



The Sedona Conference Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders (August 2021)

Federal Rule of Evidence 502 governs what happens when there is a disclosure of communication or information covered by the attorney-client privilege or work-product protection. Congress adopted the Rule in 2008 for two primary reasons. First, to address the “widespread complaint” that litigation costs related to the protection of privilege have become “prohibitive.” Second, to “provide a party with . . . 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.”

Rule 502 attempts to accomplish these goals primarily through Rule 502(d). Rule 502(d) permits parties to enter into a court order preventing waiver for privileged documents produced in the proceeding.

The Sedona Conference’s consistent position is that parties should collectively seek entry of a Rule 502(d) non-waiver order. In practice, however, Rule 502(d) orders have been underutilized in federal litigation, in part because of a lack of understanding regarding the Rule’s potential benefits, and also due to certain challenges with the use of such orders, such as through excessive clawback requests.

This *Commentary* encourages more robust use of Rule 502(d) orders by highlighting the benefits of 502(d) orders, clarifying confusion regarding the Rule’s protections and limits, and suggesting methods to deal with the potential challenges of such orders. The publication also contains three appendices: Appendix A contains “model” language for a proposed Rule 502(d) order; Appendix B contains a list of U.S. district courts that have promulgated model Rule 502(d) orders as of the date of this publication; and Appendix C reproduces the Explanatory Note to Federal Rule of Evidence 502.

By both emphasizing how practitioners and jurists may benefit from using Rule 502(d) orders and by noting issues that could otherwise impede their effectiveness, it is hoped that this *Commentary* results in more widespread use of Rule 502(d) orders.

The full text of *The Sedona Conference Commentary on the Effective Use of Federal Rule of Evidence 502(d) Orders* is available free for individual download from The Sedona Conference website at

https://thesedonaconference.org/publication/Commentary_on_Effective_Use_of_FRE_502d_Orders.

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