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Savvy Use of the Federal Rules Saves Time and Money: Privilege Review

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Editor's Note: *This is the first part of an informational series authored by a Jenner & Block partner on the changes to the Federal Rules of Civil Procedure that took effect on Dec. 1.*

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KEY TAKEAWAYS

Practice points:

- With the protections afforded by FRE 502(a), not all privilege reviews need to be treated equally. With the risk profile diminished, an informed party may choose to conduct less extensive and less expensive review.

- A party may produce innocuous communications, or work product where there is only a weak basis for asserting the immunity, without the fear that production will lead to broad waiver.

Once again, the Federal Rules of Civil Procedure have been amended in an attempt to rein in unnecessary litigation costs and to enable parties to proceed to the merits of their cases. Much commentary has focused on the Rules' emphasis on proportionality regarding the scope of discovery. Less commentary, however, has addressed the amended Rules' express references to Federal Rule of Evidence 502, a powerful, but under-used tool that can mitigate risk and significantly reduce the cost of protecting attorney-client privileged and work product protected information.

This is the first in a four-part series of articles addressing the ways parties and their lawyers can use FRE 502 and other creative approaches to minimize the burden of privilege review, logging, and privilege disputes. This article discusses FRE 502(a), which provides the backdrop for effective use of other provisions of FRE 502, particularly FRE 502(d), which will be addressed in subsequent articles.

The cost of discovery is driven not just by collecting, reviewing and producing responsive material, but also by the need to identify, withhold and effectively assert privilege over a portion of those materials. In the traditional model, large numbers of lawyers conduct linear, page-by-page privilege review of responsive documents and prepare voluminous document-by-document privilege logs. Each "touch" of a document and each QC of a privilege log adds cost to the case.

The high cost of privilege review is driven by a number of factors, among them, fear of broad waiver. Under the common law approach, disclosing an otherwise attorney-client privileged communication generally means that privilege is waived — not just over the disclosed communication, but also with respect to the subject matter of the communication. Depending on the specific circumstances, "subject matter" could be defined broadly or narrowly by the court in a pending matter or by a court in parallel or subsequent litigation involving different opponents. The feared "nightmare scenario" is that the mistaken production of even a few privileged emails might result in broad subject matter waiver over an entire investigation or dispute.

FRE 502(a) fundamentally changes the risk profile for disclosures at the federal level.

(Note: The risk of subject matter waiver continues to exist in state court proceedings in many jurisdictions.) FRE 502(a) provides that disclosing privileged or protected information in a federal proceeding or to a federal office or agency will not result in broader waiver unless: (1) the waiver was intentional; (2) the undisclosed information relates to the same subject matter; and (3) fairness requires additional disclosure.

The Advisory Committee Notes to FRE 502 make it clear that inadvertent disclosure will not result in subject matter waiver. In addition, even where waiver is intentional, no broader waiver will result except in unusual circumstances in which the disclosing party has attempted to gain an advantage

in litigation by selectively disclosing helpful privileged information while intentionally withholding unhelpful information.

How does FRE 502(a) change the cost/benefit analysis of privilege review? In a white collar investigation or where there is likely to be substantial and sensitive privileged information throughout the documents, the cost of traditional review may be justified. However, without fear of broad waiver, parties involved in more routine civil matters with voluminous electronically stored information (ESI) may decide to conduct traditional privilege review of only a subset of responsive documents; for the rest of the documents, they may choose to rely on word search protocols or other means such as technology assisted review to identify privileged documents. Well thought-out searches, with careful QC, may provide sufficient confidence that the risk of disclosing privileged material within documents not manually reviewed is outweighed by the cost of conducting more expensive manual review. You cannot "unring the bell" if your opponent reviews privileged information that you did not intend to produce, even if you later successfully claw back the information. However, an informed client may choose to assume the risk of disclosure, and the ringing of the bell, in exchange for the benefit of saving significant cost.

Manual review, of course, is not perfect. FRE 502(a) reduces the scope of risk for mistaken production of manually searched documents as well.

FRE 502(a) can reduce cost in a second way. Lawyers often over-withhold documents, putting vanilla cover letters or similarly innocuous documents on their logs for fear of giving their opponents even a narrow basis to argue for broad waiver. Under FRE 502(a), a party may decide to produce insignificant, or tenuously privileged documents without fear of broader waiver. Fewer documents withheld means fewer documents to fight about. It also means that you will not have to suffer the wrath of a court that finds such documents before it during *in camera* review in the midst of an expensive privilege dispute.

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