

LEGAL DEVELOPMENTS

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A New Rule of Evidence Designed to Lower Litigation Costs

One of the contributing factors to the increasing costs of litigation is the need to review every document prior to production for attorney-client privilege or work product protection. In an effort to reduce this burden, Congress recently enacted Federal Rule of Evidence 502.

Rule 502 is designed to lower the costs of litigation by mitigating the consequences of inadvertent production of privileged or protected materials. The new rule will also grant litigants the ability to create binding agreements regarding the scope and consequences of disclosure. Although this rule may not substantially reduce litigation costs, it should provide protection against inadvertent waiver of privileged information and work product.

The State of the Law Prior to Rule 502

Prior to the enactment of Rule 502, if a party produced a document in discovery that would otherwise be subject to attorney-client privilege or work product protection, the disclosure could be construed as a waiver of that privilege or protection. Some courts have held that a waiver can be found even if the disclosure was inadvertent. Moreover, waivers may not be limited to the specific document produced. Courts have found that the production of one privileged or protected document can in some circumstances constitute a "subject matter waiver," effectively waiving any privilege or protection as to all documents regarding the same general subject matter.

Further complicating matters is that a waiver is not limited to the litigation in which it occurred.

Rather, a waiver applies to all pending and subsequent litigation, as well as any government investigations.

Prior to the enactment of Rule 502 of the Federal Rules of Evidence, parties often entered into "clawback" agreements at the outset of litigation, in which all parties agreed to return any inadvertently produced privileged or protected documents to the party that produced them. While use of these agreements is widespread, they are subject to several limitations.

First, even if the producing party were to be successful in clawing back an inadvertently produced document, the court could still find that the initial production constituted a waiver. While a clawback agreement may typically have prevented the recipient of an inadvertently produced document from using that document in the current litigation, the producing party was not protected in subsequent litigation or from use by nonparties.

In 2006, the Federal Rules of Civil Procedure were amended in order to modernize discovery practices and lower the costs of electronic discovery. Included in these amendments was Rule 26(b)(5)(B), which imposes a duty upon the recipient of an inadvertent disclosure to either return or destroy the disclosed information similar to duties found in a standard clawback agreement. Unfortunately, the amendment did little to address the underlying concerns regarding waiver.

In the meantime, due to the high stakes involved and the severe consequences that may follow an inadvertent production, a stringent

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privilege review of every document to be produced has become absolutely vital. The growing use of electronic documents in the business world has multiplied the number of documents subject to discovery, leading to increased costs for these reviews.

New Federal Rule of Evidence 502

Faced with these rising costs, the Judicial Conference of the United States began developing a rule to remedy the situation. In September 2007, after a year of rulemaking and public comment, the Judicial Conference submitted the proposed Rule 502 to both the House and Senate Judiciary committees. This rule was signed into law—virtually unchanged—on September 19, 2008.

The intent of Rule 502 is to lower the need for an extensive privilege review. Instead of performing an extensive privilege review of every document to be produced in response to a discovery request, a party need only take “reasonable steps” to ensure that it is not producing privileged information. Under the rule, the inadvertent production of privileged or protected documents will not operate as a waiver if the producing party had taken reasonable steps to prevent disclosure. It is hoped that, by reducing the risks of inadvertent waiver, Rule 502 will encourage parties to reduce their reliance on privilege reviews.

Despite the drafters’ apparent focus on inadvertent waiver, perhaps the most important aspect of the rule is that federal court orders regarding waiver are now binding upon all subsequent litigation and subsequent parties. Equally important, the rule also states that agreements among parties regarding waiver may be incorporated into a court order and thereby enjoy the same broad, binding effect.

Drawbacks to the Rule

Several factors, however, may lessen the beneficial impact of Rule 502 on the costs of discovery. Litigants are typically reluctant to allow opposing parties to view their privileged documents. Even with protection against waiver, a lax privilege review will heighten the risk that the other side will see the producing party’s privileged documents. Once a document is seen, it cannot be unseen. While it is true that the enhanced protections of Rule 502 may make it more difficult for the receiving party to use these documents as evidence at trial, a party’s aversion to disclosing its

privileged information may be enough incentive to conduct a stringent privilege review.

Documents produced in federal court or to a federal agency will be subject to the protections of Rule 502, even in subsequent state court litigation. Rule 502 has only limited application, however, in discovery originating in state court. For documents originally produced in state court, Rule 502 may only be invoked if the documents are later offered as evidence in federal proceedings and, then, only if Rule 502 is more protective than the applicable state law on waiver. Furthermore, state courts deal with the waiver issue differently, and they lack the authority to bind subsequent litigation in other states. Discovery in state litigation and before state agencies will likely be unaffected by Rule 502 for this reason.

Finally, Rule 502 is untested. There is no case law to assist parties in determining what “reasonable steps” they must take to prevent inadvertent disclosure of privileged information. As the intent of Rule 502 is to reduce the cost of discovery, it is likely that courts will find that these “reasonable steps” will be less than a full privilege review of every document to be produced. Parties not wishing to risk waiver by inadvertent disclosure may opt for full privilege reviews regardless of Rule 502 until more case law develops.

Conclusion

Ultimately, Rule 502 may not have the impact upon discovery costs that its drafters had hoped. Through its “reasonable steps” language, the rule still requires parties to engage in some level of privilege review prior to production. Some litigants may pursue intensive privilege reviews in order to prevent opposing parties from viewing their privileged documents, regardless of later clawback and waiver protection. Moreover, state court litigation will still require vigilant privilege reviews.

Nevertheless, Rule 502 is a very positive development. It provides protection against inadvertent waiver to supplement a reasonable privilege review. Most importantly, federal courts can now issue orders regarding waiver that are binding upon all subsequent federal and state litigation, and the rule will allow parties to shape discovery to their budgets and risk tolerance.

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