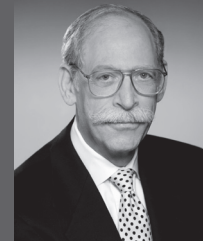


Tips on Technology

A service of the Computer Law Section
of the Delaware State Bar Association



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Privilege Waiver in Federal and State Courts New Federal Rule 502

by The Honorable Donald F. Parsons, Jr. and Kevin F. Brady, Esquire

(In the past, this column has reviewed significant advancements in the evolving law of electronic discovery. I am pleased to yield the page to Vice Chancellor Parsons and Kevin Brady, who present below this very important summary of Federal Rule 502 - RKH)

Privilege review has become the most expensive and time consuming part of the e-discovery lifecycle. With the explosion in the volume of data to be reviewed, trying to protect against waiver of the attorney-client privilege or the work product immunity has become exceptionally challenging due to the possibility that any disclosure, inadvertent or otherwise, could operate as a subject matter waiver for all privileged information. From the Court's perspective, while disputes about privilege rarely aid in moving a case forward, the parties are generally undeterred in taking aggressive positions because of the risk/reward factor. Waiver looms large for the holder of the privilege which is generally the producing party and the reward of getting the privilege waived and forcing the production of privileged material is very tempting for the requesting party.

The Purpose of Rule 502

The Federal Rules of Civil Procedure were amended in December 2006 to address the anomalies which the ubiquitous presence of electronic information engendered under the traditional rules of civil procedure. In particular, Fed. R. Civ. P. 26(b)(5)(B) was amended to prescribe a process for resolving a dispute between parties where the producing party inad-

vertently produced a privileged document and then wanted that document returned (the so-called "claw-back provision"). While that addressed the procedural aspect of waiver, the substantive topic of waiver was not addressed until September 19, 2008, when Rule 502 (with commentary) to the Federal Rules of Evidence was enacted. For an excellent discussion of the problems judges and lawyers faced before the rule change when they were dealing with the issue of waiver, see *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (where the Court pointed out that to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

Rule 502 Adopts a Middle Ground on Waiver

There has been an ongoing conflict among the jurisdictions over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. In some jurisdictions, a disclosure must be intentional to be a waiver and in other jurisdictions any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. In a majority of jurisdictions, however, waiver only applies if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. Now, that

conflict has been resolved—Rule 502(b) adopted the majority rule.

Key Points of Rule 502

1) **Intentional Disclosure – Waiver.** Under Rule 502(a), in a federal proceeding, there is a waiver of "undisclosed communications or information" if: (i) the waiver of privileged information was intentional; (ii) the communication or materials disclosed concern the same subject matter; and (iii) "fairness" (which is undefined) requires their disclosure. Unless these three elements are met, the waiver applies only to the communication disclosed.

2) **Inadvertent Disclosure – No Waiver:** Under Rule 502(b), there is no waiver if the holder or producing party takes "reasonable steps" to prevent disclosure, the disclosure was inadvertent and the producing party promptly takes reasonable steps to rectify the error after it is discovered. In the Commentary to the rule, the committee identified several factors courts can consider in assessing "the reasonableness of a producing party's efforts." Those factors include: (1) the number of documents to be reviewed; (2) the time constraints for production; and (3) the implementation of an efficient system of records management before litigation. The Commentary also notes that, depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken reasonable steps to prevent inadvertent disclosure.

3) **State Court Disclosure and Subsequent Federal Court Proceeding.**

Under Rule 502(c), a disclosure in a state court proceeding does not waive the privilege in a later federal proceeding if it would not be a waiver if made under Rule 502 in a federal proceeding, or it is not a waiver under applicable state law. It is noteworthy, however, that the enforcement of a state court confidentiality order in federal court is governed not by Rule 502, but by separate statutes and rules.

4) Confidentiality Orders. Under Fed. R. Evid. 502(d), a federal court may enter a confidentiality order with a clause providing “that the [attorney-client] privilege or [work product] protection is not waived by disclosure connected with the litigation pending before the court.” By operation of the rule such a disclosure would not act as a waiver in any other Federal or State proceeding. This sub-section reflects the broad reach of Rule 502 because it extends the protection against inadvertent waiver from the production of privileged information beyond the existing case in a federal court. The new rule also allows parties to enter into a “claw-back” or “quick peek” arrangement without the worry that any inadvertent disclosure of privileged information would result in a waiver in another federal or state proceeding. No analogous, extra-jurisdictional protection currently exists in state court proceedings. Still, in cases where state and federal litigation involves coordinated discovery, there can be significant benefits to making the production in both forums subject to the confidentiality order in the federal court and, therefore, Rule 502(d) as well.

Confidentiality orders have become very useful tools for parties trying to reduce costs and risks associated with extensive privilege reviews in large part because now under Rule 502(d), the use of a confidentiality order in one case can insulate a producing party from at least some of the risks of privilege waiver challenges in other cases and jurisdictions. ☉