An Overview of New Federal Evidence Rule 502
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On September 19, 2008, the President signed into law S.2450, signaling an end to the dark ages of inadvertent waivers of attorney client privilege and ushering in an era of stronger protections on attorney client privilege and the work-product doctrine. The legislation, which creates new Federal Rule of Evidence 502, applies to both criminal and civil actions in federal court and protects against the inadvertent waiver of the attorney client privilege or the work product protection.

The rule has no effect where the initial disclosure is in state court and the waiver issue is being decided in a subsequent state proceeding. (Arkansas is the one exception here.) Where the initial disclosure is in a state court, and the waiver issue is being decided in a subsequent federal proceeding, the decision is governed by Rule 502 or state law, whichever is more protective against the waiver.

Under the new federal rule, disclosure of privileged materials will not be a waiver of the privilege if disclosure is inadvertent or if the holder of the privilege or protection took reasonable steps to prevent disclosure or if the holder took reasonable steps to rectify the error (Fed. R. Evid. 502(a)(b)). This requires the holder of the privilege to perform an adequate review for privileged documents.

The rule also addresses the issue of subject-matter waiver, providing that such a waiver is limited to when a party intentionally puts protected information into the litigation in a selective, misleading, and unfair manner. The rule makes federal court orders protecting against waiver enforceable in both federal and state courts, while making confidentiality agreements between parties that are incorporated into court orders enforceable against nonparties. (Fed. R. Evid. 502(c))

The enactment of S.2450 resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or a work product – specifically those disputes involving inadvertent disclosure and subject matter waiver. Intended to provide predictability and cost savings for all parties in litigation, Federal Rule of Evidence 502 is a whiff of fresh air for corporate litigants embattled in massive electronic discovery actions.

As early as 2005, federal judges began addressing the problem of unintended waivers directly. United States Magistrate Judge Paul W. Grimm's opinion, in *Hopson v. Mayor and City of Baltimore*[1] represented a watershed moment on the road to enacting Evidence Rule 502. The opinion provided that neither the attorney-client privilege nor the work product protection is waived in a federal proceeding as a result of disclosure in connection with litigation pending before the court if the order incorporates the agreement of the parties before the court. Some e-discovery experts have called the *Hopson* opinion "a treatise on how to avoid waiving the

[1] 232 F.R.D. 228 (D. Md. 2005)

privilege while conducting a reasonable privilege review, as well as how to provide an adequate privilege log."[2]

In *Hopson*, Judge Grimm sets out the procedure for a workable and cost-efficient exchange of information. Employing a privilege log and "claw back" agreements are just a few of the techniques espoused in the opinion to protect attorney-client privilege and work products.

"Claw-back" agreements are a formal understanding between the parties that production of privileged information is presumed to be inadvertent and does not waive the privilege and the receiving party must return the privileged material until the question is resolved. Under "quick peek" agreements, the attorneys are allowed to see each other's entire data collection before production and designate those items which they believe are responsive to the discovery requests.

Nevertheless, these agreements are not without their ethical concerns either: attorney-client privilege conflicts stemming from such arrangements have been noted in at least one jurisdiction. Consider *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J 2004) holding such agreements may lead to disqualification of an attorney if, even after a privileged document is returned, if the opposing attorney's temporary possession of the document "creates a substantial taint on any future proceedings." The question as to what constitutes a substantial taint remains central to deciding whether employing a "claw back" or "quick peak" will be an adequate technique for protecting the attorney-client privilege.

Even though a "quick peek" agreement may be more economical, it may prove more problematic than "claw backs," given counsel's duty to perform a "reasonable" privilege review. Revealing sensitive trade secrets or other privileged materials upon "quick peek" production will seriously disadvantage your client, and expose counsel to ethical discipline. If you're going to employ a "quick peek," wear a belt and suspenders – do a privilege review and agree to claw back inadvertent disclosures.

<u>Guideposts for Navigating Evid. Rule 502</u>

-Have a comprehensive data retention plan in place; failure to do so will expose your company to cost overruns when producing documents.

-Know when subject matter waiver occurs: pursuant to 502(a), only an intentional waiver of the privilege with respect to the communication results in subject matter waiver. If the waiver of the privilege is made in a federal proceeding or to a federal officer or agent inadvertently, there is no subject matter waiver under the Rule pursuant to 502(b)(1).

-Pursuant to 502(b)(3) of the Rule, counsel must take "reasonable" steps to prevent disclosure. Some examples of this include having an efficient system of records management before litigation occurs. Know the rule is flexible, and it also considers as a factor bearing on

[2] Alan J. Ross, "Waiving at Privilege: Of Hopson, Creative Pipe, and Proposed Evidence Rule 502 With a Bit of Nilavar for Good Measure," *eDiscoTECH*, June 26, 2008.
http://www.bricker.com/legalservices/practice/litigation/ediscotech/eblog/display.aspx?id=136

reasonableness, the number of documents to be reviewed and the time constraints for production. Furthermore, the commentary to the Rule has advised using advanced analytical software applications and linguistic tools in screening for privilege and work product.

-Wear, as Judge Facciola aptly describes, “a belt and suspenders” and agree to perform a privileged review, but also agree that in the event of inadvertent disclosure after the privileged review, a claw back agreement would take effect.

-After a reasonable preproduction privilege review, create an agreement between opposing counsels that effectively preempts waiving the privilege in the event of inadvertent disclosures of privileged information or work product, and memorialize the agreement into a court order.