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President Enacted New Federal Rule of Evidence 502: But Risks Still Remain for Inadvertent Disclosures

On September 19, 2008, President George W. Bush signed into law Federal Rule of Evidence 502 (“FRE 502”), which seeks to reduce the rapidly increasing costs of privilege reviews in discovery primarily created by the growth of e-commerce, e-contracting and the resulting increase in the volume of e-discoverable material.¹ The FRE 502 greatly decreases the possibility that one inadvertently produced document could result in a “subject matter waiver” by restricting waivers only to those documents actually disclosed.² It also standardizes the analysis Courts will use to determine when a privilege holder’s inadvertent disclosure of attorney work product or attorney client privileged material operates as a waiver.³ The waiver analysis focuses primarily on the reasonableness of the measures taken by the disclosing parties to prevent the inadvertent disclosure. In making that determination, the FRE 502 requires courts to ask whether the holder of the privilege: 1) disclosed the privileged information inadvertently, 2) took reasonable steps to prevent the disclosure, and 3) promptly took reasonable steps to correct the erroneous disclosure.⁴

The FRE 502 also addresses other similar issues. For example, subdivision (c) provides that state courts must adhere to previous federal courts’ decisions with respect to waiver issues under FRE 502. It further provides that a federal court must use the law most protective of the privilege and against waiver (either state law or FRE 502) when determining the admissibility of documents produced from a state proceeding. Subdivision (d) allows a court to issue a protective order providing that a disclosure of privileged communications or information does not constitute a waiver, an order which binds parties and more importantly non-parties in all subsequent federal or state proceedings. Subdivision (e) codifies the protection given between parties to a confidentiality agreement, however, the agreement must be made by a court

order before subdivision (d) will act to bind non-parties to those protections.

Thus, by defining the standard of care required to avoid a waiver of privilege and addressing a multitude of other issues that arise in connection with the production of privileged information, FRE 502 seeks to allow parties to craft privilege reviews, document productions and confidentiality agreements to meet those standards. Without question, FRE 502 provides a certain level of relief from the issues surrounding its creation as described in the next Section, but risks still exist especially for those clients whose entire business model is e-based. For those clients we recommend that before the litigation is filed or a subpoena served that a plan is already in place to deal with privilege issues.

The Need for FRE 502

Congress tasked the Judicial Conference Committee on Rules Practice and Procedure to propose a rule to solve the privilege waiver problems in a way that would also limit the significant costs of discovery, especially e-discovery. The Committee focused on limiting when an inadvertent disclosure of privileged information in litigation could act as a waiver of the attorney-client and attorney work product privileges.⁵ Further, the Committee recognized and sought to limit when an inadvertent disclosure of a single privileged document or communication could lead to a broader “subject matter waiver” over all information relating to the subject matter contained in that document.⁶ Such waivers, either on an individual basis or when encompassing an entire subject matter, are almost universally viewed as disastrous by lawyers and their clients. The fear of such waivers significantly increase the time and resources spent by lawyers on document-by-document privilege reviews, and correspondingly results in significant increases in costs to clients.

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FRE 502 was also needed to create uniformity in the standard applicable to determining when an inadvertent disclosure results in a waiver. That issue was recently addressed in the widely reported *Victor Stanley, Inc. v. Creative Pipe, Inc.* opinion issued by Magistrate Judge Paul W. Grimm.⁷ In *Victor Stanley v. Creative Pipe*, the Defendant's electronic search and partial document-by-document review of discoverable material led to the inadvertent production of 165 privileged documents. Magistrate Grimm was confronted with the uncertain nature of the law in this area and discussed in the opinion the three different tests used to determine when an inadvertent disclosure results in a waiver. Magistrate Grimm ultimately determined that he should use the intermediate test, which required a balancing of the reasonableness of the disclosure, the extent of the disclosure, the number of disclosures, and steps taken to rectify the disclosure, with the overriding interests of justice (this approach is similar to that adopted by FRE 502). He held that the Defendant had failed to show that the steps it took to avoid disclosure were reasonable, that a waiver had occurred, and that the documents, if admissible, could be used as evidence. The court, however, was not asked to determine if the waiver of privilege went beyond those 165 documents. Much, if not all, of the uncertainty for the standards applied to an inadvertent waiver is now avoided with FRE 502, and lawyers can look to *Victor Stanley v. Creative Pipe* to help determine some of the factors a court will consider in assessing reasonableness.

Continuing Risks Suggest Advance Planning

While FRE 502 presents a standard that can be relied on, as *Victor Stanley v. Creative Pipe* teaches, parties must be sure to adhere to that standard or risk a waiver of the attorney client or attorney work product privileges. Moreover, what factors courts will consider in evaluating the standard is something that will be debated by lawyers, clients, and judges. So, while arguably, FRE 502 will operate to reduce the costs and burdens of discovery by providing both a standard of care for the protection of privilege, and the ability to protect

against disclosure of privilege by court order, these reductions do not come without risk. Given these risks, clients must plan ahead, especially clients whose businesses involve e-commerce and e-contracting. Rather than relying on FRE 502 after a litigation is commenced or a non-party subpoena served, clients should implement systems that identify (and when necessary segregate) privileged communications from all other documents subject to document review. Combining that step with appropriate document retention policies, litigation hold policies, and data mapping, will provide clients with the most insurance against inadvertent disclosures and the continuing risks that accompany such disclosures.

1 S. Rep. No. 264, 110th Cong., 2d Sess. 1-2 (2008). A copy of this report is available at http://www.uscourts.gov/rules/S_Rep_110-264.pdf

2 Provided there are no exceptional circumstances where a broader waiver is required to remedy an intentional or misleading use of protected information. FRE 502. A copy of the bill creating this rule is available at <http://www.uscourts.gov/rules/S2450.pdf>

3 S. Rep. No. 264, 110th Cong., 2d Sess. 5 (2008)

4 *Id.* at 5

5 *Id.* at 3-4

6 *Id.* at 4

7 250 F.R.D. 251(D.Md. 2008)

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