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New FRE 502 Seeks to Protect and Preserve Attorney-Client Privilege in the Age of E-Discovery

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On September 19, 2008, President Bush signed into law a bill enacting Federal Rule of Evidence 502 - Attorney-Client Privilege and Work Product; Limitations on Waiver. This new rule clarifies some of the consequences (and protections) for intentional and inadvertent disclosure of privileged information. In a nutshell, the rule protects attorney-client or work product privileged information inadvertently disclosed to another party if (a) reasonable steps were taken to prevent the disclosure, and (b) reasonable steps were taken to promptly remedy the disclosure. It also specifies that a waiver of privilege applies only to the information disclosed (i.e., not to the entire subject matter) unless the waiver was intentional and other information needs to be disclosed "in fairness."

How might this help?

As the amount of electronic information stored by corporations and organizations continues to grow, discovery has become an increasingly complicated and expensive proposition. In cases involving hundreds of thousands or millions of pages of discovery documents, privilege review can be a daunting. How can a party review large amounts of information at a reasonable cost, in a reasonable time, while limiting the potential for disclosing privileged information? Parties have looked for ways to cut costs by simplifying or automating privilege reviews, but those methods have been met with mixed reviews by the courts when they resulted in disclosure of privileged information.

New Federal Rules of Civil Procedure took effect in late 2006, including Rule 26(b)(5)(B), which provides that if a party inadvertently discloses potentially privileged information, that party can request that the information be returned to it and not used until the privilege claim is settled. This is generally called a "clawback" provision, as the party claws back information it did not intend to release. However, despite the new procedural rules, parties found that the courts were unsettled and conflicted with regard to when, and the extent to which, disclosure of privileged information constituted a waiver. Without a settled understanding, parties were reluctant to rely on negotiated clawback agreements or the new federal rule - especially parties engaged in multiple fronts of litigation or regulatory review.

The intent of this new rule of evidence is to limit the costs of discovery by allowing parties to develop cooperative and creative solutions for conducting privilege reviews, with more assurance that their agreements will not result in unintended waivers. The rule provides more protection for engaging in clawback agreements and standardizes the application of waiver across jurisdictions (at least federal jurisdictions.)

What are the risks?

The rule only applies to federal venues.

Although the Judicial Conference considered applying the rule in state and federal venues, several judges expressed federalism concerns about the rule superseding state privilege laws. The final rule limits the application of the rule to proceedings in federal venues, including federal offices and agencies. However, the protection does extend to state court if the initial disclosure is made in a federal venue. Consider the following:

If you are considering a choice of venue for an action, this rule may tip the balance in favor of a federal venue, especially if you expect your case will involve a significant amount of discovery.

The rule does not define "reasonable steps."

In order to invoke the protections of this rule, a party must take "reasonable steps" to prevent disclosure, and "reasonable steps" to remedy the disclosure. However, the rule stops short of defining what those reasonable steps may be. Until case law develops to offer some examples, the rule will be open to interpretation by judges and magistrates with widely differing levels of e-discovery experience and savvy.

What do I need to do to invoke the protection of the rule?

Get a court order.

The rule is only binding on clawback agreements incorporated into an order of the court. Make sure the judge or magistrate signs off if you want your clawback agreement to bind other parties.

Document the reasonableness of your privilege review.

As you create a protocol for conducting a privilege review, be aware that you may find yourself justifying the reasonableness of your decisions to the court later on. Make sure your process and your decisions are well-considered and well-documented. For an extra level of comfort, develop a dialogue with opposing counsel and create a review protocol together. Your opponents will find it much harder to challenge the reasonableness of your decisions if they approve them in advance.

Also consider the factors suggested by the committee notes. Although the committee explains that the intent of this rule is to be broad enough to encompass many factors of reasonableness, it offers a few examples including the scope of discovery, number of documents to be reviewed, time constraints, the extent of the disclosure, and general fairness. They also suggest that the use of analytical software applications and linguistic tools may be considered as well as the records management system in place before litigation. Consider these factors as you create your privilege review protocol and document how these factors demonstrate the reasonableness of your review.

Follow up promptly if you suspect privileged information has been disclosed.

Be sure you develop a protocol and appoint a responsible point person to follow up on any potential disclosures. Although the rule does not require a post-production privilege review just to make sure nothing fell through the cracks, it does require parties to follow up promptly if they have reason to believe something privileged was disclosed.