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E-Discovery Law Alert

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New Federal Rule of Evidence 502 Promises to Better Protect Privileged Information and Reduce the Cost of Discovery

Companies over-burdened by the steep cost of litigation and electronic discovery may get some reprieve thanks to new Federal Rule of Evidence 502, which took effect on September 19, 2008. Rule 502 is designed to provide a uniform set of standards for determining the consequences of disclosing privileged information and to reduce the litigation costs associated with protecting against waiver of the attorney-client privilege and work-product doctrine.

Discovery, Attorney-Client Privilege, and the Work-Product Doctrine

Long before parties ever set foot in a courtroom, they may be faced with enormous litigation costs because of discovery, particularly discovery involving electronically stored information. Before new Federal Rule of Evidence 502, the inadvertent disclosure of even one document protected by the attorney-client privilege or the work-product doctrine could, depending on the jurisdiction, result in a broad waiver of the protection as to all other documents involving the same subject. To protect against this broad waiver, companies have been forced to spend thousands or even millions of dollars per case in litigation costs to review each document page-by-page to ensure that no protected documents are produced. Additionally, companies that might otherwise disclose a privileged document intentionally, perhaps to further settlement negotiations or cooperate with a government investigation, have risked doing so because an intentional disclosure of privileged information would waive the privilege for (and therefore require the production of) all other documents on the same subject matter.

Provisions of New Federal Rule of Evidence 502

Limitations on Waiver. Rule 502 aims to reduce litigation costs by limiting the impact of an intentional or inadvertent disclosure of information protected by the attorney-client privilege or work-product doctrine. Under the rule, an intentional disclosure of privileged information in a federal proceeding or to a federal agency will not waive the protection against disclosure as to other information involving the same subject matter unless a court finds that such information "ought in fairness to be considered together." An inadvertent disclosure of privileged information does not operate as a broad subject-matter waiver if the producing party took "reasonable steps" to prevent the disclosure and to rectify the disclosure. Although the rule does not define what actions are "reasonable" to prevent disclosure, the Judicial Conference Advisory Committee suggests that more cost-efficient methods of pre-production review, such as electronic search tools, could be used in some circumstances. If a disclosure in a federal proceeding or to a

federal agency does not operate as a waiver under Rule 502, it also does not operate as a waiver in any state court or other federal court proceeding.

Effect of Disclosure in State Proceeding. Rule 502 also provides that a disclosure initially made in a state proceeding may not operate as a waiver in a federal proceeding. Under the rule, where there has been a disclosure in a state court proceeding, a subsequent federal court must follow the law, either state law or Rule 502, that is most protective of privilege to determine whether a waiver has occurred. The rule does not, however, change the impact the disclosure may have during the course of the state proceeding.

Parties May Agree on Effect of Disclosure. Finally, Rule 502 makes clear that parties may enter an enforceable agreement — such as a "claw-back" or "quick peek" agreement — governing the effect of a disclosure in their pending federal case. More importantly, if the agreement is incorporated into a court order, it will also bind third parties in other pending or subsequent state and federal cases. Parties could decrease or potentially even eliminate pre-production privilege review without waiving attorney-client privilege or work-product protection by agreeing on the effect of a disclosure. This approach could reduce litigation costs significantly, particularly if a litigant has voluminous information and the disclosure of otherwise protected information would not cause any harm to the litigant's interests.

What Rule 502 Does Not Do

Although new Federal Rule of Evidence 502 is designed to help reduce the cost of pre-production privilege review, litigants should understand the limits of the rule before changing their current review practices. Rule 502 does not affect the waiver of any protection other than the attorney-client privilege and work-product doctrine. And it does not apply to private arbitration proceedings.

In addition, Rule 502 does not prevent every harm that can arise from inadvertent disclosure. If a confidential or sensitive document which would otherwise be protected from disclosure were revealed because of lax pre-production review practices, it would not matter that there was no broad waiver resulting from the disclosure. The damage would be done as soon as the other party learned the substance of the protected document. Even if the other party returned the protected document, the information would still influence the other party's actions and case strategy.

Finally, the rule is new and has yet to be interpreted by the courts. To gain the benefit of the provisions relating to inadvertent disclosure, for example, a party must show that it "took reasonable steps to prevent disclosure." What constitutes "reasonable steps" for a particular case is left up to the courts to decide. And what a party considers reasonable for a particular case, a judge may not. Accordingly, litigants who want to rely on Rule 502 should, at a minimum, document their methodology for searching and reviewing information for production and privilege, the steps that they have taken to prevent disclosure.