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New Federal Rule of Evidence 502 Heralds Possible Change in E-Discovery Process

by Jerone J. English and Christine H. Yung

On Sept. 19, 2008, President Bush signed into law Federal Rule of Evidence 502 ("FRE 502"), which seeks to reduce litigation costs associated with document discovery by limiting the impact of inadvertently disclosing information protected either by the attorney-client privilege or the attorney work product doctrine. Also, the rule makes a federal court order finding no waiver or limited waiver of attorney-client privilege or work product protection binding in all other federal and state court proceedings, regardless of party privities.

The Rule Prior to FRE 502

Prior to the new rule, the inadvertent disclosure of a communication or information protected by the attorney-client privilege or the work product doctrine could waive protections.[1] Moreover, in some federal circuits, a waiver, even if inadvertent, could extend not only to the communication or information disclosed but also to all other communications relating to the same subject matter.[2]

In light of the potential draconian impact of waivers, litigants have been loath to produce documents in response to discovery requests without first engaging in a laborious document-by-document review to identify and exclude protected information.[3] The billowing volumes of electronically stored information ("ESI"), particularly email, text and instant messaging, has exacerbated both the time and expense required to identify and exclude protected information while dramatically increasing the likelihood of nevertheless inadvertently producing protected information.

The December 2006 amendments to the Federal Rules of Civil Procedure ("FRCP") were adopted to address discovery issues related to ESI. The drafters hoped changes to Rules 26 and 16 would relieve some of these pressures by legitimizing agreements to expedite privilege review before document production and to "claw-back" any privileged material inadvertently produced in the expedited process. Few practitioners took full advantage of these agreements, however, due to uncertainty surrounding their binding effect either on non-parties to the agreements or in other federal or state proceedings, even when the agreements were incorporated into court orders.

New FRE 502

FRE 502 should bring uniformity to federal court orders regarding waiver. Under the new rule, a federal court order that declares that an inadvertently produced document does not waive attorney-client privilege or work product protections is binding on all parties to the matter and, most importantly, in all other federal and state court proceedings.[4] This change gives meaningful effect to the 2006 amendments to FRCP 16, which encouraged courts to include agreements to expedite discovery in their scheduling orders.

Moreover, FRE 502 clarifies that the inadvertent disclosure of privileged or protected material does not constitute a waiver, even as to the disclosed document, so as long as the privilege-holder "took reasonable steps to prevent disclosure" and acts reasonably in rectifying the error. The 2006 FRCP amendments had provided a *procedure* for asserting claims of privilege for an inadvertently produced document, but did not address whether or not the inadvertent production actually waived the privilege.

Finally, should the federal court find waiver, FRE 502 limits the breadth solely to the communication disclosed and not to any other undisclosed communication or information except where the disclosure was intentional, the undisclosed communication or information is on the same subject matter, and the disclosed and undisclosed communication or information "ought in fairness to be considered together."

Impact of FRE 502

It remains to be seen how practitioners will utilize FRE 502 to expedite discovery and reduce discovery costs. The new rule has the potential to create significant cost-savings by providing stronger waiver protection for inadvertently produced documents. However, the actual cost reduction remains to be seen, as the rule does not remove the obligation for parties to take "reasonable steps to prevent disclosure" and prompt and reasonable steps to "claw-back" inadvertently produced privileged or protected documents.

For further information, please contact:

Jerone J. English (bio)
Los Angeles
+1.213.488.7403
jerone.english@pillsburylaw.com

Wayne C. Matus (bio)
New York
+1.212.858.1774
wayne.matus@pillsburylaw.com

Christine H. Yung (bio)
San Diego
+1.619.544.3290
christine.yung@pillsburylaw.com

[1] *See, e.g.*, *In re Sealed Case*, 877 F.2d 976, 979-80 (D.C.Cir.1989).

[2] *See, e.g.*, *Texaco Puerto Rico v. Department of Consumer Affairs*, 60 F.3d 867, 883-884 (1st Cir. 1995); *Weil v. Inv. Indicators, Research & Mgmt, Inc.*, 647 F.2d 18, 24-25 (9th Cir.1981).

[3] *See* Schwarzer et al., *Cal. Prac. Guide Fed. Civ. Pro. Before Trial* § 11:805 (The Rutter Group 2006), which recommends that practitioners not delegate but "personally review" all documents being produced to prevent the accidental disclosure of privileged information.

[4] A non-waiver agreement between parties to a proceeding still binds only the parties to the agreement unless the agreement is incorporated into a court order.