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CLIENT ALERT

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New Federal Rule of Evidence 502 Provides Protection for Inadvertently Disclosed Documents

On September 19, 2008, President Bush signed S. 2450, which enacted new Federal Rule of Evidence 502 (Pub. L. No. 110-322, 122 Stat. 3537).[1] Rule 502 limits waivers of attorney-client privilege and work product protection to facilitate efficiency of document productions and reduce costs associated with discovery. The rule applies immediately to all pending or future cases. Because the new rule depends in part upon "reasonable" steps taken in advance, it would be prudent for clients and their counsel to develop procedures now that can benefit them in future proceedings.

The litigation trend toward production of greater volumes of electronically stored information ("ESI") sparked most of the concerns regarding the waiver of documents protected by privilege. Congress conceded the need to contain rising discovery costs and address concerns regarding waiver of evidentiary privilege resulting from inadvertent disclosures and even limit the scope of waiver for certain intentional disclosures. In complex litigation, counsel may devote significant effort to producing large volumes of documents while withholding attorney-client privileged communications or work product. Prior to Rule 502, the law on disclosure of privileged materials varied by jurisdiction, and production of a single or few documents in one jurisdiction had implications for other, undisclosed documents, with the results potentially varying by jurisdiction. Considering many corporations litigate issues in multiple jurisdictions across the nation, this risk is important to minimize.

When reviewing ESI for privilege and production there are a number of unique challenges. For example, certain views of native documents (i.e., a Word document versus a printed copy of the document) may hide information about the identity of any authors or editors of the document. Also, electronic documents may exist in duplicate form within the custody of various persons, some of whom may be legal counsel and others who may not. Redacting for privilege electronic versions of documents that have duplicates may affect the integrity of that document's duplicate in the database that is being used for production. These issues are amplified by the sheer volume of information that can be stored electronically and must be reviewed – collected documents for review can sometimes tally as high as terabytes of data and millions of documents. As a result of ESI and the fear of waiving privilege, reviews for privilege are becoming increasingly more expensive and difficult to manage. As stated by NYC Bar Association president Barry Kamins, "Many cases now involve massive amounts of e-discovery and in those cases it is almost a certainty that there will be mistakes, and material will be inadvertently produced."[2]

[1] The text of the rule may be found at http://www.uscourts.gov/newsroom/2008/S2450EnrolledBill.pdf.

[2] Ryan Thompson, "Local Support for Federal Rule 502," Brooklyn Daily Eagle (Feb. 13, 2008).

Rule 502 attempts to contain both costs of review and clarify waiver in federal cases and arbitrations and, in some instances, in state proceedings. If a document protected by privilege is disclosed in a federal proceeding or to a federal office or agency, courts will not automatically deem the subject matter of that document waived in federal and state proceedings. Under Rule 502(a), even if a disclosure was intentional, other privileged documents or information concerning the same subject matter will be considered to be waived only if they "ought in fairness" be considered with the disclosure, such as when a party intentionally puts information into litigation in a selective, misleading and unfair manner. Thus, Rule 502 intends to reduce collateral privilege litigation by eliminating subject matter waivers in all but the most rare circumstances.

Under Rule 502(b), if an inadvertent disclosure is made in a federal proceeding or to a federal office or agency, the disclosure will not be deemed a waiver if the producing party originally took reasonable steps to prevent the disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed information. This codifies the current majority rule of many federal courts. While Federal Rule of Civil Procedure 26(b)(5)(B) already provides the mechanism for requesting the return of inadvertently privileged documents, Rule 502 provides clarity to the existence and scope of a waiver thus created.

Pursuant to these provisions and Rules 502(d) and (f), courts in subsequent state proceedings are required to honor Rule 502 determinations made at the federal level. If, however, the disclosure was made in a state proceeding prior to a federal proceeding, then Rule 502(c) requires the federal court to apply the law that is most protective against waiver, whether it is the state or federal rule. Many commentators have raised constitutionality concerns about the rule's applicability to the state courts. In fact, in prior versions of Rule 502, the Advisory Committee commented that it was "well aware that a privilege rule proposed through the rulemaking process cannot bind state courts."[3] The drafters of Rule 502, however, realized that this authority to bind state courts would be necessary to give any teeth to the protections in the rule.[4] Even though Rule 502 purports to direct state courts encountering documents disclosed in prior federal proceedings, it is expected that parties will continue to err on the side of caution until the constitutionality of this provision has been confirmed.

One of the most attractive aspects of the new rule is that parties may seek, and federal courts may enter, confidentiality orders concerning the disclosure of privileged or protected material, including quick peek or clawback agreements. Under Rule 502(e), any such confidentiality agreement incorporated into a court order will bind nonparties to the current litigation.

Whether Rule 502 succeeds in protecting parties will depend on whether they and their counsel take reasonable steps for protecting and retrieving inadvertently disclosed privileged documents. Much of the definition of "reasonable steps" will depend on what arguments counsel successfully make to the courts to educate them further about the handling of ESI. Developing such procedures requires an understanding of the options for reviewing substantial amounts of ESI. Although there may be some minor costs now, developing procedures that can be defended under the new rule protects against substantial (perhaps outcome-determinative) costs in future litigation.

[3] Fed. R. Evid. 502 (proposed 2006) advisory committee's note, available at http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

[4] Id.

How We Can Help

The e-discovery practice at Hunton & Williams is founded on a long history of litigating and advising on the document and e-document management issues at the heart of "bet-the-company" disputes. Building on that deep experience, the firm's e-discovery practice leaders have been at the forefront of national firms in the development of law and policy around the discovery of electronically stored information. Hunton & Williams attorneys collaborate with colleagues across the nation to provide seamless teamwork and local knowledge of e-discovery rules and practices to not only comply with preservation and production obligations, but to also strategize to protect clients' discovery interests and reduce costs. Our combination of case-specific with enterprise e-discovery engagements provides our clients with a depth and breadth of experience that is unique in the legal marketplace. If you have any questions about handling ESI in discovery or would like assistance in litigating under new Federal Rule of Evidence 502, please contact us.