

Be Careful With Secrets

By: Keith Langley



There are powerful secrets which are recognized by the federal rules of evidence, the attorney-client communication privilege, and the attorney work product privilege. These are addressed in federal rules of evidence 502(d). The language of Federal Rule of Evidence 502(d) is as follows: "**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."

A lawyer has an extraordinary right to withhold privileged information. It is important to protect the privileges, including not sharing the material with someone who is not entitled to claim the privilege. Another way to waive the privilege is by inadvertently producing privileged information and discovery. FRE 502 allows the court to enter an order that protects parties from waiving the protections. The party inadvertently producing a privilege document can snap back the document. Consideration should be given to the timing element in the order. For example the parties may state:

1. The production of privileged or work-product protected documents, electronically stored information (“ESI”) or information (“Documents”), whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).



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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



2. Notwithstanding the foregoing, the Parties agree that any Document (s) used by any Party in a deposition, expert report, or court hearing or filing in this action (with the exception of a motion related to a disputed privilege claim or a disputed confidentiality designation) ("Used Document"), which a Producing Party does not provide written notice of a claw back within forty (40) days of its initial use, shall be ineligible for claw back under 502(d). Used Documents deemed ineligible for claw back under 502(d) shall not result in a subject matter waiver in this proceeding, or in any other state or federal proceeding. The Parties reserve all rights under FRE 502(b) regarding Used Documents.

3. The Parties further agree that if only a portion of a Used Document is subject to a claw back request, and the portion of the Used Document requiring redaction was not referenced by any Party in a deposition, expert report, or court hearing or filing in this action, then the Used Document will only be deemed ineligible for claw back under 502(d) if the Producing Party does not provide written notice of a claw back within sixty (60) days of its initial use.

4. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

5. With the exception of ¶¶ 2-3 above, the provisions of Federal Rule of Evidence 502(b) do not apply.

Practice pointers - protect the privileges in every way possible!



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