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Don't Let the Clawback Bite Back: The Necessary Steps for Creating an Effective Clawback Agreement

Posted: August 1, 2018

Retrieve the Right Way

Privileged documents are sometimes inadvertently disclosed to opposing parties during discovery and the litigation process, breaching attorney-client privileges and causing havoc for both defense and plaintiff counsels. To remedy this sensitive situation, litigators construct clawback agreements that allow parties to retrieve important documents without having client-attorney privileges revoked.

But the successful retrieval of documents is only possible when clawback agreements are prepared properly and in tandem with Rule 502(b). Alongside following inadvertent-disclosure rules, litigators must prepare clawback agreements with a set of best practices in mind to ensure documents are retrieved and privileges remain intact.

Understanding Inadvertent Disclosure

Rule 502(b) (https://www.law.cornell.edu/rules/fre/rule_502) under the Federal Rules of Evidence states that disclosure does not assume a waiver in a federal state proceeding if three things are true — disclosure of information is inadvertent, reasonable steps were taken to prevent disclosure, and reasonable steps were taken to fix the error (resolving such an error may require following Federal Rules of Civil Procedure 26 (b)(5)(b) (https://www.law.cornell.edu/rules/frcp/rule_26), which outlines steps for handling the finding of sensitive information).

Rule 502(b) and Federal Rules of Procedure 26(b)(5)(b) prove that constructing a thorough clawback agreement prevents problems associated with disclosure. We've compiled a list of best practices below to help avoid some common problems associated with clawback agreements.

Know What You Need to Address

To maintain client-attorney privileges, you need to produce an agreement that addresses the Federal Rules of Evidence and Federal Rules of Procedure. According to Harvard Law School Forum, this is accomplished by adhering to set of best practices (https://corpgov.law.harvard.edu/2012/11/21/best-practices-for-preparing-a-clawback-agreement/) – and which we'll summarize below:

- *Clearly state that a waiver will not result from the inadvertent disclosure of confidential information*. An understanding that a clawback exists to prevent a loss of privileges needs to be known in writing and placed in the agreement.
- *Create a protective order*. Asking the court to enter into a protective order prohibits third parties from using sensitive information during the litigation process. Define the scope of your agreement to best protect yourself in the case of inadvertent disclosure to third parties.
- *Define your own steps*. Do away with the must-dos and instead focus on tailoring your agreement to best suit your needs. You can eliminate steps or use targeted keyword searches to screen for privileged materials.
- *Have a plan for invoking the clawback*. Create a strong defense by establishing requirements for initiating a retrieval. Lay down the rules for the period of time when a party must request the clawback, or if the clawback is to be drafted in writing.
- *Define How You'll Handle Disagreements*. One party may think a disclosed document is privileged while the other believes it is protected. Set up a framework beforehand to establish how you'll deal with this common problem.
- *Consider speech*. If a witness accidentally discloses information in testimony, adding a provision that strikes verbal testimony from the record will be beneficial.
- *Confidentiality matters*. In matters of complex commercial litigation, materials can be produced that are "confidential" and "highly classified". Implement provisions that designate the renaming or relocating of documents after they've been misplaced.

Proactively setting out to define the parameters of your agreement and including necessary clauses will help ensure privilege aren't lost. Failing to do so, however, can result in costly outcomes that aren't in your client's favor.

IRTH Solutions, LLC v. Windstream

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This was the case for IRTH

Solutions, LLC v. Windstream (https://www.ediscoverylaw.com/wp-content/uploads/2017/08/Irth-Opinion.pdf). In this discovery dispute, the Defendant Windstream Communications, LLC requested that the Plaintiff IRTH Solutions return privileged documents – a request that was denied after the court found Windstream's clawback agreement to be insufficient.

The clawback agreement didn't allow for a privilege review or state that a waiver wouldn't occur. After finding that the agreement failed to define inadvertence, set up steps to prevent disclosure, and outline reactionary measures, it was denied by court officials.

Proving you've taken the necessary steps in preventing disclosure showcases your dedication to clients. Courts thoroughly inspect clawback agreements to ensure litigators have performed this important task. A clawback agreement that is simply an agreement will not suffice, and litigators are wise to create a robust clawback agreement, outlining how they will prevent and handle disclosure.

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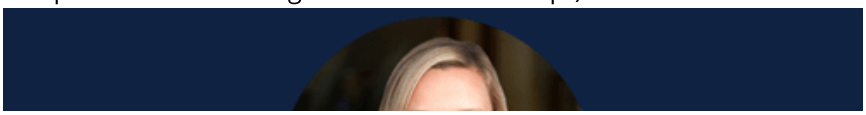

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