



# One Proposed Solution to Common Discovery Quandaries

January 7, 2016

**Editor's Note:** *This is part of an informational series authored by a Jenner & Block partner on the changes to the Federal Rules of Civil Procedure that took effect on Dec. 1, 2015.*

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Here's the scenario: The parties involved in a federal lawsuit have decided to ask the court to enter a FRE 502(d) order at the outset of the case, taking the lead from Amended Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure. They understand it should provide a streamlined process to claw back privileged information without costly disputes. What specific provisions could be included in the order?

A FRE 502(d) order, like a discovery plan or case management order, should be tailored to the needs of a specific case. One size does not fit all. The more that the parties learn about their case early, and anticipate discovery and privilege issues that are likely to arise, the better able they will be to tailor the initial order to the particular matter. FRE 502(d) orders entered as the case progresses can also solve otherwise intractable privilege issues that may arise during the course of litigation.

### Timing of Claw Backs

Although it is not necessary for a FRE 502(d) order to address the timing of claw backs, the parties may want to create some framework for the issue. One approach is to allow a producing party to claw back privileged information at any time, but if privileged information is used by another party in the matter, require the producing party to act “promptly” thereafter.

The [Seventh Circuit Pilot Project Proposed Case Management Order No. 2](#) provides that when another party uses privileged information in a matter, the producing party “must promptly assert any claimed privilege and/or protection over it and request return or destruction thereof.” Although requiring “prompt” action may open the door to disputes about whether a party acted quickly enough, it gives the producing party the chance either to assert privilege or to waive it at the time it is used in the matter.

### Effect of “Use” vs. “Disclosure”

FRE 502 addresses “disclosure” of privileged and protected material, but it does not expressly address “use” of that material after disclosure. What is the effect on the scope of waiver if a party intentionally waives privilege over a document and either the receiving party or the producing party “uses” the document — in a deposition, as an exhibit for a summary judgment motion, or during trial? The purpose of FRE 502(a) would be defeated if a receiving party could expand the scope of waiver simply by using documents that were produced in reliance on the protections of FRE 502(a).

However, what happens if the producing party uses a document? There is little case law on this issue. Without a clarifying order from the court, it is possible that the scope of waiver could default back to whatever common law rule applies to the case, which might be the broad subject matter waiver that FRE 502(a) is designed to prevent. One approach is to include in the FRE 502(d) order entered at the outset of the case a clause that provides that the scope of waiver resulting from the producing party’s use of the document will be governed by FRE 502(a), that is, further waiver will occur only where the party is attempting to obtain an unfair advantage in the litigation by affirmatively using privileged information in a selective and misleading way.

Use by the producing party risks further waiver, but it channels the question to FRE 502(a), which has a bias against broad waiver. If such a provision were commonly used, the courts would be able to provide guidance over time regarding the scope of waiver parties could expect when using their own privileged documents in a matter.

## Using FRE 502(d) Orders During the Course of the Matter

During the course of complex litigation, privilege issues arise that, if not resolved quickly, can lead to expensive and time consuming disputes. Thoughtful and creative use of FRE 502(d) orders can solve some of these issue. For example:

A party has withheld a category of documents that it believes are privileged or protected from discovery. The opponent disagrees that the documents have been properly withheld and makes it clear that it will move to compel. In many cases, the parties may need to have the court resolve the issue.

In others, a party withholding documents may decide that waiving privilege over the specific documents at issue is acceptable, so long as the disclosure and waiver does not lead to broader waiver over other, undisclosed privileged information in this or some other litigation. Before to the enactment of FRE 502(d), it was not possible to produce privileged information with confidence that it would not lead to broader waiver in a different proceeding.

Now, a federal court may assist the parties by entering a FRE 502(d) order that cabins waiver to the documents actually disclosed, enabling production of the documents without further acrimony, while giving the producing party comfort that no broader waiver will result. One of the first reported FRE 502(d) orders did just that.

In *S.E.C. v. Bank of America, Corp.*<sup>[1]</sup> the defendant agreed to produce documents responsive to an SEC subpoena, including some privileged materials. At the time, there were more than 50 federal and state matters pending against the defendant relating to many of the same issues.

Based on an agreed motion by the parties, the court entered an order ruling that the production did not waive privilege over any undisclosed information, in the matter before the court or in any other federal or state proceeding, including the dozens of then-pending matters around the country. The order itself did this by defining “subject matter” as including only the documents being produced, thereby negating the possibility that other undisclosed information could relate to the same subject matter. A court may do this more directly simply by ruling that disclosure does not lead to broader waiver.

To clearly identify the specific documents that are covered by the order, the producing party may stamp each document covered by the FRE 502(d) order. This has the advantage of enabling the producing party to tie the documents back to the FRE 502(d) order if the documents are ever at issue in another proceeding.

[1] No. 09 Civ. 06829, 2009 WL 3297493 (S.D. N.Y. Oct. 14, 2009).

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