New Federal Privilege Rule Reduces e-Discovery Risks

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A recurring problem in modern litigation is the inadvertent disclosure of materials subject to the attorney-client privilege or the attorney work product protection. New Federal Rule of Evidence 502 changes the rules concerning waiver of privilege in all Federal and many State court cases, thereby reducing the risk that inadvertent disclosures will constitute a wavier of attorney client privilege or work product protection. But the new rule requires careful application. Important risks remain.

Inadvertent disclosure of privileged or protected information too easily occurs when massive numbers of documents or files make it impractical or prohibitively expensive to review every item individually. The proverbial privileged document needle gets lost in the e-discovery haystack and is overlooked. Later, when opposing counsel recognizes that she has a potentially privileged document and brings this to the attention of disclosing counsel, there may be a fight as to whether the document will be returned, or whether the disclosure constitutes a wavier of any privilege related to the information. Under existing State and Federal law, release of privileged or protected information to an adversary, even if inadvertent, may constitute a waiver of the privilege or protection with regard to the information or document disclosed or, worse, to all documents and other information related to the same topic.

Invoking the "Claw"

Amendments to Federal Rule of Civil Procedure 26(b), adopted in December 2006, were aimed at reducing the risks of waiver from inadvertent disclosures. Rule 26(b) provides that if privileged information is produced, the party making the claim of privilege may notify any party that received the information of the privilege claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has, must not use or disclose the information until the privilege claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim of privilege. The producing party must preserve the information until the privilege claim is resolved.

Under Amended Rule 26, it has become common for trial counsel to propose and courts to adopt as orders what are commonly referred to as "clawback agreements." These provide, generally, that if a party discovers that it has received inadvertently disclosed privileged or protected information that the receiving party has a duty to notify the producing party. The producing party may then "clawback" the documents and reassert the privilege. Such agreements commonly provide that any such inadvertent disclosure will not be considered a waiver of any privilege or protection. If the parties stipulate to such a clawback agreement, and/or the Court orders a similar procedure, a receiving party is precluded from arguing that the inadvertent production of privileged or protected materials constituted a waiver of the privilege or protection. Although this was a good idea, amended Rule 26 had shortcomings. Under the laws of some States and Federal circuits, information may be privileged or protected against disclosure only if it was confidential. Once a document is disclosed to the public or to an adversary it is no longer confidential and therefore cannot be privileged or protected. Once the toothpaste is out of the tube, it cannot be put back in. Some States have rules that go further, providing that the privilege is waived with regard to the entire subject matter of the disclosed document, or at least those other privileged documents that, in fairness, ought to be considered at the same time as the disclosed documents. A party cannot selectively waive the privilege with regard to only certain documents pertaining to a single subject.

Factoring Disclosure

Other States and Federal circuits adopted a multifactor test, known as the "middle" approach or "intermediate" standard, as to whether to treat an inadvertent disclosure as a waiver:

1. The reasonableness of the precautions taken to prevent inadvertent disclosure.
2. The number of inadvertent disclosures.
3. The extent of the disclosures.
4. Any delay in measures taken to rectify the disclosure.
5. Overriding interests of justice.

This cornucopia of laws and rules threatened to destroy the effectiveness of Amended Rule 26. An agreement with opposing counsel that inadvertent disclosures made in one Federal case would not be treated as a waiver was not binding on any other party or court. State courts had no obligation to apply Federal rules of procedure, and Federal courts could not insist that a State court judge follow rulings in the original case.

As a result, a second litigant in another case in a different court could claim that the inadvertent disclosure of information in the first case constituted a waiver, removing the privilege or protection against disclosure in the second, later case.

Amended Federal Rule of Evidence 502 tries to solve this problem. With regard to any case pending on or after September 19, 2008, the disclosure of a communication or information covered by the attorney-client privilege or work-product protection does not operate as a wavier in a Federal or State proceeding if:

1. The disclosure is inadvertent.
2. The holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. The holder promptly took reasonable steps to rectify the error.

New Rule 502 also provides that an agreement between parties as to the effect of disclosure in a Federal proceeding may be made binding on persons other than the parties to the litigation if incorporated into a court order, and that a Federal court may order that the privilege or protection is not waived by disclosure connected with litigation pending before the court. If the court enters such an order, the disclosure is also not a waiver in any other Federal or State proceeding. These rules apply in Federal court annexed or mandated arbitration proceedings and to disclosures made to a Federal office or agency as well as to civil lawsuits.

Middle Course
New Rule 502 goes a long way to solving the problems of inadvertent disclosure. In essence, Rule 502 adopts the "middle" or "intermediate" standard for whether an inadvertent disclosure should constitute a limited or broad waiver of privilege or protection. But the devil is in the details. To protect the privilege, the party claiming it must take "reasonable steps to prevent disclosure" and "promptly [take] reasonable steps to rectify the error."

What's reasonable will be a matter of significant dispute, as it has been in the past where the intermediate rule applied. What search terms or other automated search mechanisms must a party use to satisfy the reasonableness standard in connection with a Terabyte of non-text searchable data? How long should a party have to realize that it has disclosed privileged information before it is required to act? What steps must it take to rectify the error in order to have acted "reasonably?"

In a recent case *Victor Stanley, Inc. v. Creative Pipe, Inc*., 2008 WL 2221841 (D. Maryland May 29, 2008), Magistrate Judge Grimm held that the disclosing party did not do enough to preserve its claims of privilege despite hiring a computer expert to structure key word searches to identify relevant and privileged documents and conducting a partial manual review to ferret out potentially privileged materials.

Although the new Rule 502 helps, IT managers, record retention managers, in-house counsel, experts, and trial counsel must still understand the rules of inadvertent disclosure and electronic information systems in depth and must adjust their practices to the difficult realities of the world of e-discovery.
