Must “Clawback” Orders Limit Retrieval to “Inadvertently” Produced Protected Documents? Part 1

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In his September 12, 2012 “Privilege Points” release, Tom Spahn discusses “clawback orders” and Federal Rule of Evidence 502(d):

Under Federal Rule of Evidence 502(d), a federal court "may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court." The Rule's legislative history clearly indicates that such an order may allow clawback of privileged documents "without the need for exhaustive pre-production privilege reviews." 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). The Rule's Explanatory Note likewise explains that such court orders may "provide for return of documents without waiver irrespective of the care taken by the disclosing party." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (d) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

Some litigants and courts have taken advantage of this Rule 502 provision. They agree on clawback orders with language such as the following: "[I]n order to facilitate discovery and avoid delays, . . . [t]he producing party is specifically authorized to produce Protected Documents without a prior privilege review, and the producing party shall not be deemed to have waived any privilege or production [sic] in not undertaking such a review." Adair v. EQT Prod. Co., Case Nos. 1:10CV00037 & 41, 2012 U.S. Dist. LEXIS 90250, at *3 (W.D. Va. June 29, 2012) (internal citation omitted). Such orders allow a producing party to retrieve protected documents regardless of the care the producing party took in a privilege review, and even in the absence of such a privilege review.

Rule 502(d)'s invitation provides a tempting standard when both sides undertake large privilege review projects. Next week's Privilege Point will address the consequences of the parties' incorporation of an "inadvertent" standard in a clawback order.