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An Investigative Piece on Clawback Agreements

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Who: Clawback agreement; alias: Rule 502 Agreement.

What: A mechanism to take back inadvertently disclosed privileged and/or confidential information and protect against an argument that you waived privilege.

When: The Federal Rules of Evidence were amended in 2008 to introduce Rule 502. States adopted Rule 502 shortly after its introduction.

Where: Rule 502 is located in the Federal Rules of Evidence, and their State counterparts.

Why: The scope of discovery seems endless. The rules permit a party to obtain discovery regarding any nonprivileged matter that is "relevant" to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). What is considered to be "relevant" evidence, for purposes of discovery, is essentially limitless. The Federal rules, and State counterparts, permit a party to obtain any piece of evidence that could lead to the discovery of admissible evidence. The rules, as they stand today, do not contemplate whether the discovery sought is sufficiently reli e at trial. They simply ask: "can this request poter admissible evidence?"

Attorneys routinely craft affirmative answers to have not caught up with the mountain of eviden relevant in today's day and age. Parties can now Twitter®, FaceBook®, Instagram®, YouTube® Snapchat®, Parascope® or any other digital re to spend an extraordinary amount of money to have every email, picture, text, tweet,

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post, and document reviewed with a fine-toothed comb, the likelihood of inadvertently producing privileged or confidential information expands with each passing year as discoverable evidence becomes more and more "digitized." Rule 502 protects you if and when privileged or confidential information is inadvertently disclosed.

Prior to 502 Rule

Before Rule 502, production of privileged or confidential information could permit your opponent to, rightfully, argue that you waived your claim of privilege and/or confidentiality. Some courts held that inadvertent production of even one privileged or confidential document constituted a waiver of the privilege for that document and all other documents related to that subject matter. As you can imagine, such subject matter waiver can drastically impact your client's case. Therefore, discovery costs skyrocketed as parties felt the need to review each and every document for privileged and/or confidential information to guard against the consequences associated with inadvertent production.

Rule 502 was implemented to protect parties who do not have Midas' war chest. Rule 502 bars an opposing party from claiming "waiver" if: (1) the disclosure was inadvertent; (2) you took steps to prevent the disclosure; and (3) you promptly took reasonable steps to rectify the error. Fed. R. Evid. 502(6).

Extent of Rule

The rule only protects those who take steps to w
information beforehand. Therefore, the rules dc
on your opponent in the hopes of your opponen
or confidential information. While your oppone
and return any inadvertently produced privilege
should not rely on your opponent to identify all
Furthermore, the purpose of designating docum
"confidential"– secrecy–is defeated if your oppc
recognize that they are privileged and/or confid

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When?

When should you talk to your opponent about a claw back agreement? In Federal Court, the ideal time to discuss a clawback agreement is during your Rule 16(b) meet and confer in Federal Court. The State Court counterpart to Rule 16(b), the Joint Report and Scheduling Order, is due significantly after discovery has commenced. Therefore, in State Court, it is advisable to formalize a claw back agreement in writing before you engage in discovery and then include the agreement with your Joint Report and Scheduling Order.

What?

What should you talk to your opponent about? There are a plethora of talking points related to clawback agreements. Parties can: define what documents are subject to be clawed back, the procedures to invoke the clawback, what the parties' obligations are when they discover privileged and/or confidential information has been disclosed, etcetera. However, the top three points of discussion should regard: (1) defining what "reasonable steps" each party would take to prevent the mistaken disclosure of privileged or confidential materials. (Defining what is and is not reasonable can potentially "head-off" any disputes about failing to discover privileged material); (2) establishing procedures for invoking the clawback and procedures for resolving disagreements about whether an inadvertently produced document is privileged or confidential; and (3) defining what categories of documents could contain privileged or confidential information. For example, witness depositions could be subject to redaction if they disclose privileged information. This process will ideally help ease discovery disputes and reduce the need to invol process.

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How?

How can you enforce a clawback agreement? Ru [to] order that the privilege or protection is not h the litigation pending before the court—in whic waiver in any other federal or state proceeding.' only if incorporated in a court order. Rule 502(e) specifies that an agreement not

incorporated in an order "will be binding only on the parties to the agreement" and will have no effect in a subsequent court action or on nonparties.

While Rule 502 does not lessen your burden to carefully review your discovery and preclude the disclosure of privileged information, it does provide a mechanism to essentially recall inadvertent disclosures and prevent your opponent from relying on the inadvertent discovery to make their case. Planning your discovery litigation ahead with the careful use of "claw back" agreements should be a valuable instrument in your "discovery toolbox" to help navigate the increasingly treacherous waters in our digital age of e-discovery production.

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RELATED CASE LAW

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