

Via Email: Rules_Comments@ao.uscourts.gov

February 15, 2007

The Honorable Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Federal Rule of Evidence 502(b)

Dear Mr. McCabe:

On behalf of the American Bar Association (“ABA”) and its more than 400,000 members, I write to submit the ABA’s comments on the proposed amendments to Federal Rule of Evidence 502(b).¹ As Chair of the ABA Section of Litigation, I have been authorized to express the Association’s views on this important subject.

As you may know, in August 2006, the ABA adopted a recommendation sponsored by the Section of Litigation to articulate principles to “address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively ‘privilege’).” With the adoption of that recommendation, the principles have become formal ABA policy, embodied in Resolution 120D. For your convenience, a copy of that resolution and the related background Report is attached.² We applaud the Advisory Committee for undertaking consideration of these important issues and moving to bring consistency to the law to guide litigants and the courts. The following comments are intended to identify significant areas of disagreement between the ABA policy and the proposed Rule 502(b) and thus to identify those areas where the ABA policy would suggest a revision in the Committee’s approach.

As described in the Committee Notes, the proposed rule has two primary purposes: (1) to resolve disputes in the courts involving the effect of inadvertent disclosure and selective waiver; and (2) to

¹ The ABA also is submitting separate comments on other aspects of proposed Federal Rule of Evidence 502 (dealing with proposed new subsection on “Effect of Disclosure of Factual Summaries of Internal Investigations”) and separate comments on Federal Rule of Criminal Procedure 29. In addition, on January 29, 2007, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure.

² The “Recommendation” portion of Resolution 120D, but not the related background “Report,” constitutes official ABA policy.

address concerns that the cost of reviewing material to protect privilege/work product has become prohibitive, particularly where electronically stored information is involved.

According to the Committee Notes, “[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection.” The rule does not affect federal or state law that determines at the outset whether a document is privileged or protected; nor does it seek to “supplant applicable waiver doctrine generally.” The rule addresses only specific waivers that may arise as a result of disclosure.

The comments below focus specifically on proposed Rule 502(b), which addresses inadvertent disclosure of attorney-client privileged material.

The Proposed Two-Part Waiver Test

Proposed Rule 502(b) sets forth a *two-part* test for determining whether an inadvertent disclosure of privileged materials will result in a waiver of the privilege or protection: such a disclosure “does not operate as a waiver in a state or federal proceeding if . . . the holder of the privilege or work product protection . . . [1] took reasonable precautions to prevent disclosure and [2] took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error”

The factors articulated in the proposed rule do not comport with ABA policy, as set forth in the attached Resolution 120D. That policy provides that waiver of privilege as a result of an inadvertent disclosure be determined under a *four-part* test, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error.

The first ABA factor – the reasonableness of the steps taken to avoid disclosure – is reflected in proposed Rule 502(b).

The second and third ABA factors – the scope of discovery and the extent of the inadvertent disclosure – conceivably could be construed as falling within the first factor. The reasonableness of the steps taken to protect against disclosure may depend in part on the size (or scope) of the production, and it may also affect the breadth or extent of the disclosures. We believe, however, that these are important factors bearing on waiver and that they should not be left to be “implied” into the rule by judicial interpretation. Interpretations can – and often do – differ from court to court, and there would be no assurance that all courts would interpret the “reasonableness of steps” to embrace the scope of the discovery in which the disclosure was made and the extent of the inadvertent disclosure.

The best way to ensure that these factors are considered by the courts would be to amend the proposal to explicitly identify them as factors that must be evaluated. This would have the benefit of ensuring consistency in the application of the test from jurisdiction to jurisdiction – one of the primary goals of both the proposed rule *and* the ABA policy. *See* ABA Resolution 120D,

paragraph 1 (“consistent rules [should] be established . . . to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of [privileged] materials”); and related background Report, page 3 (“There should be consistent rules and procedures”).

The fourth ABA factor – the interests of justice – does not appear at all in proposed Rule 502(b). We believe it should. Motions to determine waiver will present a myriad of facts and circumstances, and no listing of factors could anticipate them all. We think it is important for courts to be directed to consider relevant facts that may not fit (or fit neatly) into the other articulated factors but that, in fairness, may bear on the inquiry.

We recognize that explicitly granting courts discretion to make a determination that is consistent with the interests of fairness and justice may cut both ways. That is, it may empower courts to find waiver, in the interests of justice, where the other factors would not point toward a waiver. Conversely, it would permit courts to find no waiver where application of the other parts of the test would support a waiver. In either event, the court would be doing what we expect judges to do: adjudicate the rights and obligations of the parties in accordance with the dictates of fairness and justice. To the extent an open-ended “interest of justice” factor injects a measure of unpredictability into the calculus, we believe it is outweighed by the benefit gained by giving judges flexibility to adapt the rule to each set of unique circumstances presented.

Action Required Following Discovery

Our other concern with the proposed language of Rule 502(b) involves what is required of the producing party after the error is made. Again, the current proposal is inconsistent with the August 2006 ABA policy contained in attached Resolution 120D.

“. . . knew or should have known of the disclosure”

Proposed Rule 502(b) requires the remedial steps to be taken after the producing party “knew or *should have known* of the disclosure” (emphasis added). This creates uncertainty and the potential for further dispute over when the producing party “should have known” of the production error.

In large document productions, particularly with the advent of “electronic discovery,” it may be months – even years – before the error is discovered, and determining when an error “should have been discovered” is inherently subjective. It will be fertile ground for litigation and will defeat the purpose of the rule: developing consistent standards to guide litigants and courts in resolving these issues.

The “should have known of the disclosure” standard unduly focuses on the time of production rather than the time when the mistake has been discovered. In one sense, all productions are voluntary acts. The purpose of the rule, however, is to give recognition to the fact that mistakes are made and some protection should be afforded for inadvertence. The “should have known” standard is an invitation to litigate the extent of inadvertence in every case and will destroy the purpose of the rule to provide predictable standards and meaningful protection from inadvertence.

The ABA policy provides that the party’s obligation to act is triggered when it *actually* discovers that a mistake has been made. Requiring action after *actual* knowledge would link the need for

action to a concrete event and would reduce the unpredictable element of subjectivity inherent in the “should have known” standard in the current draft.

We understand that there are those who believe a “should have known” standard better comports with the diligence required of counsel to take steps to preserve privileged information, and that not requiring some measure of diligence will reward the sloppy lawyer. We appreciate this concern but believe the sloppy lawyer will not be immune from waiver, because both the ABA policy and the draft rule take into account the reasonableness of the precautions taken to prevent disclosure.³ In addition, the privilege belongs to the client. The concept of waiver ordinarily requires the knowing relinquishment of a right. Although the client is chargeable in most instances with counsel’s actions, the critical importance of the attorney-client privilege to our adversarial system of justice would suggest that punishing the client by deeming the privilege waived because of counsel’s inadvertence imposes too high a price.

Existing ABA policy also requires a lawyer to notify opposing counsel when the lawyer knows or has reason to believe that opposing counsel has inadvertently produced privileged material. This assumes that opposing counsel does not know that he or she has produced it (otherwise counsel presumably would have already asked to have it returned). The principle therefore applies regardless of whether opposing counsel “should have known” that he or she produced it.

“reasonably prompt measures” to rectify the error

The proposed rule would require the holder of the privilege to take “reasonably prompt measures” to rectify the error.⁴ We believe this subjective test may cause more problems than it solves. Because it does not give parties or their counsel specific guidance on what they must do (and when they must do it) to avoid waiver, it is an invitation to the party who received the erroneously-produced documents to litigate whether the remedial steps taken by the disclosing party were both appropriate and “reasonably prompt.” Again, there may be further confusion created by arguments focusing on the delay from the actual production rather than from discovery of the mistake. The result will be to multiply disputes rather than minimize or eliminate them.

In contrast, the ABA policy provides an objective test that would provide greater certainty to the parties and engender fewer disputes: within a specified period of days after learning of the inadvertent production, the producing party should be required to raise the privileged status of the documents by simply giving notice to the opposing party that the materials are protected and amending its discovery responses to identify the materials and the privileges.

³ We also understand that the Committee has expressed concern that the “actual knowledge” standard would permit sloppy practitioners to ignore letters from the other side inquiring into whether particular documents were produced in error and then, later, claim a mistake was made. We believe that notice from the other side inquiring whether an error was made with respect to the production of particular documents is sufficient to create actual knowledge and that the note should so state.

⁴ We assume that the term “holder of the privilege” is intended to encompass either the technical holder of the privilege (which is the client, in the case of the attorney-client privilege) or its counsel. It may be advisable to make that point explicitly in the definitional portion of the rule.

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The ABA policy does not specify the number of days and we believe that any of a number of reasonable time periods could be selected. Whatever time period is chosen, however, the important point is that the party knows precisely what it must do (give notice to its opposing party and amend its discovery responses) and when it must do it (within the specified period) to preserve its right to assert that the privilege survives the disclosure. This provision therefore would work well in conjunction with newly revised FRCP 26(b)(5)(B), which requires a party receiving notice of an inadvertent production of materials to sequester, return, or destroy the materials pending resolution of the claim of privilege by the courts.

* * * * *

We appreciate the opportunity to provide our comments and we thank you for considering them. If you would like more information regarding the ABA's position on these issues, please contact me at (214) 939-5579.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kim J. Askew". The signature is written in black ink and is positioned above the typed name.

Kim J. Askew
Chair
ABA Section of Litigation

Enclosure

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****August 7-8, 2006****RECOMMENDATION**

RESOLVED, That the American Bar Association recommends that consistent rules be established throughout the federal, state and territorial courts to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively “privilege”).

FURTHER RESOLVED, That the American Bar Association recommends that relevant Federal Rules of Evidence and/or Federal Rules of Civil Procedure, and state rules be adopted or amended to provide as follows:

1) A producing party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials and the privileges. The period should commence when the party actually discovers the disclosure has been made, not from when the material was produced.

2) A party receiving notice that any inadvertently disclosed materials have been produced to it should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials until the issue is resolved.

3) Specific grounds for testing the inadvertent disclosure should be set forth and should include the following general provisions:

A) The receiving party should be allowed to challenge the disclosing party’s claim that the material is privileged.

B) The receiving party should be allowed to challenge the timeliness of the producing party’s notice recalling the material on a claim of privilege.

C) The receiving party should be allowed to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege.

4) In deciding whether privilege has been waived, the court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (a) the reasonableness of the precautions taken to prevent inadvertent disclosure; (b) the scope of discovery; (c) the extent of the disclosure; and (d) whether the interests of justice would be served by relieving the party of its error.

REPORT

Introduction

Although courts, lawyers and the legal system try to avoid mistakes, they sometimes happen. There have always been situations where, for one reason or another, material or information that one party claims to be privileged is disclosed to the other side. Formal Opinion 05-437 of the American Bar Association's Standing Committee on Ethics and Professional Responsibility therefore takes the position that a lawyer who receives a document, and knows or reasonably should know that the document was inadvertently disclosed, should promptly notify the disclosing party to permit the sender to take some action to deal with the situation.

Discovery is increasingly subjecting parties to the risk of inadvertently disclosing privileged material

Discovery has also always posed the risk of the inadvertent production of privileged material. With the advent of electronic discovery – encompassing exponentially more “documents” and electronically stored information – the problem has become more acute. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (in a case involving e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that this review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist on “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

There are no consistent rules or procedures to deal with inadvertent production of privilege material

The issue is exacerbated because there is neither a consistent substantive rule nor a consistent procedural mechanism for resolving it. In general, the courts have taken three approaches.

A minority of jurisdictions take the position that any privilege is waived once the information has been disclosed, regardless of whether the disclosure was intentional or inadvertent.

Some other jurisdictions take the opposite position, holding that no waiver occurs unless the party intended to disclose the privileged material.

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The third position, adopted by a majority of courts, is to consider all the circumstances of the disclosure to determine, on a case-by-case basis, whether the inadvertent disclosure has waived any privilege. In making this determination, these courts generally apply a multi-factor analysis that considers (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) whether the interests of justice would be served by relieving the party of its error.

Notwithstanding the varying approaches applied by the courts, ethical rules and opinions may impose a duty on the attorney receiving inadvertently disclosed privileged materials to notify the opposing party of the disclosure so the producing party can take remedial steps. Proposed federal rule changes will soon require attorneys to return or segregate these materials when notified by the adverse party until the court is able to rule on the question of waiver.

Because the courts have taken different positions on inadvertent disclosures, litigants who discover or are informed of an inadvertent disclosure may have little idea whether their privileges will continue to be enforced. Inadvertent disclosures are a recurring problem in litigation, especially in complex cases with expansive document production.

We believe that the better reasoned position is that a privilege should not ordinarily be deemed waived unless the waiver was knowing and voluntary. The attorney-client privilege and its companion, the work-product doctrine as codified in Fed. R. Civ. P. 26(b)(3), are too important to the legal system to permit an inadvertent act from overriding them.

There should be consistent rules and procedures

Courts, attorneys and parties presented with the issue of inadvertently disclosed privileged material should therefore (a) have clear, consistent rules to resolve the issue and (b) also have clear, consistent procedures to do so.

We therefore recommend that, where appropriate, the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure, along with their analogues in state rules of evidence or procedure, be amended to provide that a disclosing party may reassert its privileges by promptly notifying the other parties of the inadvertence of the disclosure and the privileges asserted. On receipt of this notice, the receiving parties must then promptly safeguard and make no further use of the inadvertently disclosed materials, but with the option of being able to then challenging the applicability of the privilege, the inadvertence of the disclosure, the timeliness of the notice, or the waiver of the privilege based on specified relevant factors.

Background

The ground rule for discovery in the federal courts is Federal Rule of Civil Procedure 26(b)(1): parties “may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party”

Under Federal Rule of Evidence 501, privileges are “governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience,” subject to any requirements imposed by the Constitution, Congress, or the Supreme Court.

For cases where the “rule of decision” for a claim or defense is governed by a state law, Rule 501 requires the federal court to apply the evidentiary privilege as determined by the law of that state.

Fed. R. Civ. P. 26(b) and Fed. R. Evid. 501, however, provide no guidance to judges, attorneys or parties about (a) what materials are exempt from discovery because they are privileged, (b) what happens when privileged material is inadvertently produced or (c) what factors and procedures should be used to decide these issues. Instead of one rule, litigants must look to a body of often conflicting case law developed by the federal and state courts. Faced with the recurring issue of inadvertent disclosures, the courts have developed three general approaches to the problem. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

First, some jurisdictions say that an inadvertent disclosure does not waive a claim of privilege. Courts taking this approach generally reason that waiver is a question of intent, and that a truly inadvertent disclosure does not demonstrate the intent required for a true waiver of the privilege. *See, e.g., Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827 (3d Cir. 1995); *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933, 940-42 (Me. 1999); *Sterling v. Keidan*, 412 N.W.2d 255, 257-58 (Mich. Ct. App. 1987).

These courts also reason that the privilege belongs to the client, not the attorney, and therefore only the client can voluntarily waive a privilege. *E.g., Herbert v. Anderson*, 681 So.2d 1127, 1128-29 (La. Ct. App. 1991); *Leibel v. General Motors Corp.*, 646 N.W.2d 179, 185-86 (Mich. Ct. App. 2002); *Harold Sampson Children’s Trust v. Linda Gale Sampson 1979 Trust*, 679 N.W.2d 794, 796 (Wis. 2004). At least one state has adopted this “no waiver” approach by placing it directly into the general discovery rules. *See Tex. R. Civ. P. 193.3(d)* (production of material without intending to waive a claim of privilege does not waive the claim if the party amends its discovery responses to assert the privilege within ten days of discovering the production was made).

Second, a few courts take the opposite view, holding that even an inadvertent disclosure waives any privilege for the materials disclosed. The finding of waiver is an automatic and necessary result of the materials having been disclosed to an opposing party. *E.g., Ares-Sereno, Inc. v. Organon Int’l B.V.*, 160 F.R.D. 1, 4 (D. Mass. 1994); *FDIC v. Singh*, 140 F.R.D. 252, 253-54 (D. Me. 1992).

Third, the majority position (including most federal courts), is to consider all relevant circumstances in determining whether an inadvertent disclosure should result in the waiver of a privilege. Among other factors, these courts examine (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the amount of time taken to remedy the error; (3) the

scope of discovery; (4) the extent of the disclosures; and (5) whether the interests of justice would be served by relieving the party of its error. *See, e.g., Alldread v. City of Grenada*, 988 F.2d 1425, 1433-34 (5th Cir. 1993) (governmental attorney-client privilege); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege); *see also Scott v. Glickman*, 199 F.R.D. 174 (E.D.N.C. 2001); *John Blair Communications, Inc. v. Reliance Capital Group, L.P.*, 182 App. Div. 578 (N.Y. Ct. App. 1992); *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1371-72 (Ill. Ct. App. 1992).

The American Bar Association's Civil Discovery Standard 28 (August 2004) advises that "[t]he parties should consider stipulating in advance that the inadvertent disclosure of privileged information ordinarily should not be deemed a waiver of that information or of any information that may be derived from it." *See also Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents").

This kind of an agreement can bind only the parties to the agreement. If they want protection against non-parties, for example, in other litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 238 (D.Md. 2005) ("it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Consistent with these principles, recent proposed amendments to the federal discovery rules, which most likely will go into effect on December 1, 2006, therefore encourage parties to discuss entering into agreements on inadvertent privilege waiver as part of early discovery planning and to have those agreements formalized by the Court in the initial scheduling order.

Where the parties do not enter into an agreement, the proposed amendments establish a procedure for the court to resolve claims of privilege after documents have been produced.

The amendments do require that a party that receives notice that the producing party is asserting a claim of privilege must "promptly return, sequester or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved." A receiving party may then "promptly present the information to the Court under seal for a determination of the claim." The proposed amendments require that "[i]f the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it" and "[t]he producing party must preserve the information until the claim is resolved."

We laud these proposed amendments and believe they should be adopted.

General ethical principles also recognize that an attorney who receives privileged material may have an obligation to notify the producing party. Formal Opinion 05-437 of the ABA's Standing Committee on Ethics and Professional Responsibility recently reaffirmed that a lawyer who receives a document, and knows or reasonably should know that the document was inadvertently disclosed, should promptly notify the disclosing party to permit the sender to take remedial action to protect the privilege. Although Formal Opinion 05-437 does not address whether the disclosure waives privilege, it recognizes that inadvertent disclosures are not uncommon in litigation, and that an attorney or party who makes an inadvertent disclosures will usually have a remedy to limit any harm caused by the disclosure. *See also* Formal Op. 94-382 (requiring attorney to notify opposing counsel of receipt of privileged materials); Formal Op. 92-368 (same).

Proposed Amendments

The Section of Litigation recommends that the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure be amended in a fashion that would (i) allow a party to continue to assert privilege for inadvertently disclosed material, (ii) require the return of this material after a timely request to do so and (iii) provide a clear set of consistent factors to be used by the court in determining whether privilege has been waived by inadvertent disclosure.

Why Rule Amendments Are Called For

Inadvertent disclosures are a real and recurring problem, particularly in this day and age of complex cases and discovery that often involves electronic information and/or significant volumes of documents. Even the most thorough screening may not prevent privileged material from slipping through the cracks in a document production. Accidental disclosures may occur for any number of understandable reasons, including (i) the failure to recognize that a communication involves an attorney, (ii) a client's mistaken inclusion of trade secret documents in a file of otherwise discoverable materials and (iii) copying or handling errors occurring after the producing attorney's review of the production documents.

Only a few courts have held that inadvertent disclosure automatically waives the client's privilege. This approach has been rejected by the overwhelming majority of courts, and rightly so. Ordinary waiver principles require that a party intentionally relinquish a known right, which is obviously not the case when a disclosure has been done inadvertently.

Most courts have therefore adopted a multi-step inquiry that considers all relevant circumstances and tends to lean in favor of preserving privilege. Part of this calculus properly includes an assessment of whether the party or counsel took reasonable steps to prevent the disclosure of privileged material. It also provides flexibility where protection of the privilege would lead to an unjust result. (We would note that the balancing-test approach is a default rule – one that the parties can modify in advance by agreement, something that is encouraged by both the ABA Civil Discovery Standards (August 2004) and the proposed amendments to the federal discovery rules.)

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The applicable rule or rules should have three major features.

First, a party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the disclosure by notifying the other parties and amending its discovery responses to identify the materials and the privileges. The period should run from when the party actually discovers the disclosure has been made, not from when the material was produced. This is consistent with both (a) the policy underlying the privilege and (b) the normal rules of waiver that require an intentional (as opposed to inadvertent) relinquishment of a known right. At the same time, the specified window would require the producing party to act promptly to remedy the disclosure once it has been discovered.

Second, any inadvertently disclosed materials should have to be promptly returned to the party that produced them, or destroyed or sequestered, while the issue is being resolved. This “preservation” provision is necessary because some parties might object to a request to return inadvertently disclosed materials, arguing that they are not privileged or that any privilege has been waived. There should therefore be an affirmative obligation on all parties to return, destroy or sequester any disputed materials until the court can consider the applicability of the asserted privileges and whether the privilege has been waived.

Third, there should be specific grounds for testing the inadvertent disclosure.

One, the receiving party should be able to challenge the disclosing party’s claim that the material is privileged. (Having already seen the material, the receiving party should be in an excellent position to assess its privileged status.)

Two, the receiving party should also be able to challenge the timeliness of the producing party’s notice recalling the material on a claim of privilege.

Three, the receiving party should be able to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege. The court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error.

We would note, however, that we recommend omitting one of the factors some courts have considered – the amount of time taken to remedy the error – from this list. To provide clarity and certainty (and to comport with the policy underlying privilege and the normal rule of waiver), the sole test in terms of time should be whether the disclosing party has given notice of the inadvertent disclosure within a specified number of days of actually discovering it. If notice was given within this time, it is timely. If not, it is not timely, and the material should no longer be entitled to protection as privileged.

The proposed House of Delegates resolution also calls on the states to adopt analogous state rules so there will be consistency and predictability to this important recurring issue.

We would also note that some commentators have suggested that Congress, pursuant to its Commerce Clause powers, should adopt a nationwide rule that would apply in both federal and state courts. Given litigation has become increasingly “multi-state” and involves courts, parties and issues in more than one state, we would also applaud the adoption of a nationwide standard.

Brad D. Brian, Chair
Section of Litigation
August 2006