DANGERS IN THE USE OF QUICK PEEK AND CLAW BACK AGREEMENTS UNDER THE NEW E-DISCOVERY RULES

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Once you start saying, 'we can claim privilege later,' you start down a slippery slope." That was the warning given by Steven Saltzburg, Professor, George Washington University School of Law, in a September 2006 e-article by Michael T. Burr on www.insidecounsel.com entitled "*Claw-Back Conundrum: Updated Discovery Rules Threaten to Reveal Privileged and Confidential Information*." Professor Saltzberg was commenting on the use of claw back and quick peek agreements under the new federal e-discovery rules. Attorneys should take heed of Professor Saltzberg's warning and carefully consider whether to accept the invitation in the advisory notes to the amendments to FRCP 26 before entering into such agreements.

While claw back and quick peek agreements may now be enforceable under the new rules, several issues relating to their use await resolution by the courts. Prudent practitioners should not forego reasonable pre-production review of documents in reliance on the new rule and advisory note without considering and advising their clients of the risks.

A. The December 1, 2006 Amendment Adding FRCP 26(b)(5)(B)

FRCP 26(b)(5)(B) sets forth a procedure to address the inadvertent production of materials subject to a claim of privilege or work-product protection in the absence of a pre-existing agreement between the parties. The new rule provides that a producing party may notify the receiving party of the claim and the basis for the assertion of privilege or protection. After such notification, the receiving party "must promptly return, sequester, or destroy the specified information until the claim is resolved." The producing party must in turn preserve the information until the claim is resolved. The receiving party also has the option of promptly presenting the information to the court under seal for resolution rather than first returning it to the producing party.

The new rules encourage parties to agree to non-waiver through the use of "quick peek" or "claw-back agreements" before the Rule 16(b) Scheduling Conference, which can then be incorporated into the case management order. Claw-back agreements provide that inadvertently produced privileged data shall be returned upon notification to the receiving party, and that any inadvertent productions shall not amount to a waiver. Under a quick peek agreement, a responding party can agree to provide certain requested materials for initial examination by the requesting party without waiving privilege or work product protections. The requesting party then designates documents it wants produced pursuant to a Rule 34 request. The responding party then reviews only the requested documents for formal production and asserts any claims of privilege or work-product protection.

In the past, some courts had refused to enforce claw back agreements. See, for example, *Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109 (D. N.J. 2002) (declining to give effect to a claw-back agreement). Under the new rules there will no longer be an issue as to the enforceability of such back agreements between the parties. However, there are several issues that still remain unresolved which should be considered before you enter into a claw back or quick peek agreement.

1. The Court Is Not Bound By These Agreements Even If They Are Part of the Rule 16(b) Scheduling Order

Even if the parties enter into a claw-back or quick peek agreement, the Committee notes make clear that a presiding court does not have to make them part of the Rule 16(b) scheduling order. And these agreements between counsel do not automatically deem the disclosed, privileged information unwaived. The Committee note to Rule 26(b)(5)(B) makes clear that this new rule is not meant to address, as a matter of law, whether a prior production under these agreements will constitute automatic non waiver. The rule (and the suggested types of agreements) is merely to allow the presiding judge to take these agreements in account – in view of case law on privilege waivers – when faced with a party's motion to compel on the grounds that the prior production of privileged content constitutes a waiver.

Thus, while the amended FRCP 26(b)(5)(B) and committee notes provide a clearer procedure for handling inadvertent disclosure and claims of privilege, they do nothing to clarify the substantive decision of whether inadvertent production waives the claim of privilege. As one court considering the effect of the new rule cautioned:

> Thus, after nearly ten years of extensive study of the discovery rules by the Advisory Committee on the Federal Rules of Civil Procedure, the procedures proposed to address the burdens of privilege review associated with production of electronically stored information surely would ameliorate them, but at the price of risking waiver or forfeiture of privilege/work product protection, depending on the substantive law of the jurisdiction in which the litigation was pending. *Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule.*

Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 233-34 (D. Md. 2005)(emphasis added).

Until the effect of these agreements on the question of privilege waivers is resolved by further court decisions, parties need to carefully consider the degree to which, if at all, they will be comfortable in relying on such agreements to scale back their normal privilege review.

2. These Agreements May Not Protect Your Client From Disclosure To Third Parties.

Even if a claw back or quick peek agreement is adopted by the court's Rule 16(b) scheduling order, because the amendments do not address the application of substantive evidence law relating to the waiver of the privilege by inadvertent production, the risk remains that such agreements may not bind third parties and may not apply in related proceedings in other jurisdictions. *Hobson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 235 (D. Md. 2005) citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (finding non-waiver agreement between litigant and DOJ regarding documents produced during investigation does not preserve privilege against different entity in unrelated civil proceeding); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (nonwaiver agreement between producing party in one case not applicable to third party in another civil case). In the future, this problem may be resolved by proposed FRE 502 (see discussion below), but for now, counsel should be cautious in entering into these agreements, especially where there is a possibility that a third party may seek the documents produced in discovery.

3. <u>These Agreements Offer No Protection From Waiver of Legal Duties Regarding Confidentiality Other than the Litigation Privileges.</u>

Finally, claw back and quick peek agreements should be used with caution in cases where a client has an independent obligation to protect the privacy of its employees, patients or stakeholders. The new rules and committee notes are silent about other confidential information that clients may be obligated by law or agreement to maintain in confidence. Therefore, if there are potential trade secrets, employee privacy issues or HIPPA issues which impose an independent duty of confidentiality on your client, the new rules will probably not protect your client and you will have no choice but to conduct a pre-production review of documents.

B. <u>Proposed FRE 502 Will Address Some But Not All of These Concerns</u>

Because of some of the concerns addressed above, efforts are under way to amend the Federal Rules of Evidence (FRE) by adding Rule 502 to address many of the issues regarding attorney-client privilege and work-product protection in the context of electronic discovery. See Report of the Advisory Committee on Evidence Rules dated May 15, 2006, available at http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

The newly proposed FRE 502 addresses the issue of waiver of the attorney-client privilege and work product immunity by inadvertent disclosure. See Report of the Advisory Committee on Evidence Rules, May 15, 2006, available at http://www.uscourts.gov/rules/Reports/EV05-2006.pdf. The Advisory Committee's draft FRE 502 would fill the gap in the Federal Rules of Civil Procedure by creating a uniform national rule concerning the substantive issue of whether the attorney-client privilege or work product protection is waived in specific circumstances.

Proposed FRE 502(b)(2) would provide an exception to waiver of the attorney-client privilege and work product protection through voluntary disclosure when privileged or work product protected information is inadvertently produced during

discovery and "the holder of the privilege took reasonable precautions to prevent disclosure and took reasonably prompt measures ... to rectify the error." Proposed FRE 502 subsections (c) and (d) address the controlling effect of both court orders and inter-party agreements. Court orders regarding the preservation or waiver of the privilege or protection would be binding on the parties as well as all others outside the case in which the order is issued whereas agreements between the parties would only be binding on the parties to the agreement. Thus, under proposed FRE 502, the protections afforded by an agreement between the parties would be binding on all others outside the case only if that agreement is incorporated into a court order.

While the proposed change to the Federal Rules of Evidence would relieve much of the uncertainty in the use of claw back and quick peek agreements, the earliest the new evidence rules would come into effect is in late 2008, if at all. Moreover, even if these rules are adopted, issues may remain as to the extent such rules would apply in cases implicating state law privilege rules (such as diversity suits). Thus, until some of these issues have been resolved by the courts, counsel should enter into claw back and quick peek agreements with care and fully advise their clients of the risks of inadvertent disclosure when such agreements are used.