

Federalism and Federal Rule of Evidence 502(d)

by Pete Haskel

A well-intended provision of Federal Rule of Evidence 502 creates a major federalism problem[1] and, if tested, likely will prove to be unenforceable. Fed. R. Evid. 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver) was enacted to limit the cost and time needed for privilege reviews in pretrial discovery, particularly review of massive electronic files.[2] The Rule includes several provisions that purport to protect federal litigants, who disclose privileged information under a protective order or under a confidentiality agreement that is incorporated into a court order, from assertions in a subsequent state or federal proceeding that the disclosure in the earlier litigation waived attorney-client and work-product privileges (i) for the disclosed documents, and (ii) for other documents and information on all subjects covered by the disclosed materials.

Fed. R. Evid. 502(d). My concern is how the following provision of Rule 502 could be enforced in a subsequent state-court proceeding against a state–court party that had not been a party to the federal action in which the Rule 502(d) order had been entered:

> Rule 502. Attorney—Client Privilege and Work Product; Limitations on Waiver. The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
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> * * *
>
> **(d) 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.[3]

The drafters of Rule 502(d) point to Magistrate Judge Paul W. Grimm's discussion in *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), of conflicting decisions about whether protective orders or confidentiality agreement will or will not be effective in subsequent litigation to preserve privileges pertaining to material disclosed in the earlier litigation.[4] However, the Committee cites no authority expressly authorizing Rule 502(d).

Trying to Enforce Rule 502(d). So what would happen if a federal judge entered a Rule 502(d) order, directing that no disclosure by Party X under a protective order in a to a lawsuit pending in her court would waive privileges in any other federal or state proceeding,[5] but later, a state court judge admitted into evidence a document supposedly protected by the federal order through the interpretation of applicable state evidence rules? Could Party X seek collateral relief from the federal court? If so, what form might that relief take? Enjoin the opposing state court party to withdraw the exhibit? (That would not change the order admitting the exhibit unless the state judge agreed, and would constituted an unprecedented federal court intervention into a state court judicial proceeding). Order the state court judge, under pain of contempt, to strike the exhibit? (So much for judicial immunity and federalism). Transfer the case to federal court? (Is violation of a Rule 502(d) order a ground for federal subject-matter jurisdiction? I think not).

Moreover, what practical confidentiality protection would Party X have once the item was used in state court? Newspapers could publish it; TV stations could put it on the air; radio commentators could read from it. Rule 502(d) does not authorize an injunction against non-parties to the federal proceeding against using documents after the proceeding is over. I have never seen a federal case that would authorize such an order aside from information classified for national security purposes.

Notes

1. Some members of the Judicial Conference's Federal-State Jurisdiction Committee opposed Rule 502(d) because "requiring all states to adhere to a uniform rule based upon the treatment of disclosures in the course of federal litigation may undermine the traditional control that state courts have exercised over the application of waiver rules"). Henry S. Noyes, *Federal Rule Of Evidence 502: Stirring The State Law of Privilege and Professional Responsibility With A Federal Stick*, 66 WASH. & LEE L. REV. 673, 727 (Spring 2009).
2. This new Rule has two major purposes: (1) it resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver. (2) It 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. *See, e.g.*, Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D. Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation"). Advisory Committee Notes, Explanatory Note (Revised 11/28/2007), Fed. R. Evid. 502.
3. Fed. R. Evid. 502(d).

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it was obtained with evidence procured in violation of the Fourth Amendment.

The issue now comes before the U.S. Supreme Court. In addition to the question presented by the petition for certiorari (whether the warrantless use of a tracking device on Jones's vehicle to monitor its movements on public streets violated the Fourth Amendment), the parties were directed to brief and argue the following question: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." ML

Inside Canada

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chases, with little wait time or screening, were most likely to occur at retail pet stores. "Requiring owners to put additional thought and preparation into their decision to purchase a dog is rationally connected to reducing unwanted dogs in the city."[8]

Other Canadian cities are now looking at enacting similar restrictions.

Notes

1. *International Bio Research v. Richmond (City)*, 2011 BCSC 471, at para. 16 (B.C.S.C. Apr. 15, 2011).
2. *Id.* at para. 6.
3. Council Minutes, Nov. 08, 2010, at para. 3, available at http://www.richmond.ca/cityhall/council/agendas/council/2010/110810_minutes.htm.
4. *International Bio Research*, at para. 3.
5. *Id.* at para. 37.
6. *Id.* at paras. 56,57.
7. *Id.* at para. 83.
8. *Id.* at para. 77. ML

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4. Advisory Committee Notes, Fed. R. Evid. 502(d).
5. For an example of a motion seeking a Rule 502(d) order, *see* City of Dallas' Motion for Entry of Order Protecting Privileges from Waiver with Supporting Brief, *United States. v. Don Hill*, Crim. Action No. 3:07-CR-289-M (N.D. Tex. Aug. 5, 2009), ECF No. 929; and for an example of a Rule 502(d) order, see Order Granting Motion for Entry of a Protective Order as to City of Dallas, *United States v. Don Hill*, *supra* (N.D. Tex. Aug. 14, 2009), ECF No. 934, which provides in pertinent part:

> The motion is GRANTED, and it is hereby ORDERED that pursuant to Federal Rule of Evidence 502(d) and the Court's inherent powers, no privilege or protection for communications or other information claimed as privileged by the City of Dallas, Texas, is waived by disclosure connected with the litigation pending in this case, and that any such disclosure is also not a waiver in any other Federal or State proceeding.

Note that Dallas had to seek relief under common law and inherent powers to protect privileges beyond attorney-client and work product because Rule 502 is limited to protecting only those two privileges. The City's main additional concern was to protect the legislative deliberative privilege for City Council discussions. ML

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have deterred broadband deployment or adoption, or that they will do so in the future. If the FCC has genuinely not pre-judged these issues, it should have little trouble concluding that its time and resources are better spent elsewhere. But, if the FCC cannot appreciate the evidence we have placed before them, we are fully prepared to visit the matter with higher authorities such as the Congress, the courts and the people of America—the real owners of the rights-of-way.

Jay Doegey is IMLA's President-Elect and City Attorney of Arlington, Texas. Gerry Lederer is Of Counsel with the law firm of Best Best & Krieger (incorporating the practice of Miller & Van Eaton) and a proud IMLA member. Best Best & Krieger has been honored to assist IMLA in assembling and serving as counsel to the local government coalition.

Notes

1. *In re Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, FCC 11-51 (Apr. 7, 2011).
2. The coalition's members, in addition to IMLA, include: The National League of Cities, National Association of Counties, United States Conference of Mayors, National Association of Telecommunications Officers and Advisors, Government Finance Officers Association, International City/County Managers Association, and the American Public Works Association.
3. *Seventh Broadband Progress Report and Order on Reconsideration* (GN 10-59), dissenting Statement of Commissioner Robert McDowell (released May 20, 2011) at 1. ML