

ARTICLES

Are Clawback Agreements Being Used to Their Full Extent?

By Jennifer F. Beltrami – April 30, 2012

In its infancy, electronic discovery was heralded as being potentially much more cost effective than discovery by the old-fashioned method of review and production of boxes of hard-copy documents. We now know that to be far from true. The universe of documents potentially relevant to a case and the cost to review and produce such documents have exploded, caused in part by the specter of sanctions for failure to preserve and by complicated, often unwieldy search methodology. Electronic document review can escalate litigation costs by the hundreds of thousands of dollars.

Litigants have responded to such prohibitive costs by entering into “clawback” or “quick-peek” agreements and, in some cases, seeking to memorialize such agreements in a court order. A clawback agreement or order provides that a party producing materials in discovery may “claw back” inadvertently produced privileged materials, while a quick-peek agreement or order allows litigants to produce documents before conducting a privilege review, instead reviewing a smaller set of documents once the party to whom the documents are produced selects those documents it wishes to copy. New Federal Rule of Evidence 502, which went into effect in 2008, explicitly codifies and encourages the use of such agreements and orders. And Federal Rule of Civil Procedure 26(b)(5)(B) now provides a uniform procedure for dealing with inadvertently produced privileged documents. However, clawback arrangements have by no means become universal; many litigants fail to take full advantage of the protections potentially afforded by such agreements.

The Rules Seek to Contain Costs

Federal Rule of Evidence 502 was enacted in 2008 with the stated purpose of reducing the rapidly escalating cost of electronic discovery. One simple provision of the new rule provides a mechanism to safeguard parties to a proceeding against the perils and expense of a huge privilege review as well as the consequences of inadvertent production of privileged material—in that proceeding and others. Rule 502(d) reads:

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.

This level of protection is available only if memorialized in a court order, but a party agreement also provides a level of protection. Fed. R. Evid. 502(e) (“An 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.”). Litigants should be mindful that, even if an opposing party



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will not agree to a clawback provision, they should consider seeking the entry of a clawback order. Some courts will enter such an order sua sponte. *See Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M.*, No. CIV 09-0885 JB/DJS, 2010 WL 4928866 (D.N.M. Oct. 22, 2010) (court suggested and entered protective order with clawback provision).

The “major purpose” of Rule 502(d) is to cut costs, as the advisory committee notes specify:

[Rule 502] responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.

The notes further specify that the goal of the rule is to reassure parties that court orders protecting against waiver of privilege will be enforced:

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable.

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[T]he court order may provide for return of documents without waiver *irrespective of the care taken by the disclosing party*; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”). The rule provides a party with a predictable protection from a court order—predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Fed. R. Evid. 502 advisory committee’s notes (emphasis added).

Thus, Rule 502(d) is an essential tool in achieving one of the main purposes of Rule 502: reducing the cost of electronic discovery.

In the absence of a clawback order, the court will fall back on Rule 502(b), which, even without a court order or agreement between the parties, protects against inadvertent disclosure:

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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).

Many Courts Encourage, Uphold, and Enforce Clawback Provisions

Courts have relied on Rule 502(d) to enforce party agreements and orders containing clawback and quick-peek provisions, in some cases without regard to the level of review the parties engaged in. *See, e.g., Degeer v. Gillis*, No. 09 C 6974, 2010 WL 3732132, at *8 (N.D. Ill. Sept. 17, 2010) (following clawback agreement to find no waiver; no application of Rule 502(b)); *Rodriguez-Monguio v. Ohio State Univ.*, No. 2:08-cv-00139, 2009 WL 1575277, at *3 (S.D. Ohio June 3, 2009) (relying on clawback provision in protective order to find no waiver); *Alcon Mfg. Ltd. v. Apotex, Inc.*, No. 1:06-cv-1642-RLY-TAB, 2008 WL 5070465, at *6 (S.D. Ind. Nov. 26, 2008) (enforcing clawback provision of protective order to find no waiver and observing that “expensive, painstaking review” such as “double or triple-check[ing] all disclosures” . . . “is precisely what new Evidence Rule 502” was “designed to avoid”); *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2011 WL 3808544 (N.C. Super. Ct. Aug. 26, 2011) (finding no need to examine whether review and recall was reasonable under Rule 502(b), as the parties had entered into a clawback agreement).

Some Courts Don’t Give Clawback Provisions the Power Rule 502 Intended

Somewhat perplexingly, some courts, even since the adoption of Rule 502(d), have engaged in an analysis under Rule 502(b) even though a clawback or non-waiver agreement is in place. *See Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125 (S.D. W.Va. 2010) (despite clawback agreement, steps to prevent disclosure of privileged materials in the first instance must be reasonable; finding waiver because producing party failed to conduct sampling to determine efficacy of search terms); *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. CV06-607HU, 2008 WL 5122828 (D. Or. Dec. 4, 2008) (finding waiver where two emails slipped through review of documents spanning 40 feet of shelf space, despite protective order with clawback provision). Such decisions are potentially quite destructive to the efficacy of Rule 502, which, as the advisory committee notes indicate, was intended to encourage entry and enforcement of clawback orders to reduce the need for parties to concern themselves over whether their conduct would pass scrutiny under a Rule 502(b) reasonableness analysis.

Other decisions are ambiguous as to whether the court’s analysis relied on the existence of a clawback agreement or order, or on the weighing of Rule 502(b) factors. *See, e.g., Bd. of Trs., Sheet Metal Workers’ Nat’l Pension Fund v. Palladium Equity Partners, LLC*, 722 F. Supp. 2d 845 (E.D. Mich. 2010) (upholding clawback provision in protective order but also enumerating factors demonstrating that Rule 502(b) factors were met by producing party; finding no waiver);



Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076 (C.D. Cal. 2010) (enforcing clawback provision in protective order but also making specific determination as to whether producing party's review and recall were reasonable). The reason for the ambiguity may lie in the wording of the clawback provision itself. Without a sufficiently broad provision, the court may feel constrained to engage in the exercise of weighing reasonableness pursuant to Rule 502(b).

Crafting a Strong Claw to Avoid Costs

Parties can increase the cost-avoidance efficacy of a clawback provision and decrease the likelihood that the court will examine the parties' conduct under Rule 502(b) by crafting a clawback agreement that contains more protective language. If crafted broadly enough, a clawback provision can obviate the need for a privilege review entirely. The simple provisions used by the parties in the *Degeer* and *Morris* cases were deemed sufficiently clear that the court need not analyze the parties' conduct pursuant to Rule 502(b). In *Degeer*, 2010 WL 3732132, the provision read simply as follows:

[I]nadvertent production of any confidential, privileged, or work product documents shall be without prejudice to any claims that the document is confidential or privileged, and shall constitute neither a waiver of any claim of privilege that may otherwise attach thereto nor a general waiver of such claim or privilege.

In *Morris*, 2011 WL 3808544, the provision read as follows:

The production of attorney-client privilege materials, work product protected materials, or trial preparation materials shall not constitute a waiver of those protections. In the event of such protected information, the Parties will follow the procedure set out in Rule 26(b)(5).

However, given decisions such as *Palladium*, *Kandel*, *Mt. Hawley*, and *Relion*, in which the clawback provisions were arguably no less clear than those in *Degeer* and *Morris*, it might behoove a party to include in the clawback provision language specifying that the review undertaken by producing parties is deemed to satisfy the reasonableness requirement of Rule 502. The provision at issue in *Mt. Hawley* contained such language as to parties' conduct upon discovery of the inadvertent production but not as to the initial review.

Other language may be included at least to cut off inquiry as to whether the disclosure is inadvertent. For example: "Production of materials as to which a claim of privilege is later asserted pursuant to this provision shall be deemed inadvertent." Even language requiring "that the producing party promptly makes a good-faith representation that such production was inadvertent or mistaken" may be sufficient. See *Alcon*, 2008 WL 5070465. In *Degeer*, 2010 WL 3732132, for example, the court enforced the clawback provision, but it did engage in a determination as to whether the disclosure was inadvertent. Language such as the foregoing may render such inquiry unnecessary.



Lessons from the Case Law

Thus, although the advisory committee notes suggest it, litigants are unlikely to take the drastic step of forgoing a privilege review altogether, because there is no absolute guarantee the clawback provision in the confidentiality order will be enforced. Also, at least one court has indicated that a “document dump” without “[any] effort whatsoever to review for privilege or protected documents” may not be permissible even under an enforceable clawback provision. *See Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582, at *7 (D. Kan. July 22, 2010) (entering clawback order on showing of good cause by party seeking the order, over opposing party’s objection). However, even if it does not eliminate the need for review altogether, the entry of a Rule 502(d) clawback order containing the right provisions can at least drastically reduce the cost of such review.

A further reason parties may be reluctant to rely too heavily on clawback provisions is that once a party is on notice of an inadvertent production, the safeguards of Rule 502 may be lost altogether. *See United States v. Sensient Colors, Inc.*, No. 07-1275 (JHR/JS), 2009 WL 2905474, at *22–23 (D.N.J. Sept. 9, 2009), and Fed. R. Evid. 502(b) advisory committee’s note (“The rule does not require the producing party to engage in post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on obvious indications that a protected communication or information has been produced inadvertently.”); *see also Brookdale Univ. Hosp. v. Health Ins. Plan of Greater N.Y.*, No. 07 CV 1471(RRM)(LB), 2009 WL 393644 (E.D.N.Y. Feb. 13, 2009) (enforcing clawback agreement but finding privilege preserved only as to those documents initially recalled; producing party not excused from reexamination of entire production). Thus, one mistake in a huge document production could require re-review of the entire production.

But there certainly does not seem to be much downside, if any, in seeking the entry of a protective order with a clawback provision. It would seem that one of the only advantages to not entering into a clawback agreement or seeking a clawback order from the court may be that, should one’s adversary slip up and inadvertently produce a privileged document, one may argue that the privilege has been waived (although, for such a waiver argument to succeed, one would still need to show that the producing party had failed to satisfy the standard of Rule 502(b)). Engaging in such tactics on the slim chance of gaining a litigation advantage would seem to be clearly outweighed by the potential peril that can be avoided with a clawback agreement or order. *See Rajala*, 2010 WL 2949582, at *7 (“To deny entry of such a clawback provision merely because Plaintiff would be deprived of the opportunity to demonstrate that the producing party had not taken reasonable care to prevent disclosure would defeat the purpose behind rule 502(d) and (e). The goal is not to encourage disputes regarding waiver and inadvertent production, but to prevent such disputes from arising in the first place.”).

The disadvantages of proceeding without a clawback provision include exposure to malpractice claims arising from the inadvertent production of privileged material and a higher cost of privilege review. Although a party may fall back on Rule 502(b), without a clawback agreement



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or order, that party faces the risk that the court will not deem the efforts made to protect the information sufficient to satisfy Rule 502(b). Most courts do favor the producing party and find that no waiver results from inadvertent production of privileged material, but not all do, and the determination is within the discretion of the court. How much simpler to reach an agreement, “so ordered” by the court, at the outset of the case, that any materials inadvertently produced will not effect a waiver of the privilege. As Judge Shira Scheindlin, author of the *Zubulake* decision quoted in the advisory committee notes to Rule 502, reminded attendees at a recent New York State Bar Association meeting, remember to seek a clawback order—especially in cases where high electronic discovery costs loom.

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