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Clawback Agreements - Friend or Foe?

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As construction attorneys, we are no strangers to voluminous productions of client documents and communications, both in electronic and hardcopy formats, during discovery. Even with proper safeguards in place during document review, there exists the possibility that some privileged material may accidentally slip over to an opposing party. Production of such material to a third party, especially an adversary, runs the risk of waiving attorney-client privilege or attorney work product privilege.

Rule 502(b) of the Federal Rules of Evidence creates somewhat of a safety net for inadvertent disclosures, but requires compliance with a number of steps. Fed. R. Evid. 502(b) ("disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B) [concerning inadvertent production of trial preparation materials].") Note also that the term "inadvertent" is not defined. *Id.* Whether those three requirements are met can be challenged by the opposing party.

Clawback agreements, pursuant to Federal Rules 502(d) & (e) and equivalent state rules, are aimed at avoiding waiver of privileges without having to resort to proof under Rule 502(b). *See* Fed. R. Evid. 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."); Fed. R. Evid. 502(e) ("An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order."). Likewise, scheduling orders under Rule 16 of the Federal Rules of Civil Procedure contemplate the Court approving the parties' clawback agreement in this regard ahead of time. Fed. R. Civ. P. 16(b)(3)(iv) ("The scheduling order may . . . include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502").

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