

CLIENT ALERT

Court Invokes FRE 502(d) to Permit Intentional Production of Privileged Materials Without Waiver

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A recent court ruling illustrates the significant value of Federal Rule of Evidence 502 for preserving privilege in a cost-effective and expedient manner. In *Chevron v. Weinberg Group*, Misc. Action No. 11-409 (D.D.C.), Magistrate Judge John Facciola entered a Rule 502(d) order that allows the defendant to knowingly produce purportedly privileged materials without waiving any privileges applicable to those materials. In entering the order, the court expressed dismay that the defendant had "just now discovered Rule 502(d), the use of which may have prevented the protracted litigation and discovery battles that have plagued this case for the past two years."

In September 2012, Judge Facciola -- who is widely regarded as a leading jurist in the field of e-discovery -- admonished the defendant "for the inadequacy of its privilege log and attendant refusal to disclose documents that could not, in fact, be regarded as privileged." The court had ordered the defendant "to begin production of certain documents, previously withheld under a claim of work product privilege, at a rate of 100 documents per day until complete, redacting only those portions of the documents that constituted true opinion work product." In that same order, Judge Facciola graciously threw the defendant a life-line by noting *sua sponte* that he would enter a Rule 502(d) order if requested by the parties. Apparently faced with the burden of redacting and quickly producing hundreds of documents, the defendant accepted the court's offer and requested such an order, admitting that it was "willing to disclose all of the requested documents 'without redacting opinion work product,' so long as disclosure would not amount to a waiver of the [defendant's] right to assert a privilege when [the plaintiff] attempts to make use of those documents." As promised, Judge Facciola entered an order affording the defendant the privilege protection it sought without having to redact the documents, but not without first resolving another dispute.

Apparently unable to agree on the terms of a Rule 502(d) order, the parties submitted competing proposed orders. The principal difference between the competing orders concerned which party would bear the burden should the plaintiff challenge the privilege assertion as to any of the documents to be produced. Under the defendant's proposed order, the plaintiff would have to "prove that the document is *not* privileged," rather than the plaintiff bearing the burden "to prove that the privilege is applicable and the document should not be used." The court rejected this approach as impermissibly shifting the defendant's burden to the plaintiff since the party claiming a privilege typically bears the burden of proving up the privilege. The court also concluded: "To force [the plaintiff] to challenge each document, one by one, in hopes of figuring out which parts of it are and are not privileged, would negate the intent and purpose of my [September] order, which was to force the [*defendant*], not [the plaintiff], to go through each document and redact material that fell within a genuine privilege." The court, thus, rejected the defendant's proposed order and largely adopted that submitted by the plaintiff. In reaching this conclusion, the court noted that the parties were "in this predicament in the first place precisely because the [defendant] submitted an insufficient privilege log, filled with either inappropriate or inadequately explained claims of privilege."

Although entering the Rule 502(d) order, Judge Facciola was "troubled" by the fact that doing so "relieves the [defendant] of its responsibility to go through each document in earnest and make a sound determination regarding any material that is privileged." The court concluded, though, that the need to expedite the document production because of the looming discovery

deadline trumped this concern and warranted entry of the order. It is unclear whether the court would have allowed the defendant to avail itself of the protections of Rule 502(d) so late in the case, after years of "protracted litigation and discovery battles," had more time remained for discovery.

Judge Facciola best sums up the moral of the story: "When used properly, [] a 502(d) order can alleviate much of the meaningless back and forth these parties have already endured. It is a shame that this tool was not employed by the [defendant] earlier on." The primary purpose of the rule, which has been in place for several years, is to reduce the costs and burdens of meticulous privilege reviews and subsequent battles over logs and productions. Litigants and counsel need to familiarize themselves with Fed. R. Evid. 502 (and of course all other applicable rules) and carefully consider its protections as early as possible in any proceeding subject to the rule. And Judge Facciola's decision suggests that any attempt to use a Rule 502(d) order to shift the burden in a privilege dispute to the party challenging the privilege is unlikely to succeed.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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