Striking Right Balance When Using FRE 502(d)

The idea behind FRE 502(d) to protect privileged information is straightforward, but how it impacts e-discovery strategy is more complicated.

Robert Coppola, QuisLex, Legaltech News

According to Rule 502(d), which falls under the "Attorney-Client Privilege and Work Product; Limitations on Waiver" section of the Federal Rules of Evidence (FRE), "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." FRE 502(d) was created, according to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in recognition of the fact that "the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information."

The idea behind FRE 502(d) is straightforward. It provides additional protection in case parties inadvertently produce privileged information. Many commenters have expressed confusion as to why FRE 502(d) has not been more widely employed, considering the benefits from the standpoints of efficiency (less time and resources spent on privilege review) and quality (less potential for damage from the inadvertent production of privileged documents). U.S. Magistrate Judge Andrew J. Peck of the Southern District of New York believes the order "is still used in only a small percentage of cases" despite the fact that in certain scenarios, "it is malpractice for lawyers not to at least consider asking for a 502(d) order."

While most attorneys would agree that obtaining a FRE 502(d) order is advantageous, the question of how the order should impact a party's e-discovery strategy is a much more complicated one.

The Opposite Ends of the FRE 502(d) Spectrum

There are certain matters that pose less risk than others and, therefore, greater reliance on the protections of FRE 502(d) may be warranted. For example, if a company responding to a third-party subpoena has no stake in the outcome of the litigation, and is not particularly concerned about the underlying content in privileged documents, it is probably not necessary to conduct multiple layers of review and quality control to ensure every last privileged document has been identified and withheld from production. In these situations, FRE 502(d) allows counsel to focus primarily on cost and efficiency as they can remain less concerned about the potential disclosure of privileged material.

At the other end of the spectrum sits counsel for a company with an extensive litigation profile. This company may find itself constantly embroiled in cross-border or "asymmetrical" matters, often dealing with aggressive opposing counsel or regulators. In these situations, counsel cannot rely on the protections of FRE 502(d) alone. While the opposing party may be obligated to return any privileged material, the damage of producing this information may have already been done. The contents may reveal sensitive information damaging to the matter, and what has been read cannot be unread. The inadvertent production of privileged material in these situations may also lead to messy and costly disputes regarding whether the documents are, in fact, privileged. In such matters, counsel should spend the time and money to ensure that large document productions have been effectively scrubbed of potentially privileged data, even if a FRE 502(d) order is in place.

Finding the Middle Ground

Most matters fall somewhere in between these two extremes. The question then becomes what factors counsel should consider in deciding how heavily to rely on the protections of an FRE 502(d) order while still effectively mitigating both risk and cost. The following practical advice has been gleaned from years of managing large-scale discovery.

Risk Assessment: The first thing counsel should do is identify the source(s) of the risk. Is the case a high-profile, bet-the-company matter? Does the risk of revealing privileged information outweigh the benefits of a less intensive (and costly) privilege review? Could candid communications from senior executives or other sensitive information be disclosed, putting the company's reputation at risk? Has the opposing party been combative, suggesting it may dispute future requests to treat produced data as privileged, leading to disagreements that may consume more resources than identifying the privileged material in the first instance?

The more voluminous and significant the sources of risk, the more likely counsel should devote resources to a more extensive privilege review. If very few risks are present, perhaps a strategy geared toward leveraging the benefits of FRE 502(d) to reduce cost would be more appropriate.

Resource Allocation: Counsel can now focus resources on addressing these risks, while relying more heavily on FRE 502(d)'s protections for other aspects of the review. This means identifying those sets of documents most likely to contain content that is both privileged and sensitive. This can be done by custodian, relevant dates or time periods, or documents that, based on keywords or other analytics, relate to certain key subject matters. For example, in responding to a second request from the Department of Justice or Federal Trade Commission, it would be important to emphasize the period when the transaction started to materialize and became heavily negotiated, as well as when the parties were responding to regulatory investigation.

Counsel would also want to focus on any custodians or other individuals (such as outside antitrust counsel) that were involved. Other more innocuous categories of privileged documents (e.g., the drafting or negotiating of routine agreements) can then receive a "lighter touch" made possible by the protections of FRE 502(d).

Complexity of the Review: Assessing the complexity of the review may guide counsel's decision in determining how intensive a privilege review to undertake. If documents must be critically reviewed in advance of production for issues such as importance, data privacy, confidentiality, among others, does a more streamlined approach to privilege review even make sense as the additional time and cost is minimal?

Assessing all facets of the review and applying common sense may help counsel choose their path. A determination may be reached that running additional checks to documents with a greater likelihood of containing privileged information is worth the incremental added cost and effort.

While there are various reasons FRE 502(d) is underused, one primary factor is that counsel may not feel comfortable with the risks, despite FRE 502(d) protection. In certain matters, however, this concern may be relatively limited or adequately addressed without undertaking an overly extensive privilege review.

Counsel should seek to identify the true risks of producing privileged material on a matter-by-matter basis and determine the optimal plan to deploy resources to mitigate the risk. (Even absent a FRE 502(d) order, this approach should be a standard practice.) By doing so, counsel can strike a better balance in determining an acceptable level of risk and leveraging the benefits of FRE 502(d).

Robert Coppola is associate vice president of legal services at QuisLex. Before joining QuisLex, he spent many years as an associate with leading law firms, where he gained significant experience managing and overseeing all aspects of discovery pursuant to large, complicated government investigations and private litigations. He received his J.D. from Georgetown University Law Center and a B.A. in political science from Williams College.