimm, Matthew P. Kraeuter and Lisa Yurwit Bergstrom, "Federal Rule of Evidence 502: Has It Lived Up To Its Potential?," Rich. J.L. & Tech., Vol. XVII, Issue 3, at 68 (2011).

So it is not just that a 502(d) order can assess and determine what constitutes reasonable steps—it can dispense with reasonableness altogether—and bind future litigants. You could decide to produce the entirety of your client's e-mail archives—including the e-mails of the client's general counsel. You know, not just suspect, but know that privileged materials will be included in that data dump. You are consciously taking not the slightest precaution to filter out privileged material. If sloth were an Olympic event, you would be the gold medalist. But if the court were to enter an order approving that, you have your get out of jail free card—no waiver of privilege.

Wow. I had no idea. Now, I take some comfort that I am not unique in my former ignorance—Grimm notes that "a disappointingly small number of lawyers seem to be aware of the rule and its potential." Id. at 2. And not just lawyers; at least some judges have the same mis-read that I did.

In *Spieker v. Quest Cherokee LLC*, 2009 U.S. Dist. Lexis 62073 (D. Kan. July 21, 2009), Quest estimated that a privilege review would cost $250,000; Magistrate Judge Karen Humphreys was asked to ameliorate that cost by entering a 502(d) order that would allow Quest to turn everything over without review, yet maintain Quest's privilege. But Humphreys declined because, she reasoned, 502(b) requires reasonable steps to maintain privilege and, in her view, no steps does not equal reasonable steps.

> A provision of Rule 502, it seems, shelters the negligent and wantonly reckless.

Now, Grimm writes that *Spieker* and similar holdings "fly in the face of the clear intent of Rule 502 and ignore the rule's explicit provisions." Rich. J.L. & Tech., at 64. But I confess I come out squarely on the fence on this. I know that Grimm was there, he was part of getting Rule 502 enacted, he knows what it was meant to mean. But I'm not sure that Humphreys got it wrong. I have read Rule 502 over and over and cannot find anything that explicitly says that a 502(d) order can be totally inconsistent with the requirements of 502(b). If the rule is as Rosenthal and Grimm believe, it is an unwritten rule. And the single phrase in the accompanying notes "irrespective of the care taken" does not, at least for me, express it any more clearly. Does "irrespective of the care taken" simply mean "we aren't going to revisit whether the right amount of care was taken" or does it grandly mean "it doesn't matter that no care—not one little bit—was taken"?

A POWERFUL RULE

Well, one thing is clear to me. Grimm and Humphreys have the equal right to come down on opposite sides of the fence on which I teeter. Rule 502(d) unambiguously says that a court "may"—not "must," not "should"—enter an order; and the statement of congressional intent that accompanies the rule could not be more explicit: In any 502(d) order, "the court retains its authority to include the conditions it deems appropriate."

So here's the point. In any case involving costly privilege review, consider Rule 502 carefully. Read Grimm's article, to which I cannot do justice in my column's 1,500-word limit.

I'm not sure you can convince your particular judge that it's OK to do nothing at all, but you can certainly reduce the cost of discovery by using Rule 502, whatever it means. Write that down. And don't try to stretch a double into a triple with no outs.