New Federal Evidence Rule 502 Limits Inadvertent and Subject Matter Privilege Waivers

November 24, 2008
by MEREDITH DuBARRY HUSTON
MGKF News Flash

A new protection against waivers of privilege should be welcome news for clients involved in litigation matters. In the era of electronic discovery, where large volumes of data are exchanged in litigation, privilege reviews have become increasingly expensive. Federal Rule of Evidence 502, which went into effect on September 19, should help to curtail the costs associated with such reviews by protecting against the forfeiture of a privilege when a disclosure is the result of an innocent mistake. Further, by effectively eliminating subject matter waiver, Rule 502 resolves a divergence of authority among the federal courts concerning the scope of a waiver.

Under Rule 502 inadvertent disclosures of privileged information in a federal court or federal administrative proceeding do not waive a privilege where the privilege holder acts promptly to retrieve the inadvertently disclosed documents and takes reasonable steps to prevent disclosure. What remains to be seen is how the courts will interpret whether a response to an inadvertent waiver has been sufficiently "prompt" or whether steps taken to prevent disclosure were "reasonable."

Pursuant to Rule 502, the voluntary disclosure of privileged information results in a waiver of the information actually disclosed, but does not automatically constitute a subject matter waiver. Prior to Rule 502, the production of a single protected document in some jurisdictions could result in a waiver of attorney-client privileged communications and work-product not only as to that document, but also as to all related material—and not only in the case in question, but also in all other matters. Under Rule 502, subject-matter waivers are reserved for "unusual situations in which fairness requires a further disclosure of related, protected information."

Federal courts can now enter orders under Rule 502(d) providing that disclosure of privileged or protected material under "quick peek" agreements (allowing each side to review the other's universe of documents before determining the scope of production) or "clawback" agreements (providing for the return of mistaken disclosures) does not constitute a waiver. Rule 502(d) also allows courts to enter a non-waiver order that will bind nonparties. Rule 502 provides reassurance that agreements regarding disclosures in one case will not be second-guessed by a judge in a subsequent action.

State courts in subsequent state proceedings are required to honor Rule 502 determinations made at the federal level. If there is a disclosure in a state proceeding, then admissibility in any subsequent federal proceeding is determined by the law that is most protective against waiver. Rule 502 does not apply to disclosures made in a state proceeding that are later introduced in subsequent state proceedings.

The new rule applies to all cases filed after September 19 and, "in so far as is just and practicable," to all pending cases.