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Litigation Update: New Protections For The Inadvertent Disclosure Of Privileged Documents

By Douglas C. Northup and Thomas Loquvam

Up until now, serious concerns have existed regarding the inadvertent production of privileged documents. If a privileged document slipped into a massive document production, a risk existed that a court would find a waiver of all privileged documents concerning the same subject matter. Courts call this result a "subject matter waiver." In these days of massive electronic production and ever-present electronic mail, only costly document reviews permitted lawyers to find these privileged needles in the electronic haystack. Congress and President have now stepped in to protect against such inadvertent subject matter waivers of the attorney-client privilege.

On September 19, 2008, President Bush signed into law S2450, which enacts Rule 502 of the Federal Rules of Evidence.¹ It is a direct response to the enormous cost of reviewing documents for privileged material, as well as concerns about conflicting rules on inadvertent disclosures and the scope of privilege waivers. This Bulletin first discusses some key aspects of Rule 502. It concludes by addressing what Rule 502 means for our clients.

Rule 502 Limits the Scope of Subject Matter Waiver

Previously, the production of one privileged document risked waiving privileges for other documents involving the same subject matter. See *U.S. v. Skeedle*, 989 F. Supp. 905, 908 (N.D. Ohio 1997) ("[a]s a general rule, waiver of the privilege with regard to some communications waives the privilege as to all other communications relating to the 'same subject matter.'"). Rule 502, however, significantly limits that risk. Now, the production of privileged information in a federal proceeding, or to a federal office or agency, only results in a waiver of the actual communication or information disclosed. See Fed. R. Evid. 502, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ322.110.pdf.

The waiver of other documents related to the same subject matter is now reserved to the unusual circumstance in which fairness requires further disclosure of related information. The Advisory Committee describes this circumstance as "situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." See Federal Rule of Evidence 502 Advisory Committee Notes, Subdivision A. It is important to note that only the intentional waiver of protected information can result in a broader subject matter waiver.

Rule 502 Codifies the Majority Rule Concerning the Inadvertent Disclosure of Privileged Information

Before Rule 502, different federal jurisdictions had different rules concerning the nature and scope of waivers arising out of the inadvertent disclosure of privileged information. Rule 502 codifies the majority rule. It provides that the inadvertent disclosure of privileged information in a federal proceeding, or to a federal office or agency, is not a waiver in later federal or state proceedings if:

¹ The United States Supreme Court typically promulgates new rules of evidence. Rules "creating, abolishing, or modifying an evidentiary privilege," however, must be approved by an Act of Congress to be effective. See 28 U.S.C. § 2073 (1988).

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(i) the disclosure is inadvertent; (ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and, (iii) the holder promptly took reasonable steps to rectify the error. See Rule 502(b). Thus, the steps a party takes before disclosure impacts whether the inadvertent disclosure of privileged documents constitutes a waiver. Using advanced software to screen for protected documents, or implementing an efficient system of record management before litigation, may demonstrate reasonable efforts to prevent the inadvertent disclosure of documents. And, once a party discovers that they may have inadvertently disclosed privileged documents, it should take reasonable steps to retrieve those documents from the other side.

Rule 502 Strengthens Court Orders Protecting the Privilege

Before the enactment of Rule 502, litigants who disclosed privileged information under the aegis of “clawback” or “quick-peek” agreements (or orders) risked a later finding by another court that such disclosure waived the privilege.² The rule now provides that, should a court enter such an agreement as an order, the subsequent disclosure of any protected documents does not constitute a waiver in any other federal or state proceedings. See Rule 502(d). This strengthens clawback and quick-peek agreements — both designed to lessen the expense and dangers associated with large document productions — and will likely encourage their use.

What This Means For Fennemore Craig’s Clients

Previously, lawyers erred on the side of claiming the privilege — and engaged in costly document reviews — solely due to fears of waiving privileges. Rule 502 eases those fears. It establishes mechanisms that permit parties to narrow their disputes to what actually matters and avoid unnecessary fights over the existence and scope of privilege waivers. Massive, painstaking document review solely for the purpose of finding privileged documents are now likely a thing of the past. The result is that everyone will save time and money.

In addition, Rule 502 will greatly increase the efficacy of protective agreements such as clawback and quick-peek agreements. An opportunity to save significant cost and time with ironclad clawback and quick-peek agreements now exists. Fennemore Craig regularly crafts such agreements that will stand up not only in the immediate litigation for which they are drafted, but in all subsequent proceedings.

Finally, this rule codifies the majority rule regarding what steps a business can take before the production of documents, and indeed before litigation, to protect against the waiver of the attorney-client privilege and work product protection as a result of an inadvertent disclosure of protected documents. We are ready to provide counseling and services regarding Rule 502’s guidelines and how businesses can quickly and efficiently implement such protections to reduce the likelihood of waivers in the future. Please call Doug Northup at (602) 916-5362 or Thomas Loquvam at (602) 916-5486 if you have any questions concerning Rule 502 or want to discuss how Rule 502 impacts your day-to-day operations.

² Clawback agreements permit the return of mistakenly disclosed documents. Quick-Peek agreements permit parties to review the universe of the other side’s documents to determine the scope of production without waiving the privilege.

Douglas C. Northup practices on complex commercial, tort, and professional liability litigation. He chairs the firm’s Commercial Litigation Practice Group. Mr. Northup represents several large corporate clients in a variety of contractual disputes, franchise and real estate litigation. Mr. Northup also assists clients with avoiding and minimizing the risk of litigation through contractual indemnity and limitation of liability clauses and insurance. Mr. Northup also has significant experience dealing with electronic data preservation and discovery. He has helped corporate clients formulate policies for suspension of routine document deletion policies when litigation is pending or threatened, and has worked extensively with clients to ensure compliance with court rules relating to document gathering and production. He earned his B.A. (1984) from New Mexico State University and his J.D. (1991) from Oklahoma City University.

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