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Amendments to the Americans with Disabilities Act Change Legal Landscape for Employers

By Darryl G. McCallum

On January 1, 2009, the much anticipated amendments to the Americans with Disabilities Act (ADA) took effect, drastically altering the manner for determining whether an employee is "disabled." These amendments, known as the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) will undoubtedly make ADA claims much more appealing to plaintiffs' attorneys. As a result, in-house counsel and their clients should be prepared for a new wave of litigation under this statute.

To put it briefly, the amendments to the ADA have extended its protections to a larger percentage of the population than the law previously protected. According to the Education and Labor Committee of the U.S. House of Representatives, in 2004, plaintiffs lost 97 percent of ADA employment discrimination claims, often because the employee did not have an impairment that qualified as a "disability" under the ADA. Individuals with impairments such as epilepsy, cerebral palsy, and multiple sclerosis were often unable to establish that they were disabled. Under the ADAAA, individuals with these and other impairments will be able to establish much more easily that they are disabled. As a result, in-house counsel will need to work

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The Impact of *LaRue v. DeWolff, Boberg & Associates, Inc.*, on the Administration of 401(k) Plans

By Jeremy L. Ross

Employers and administrators responsible for 401(k) defined contribution plans are responding to a recent U.S. Supreme Court decision that expanded fiduciary liability under the Employment Retirement Income Security Act of 1974 (ERISA) to include claims relating to the management of individual 401(k) plan accounts of employee-participants. On February 20, 2008, the Supreme Court unanimously held in *LaRue v. DeWolff, Boberg & Associates, Inc.,* that section 502(a)(2) of ERISA[1] authorizes a participant in a defined contribution plan to sue a plan fiduciary for losses caused by a fiduciary breach that decreases plan assets in his or her individual account.[2] Prior to *LaRue*, most practitioners understood that participants bringing suit under section 502(a)(2) could only seek relief on behalf of the "entire plan," a derivative-style claim for harm to the plan as a whole, pursuant to the Supreme Court's earlier decision in *Massachusetts Mutual Life Insurance Company v. Russell*.[3]

James LaRue filed suit in 2004 against his former employer, DeWolff, Boberg & Associates, Inc., and the ERISA-regulated 401(k) retirement savings plan DeWolff administered, for breach of fiduciary duty under ERISA.

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Highlights

Protecting the Privilege: New Federal Rule of Evidence 502

By Courtney Ingraffia Barton and David D. Cross

On September 19, 2008, President Bush signed into law a bill that amended the Federal Rules of Evidence (FRE) to add new Rule 502. This new rule addresses privilege waiver—arguably one of the greatest risks and sources of costs associated with the incredible volume of information (primarily electronic) that is now being produced in litigation. The rule does not change federal or state law of attorney-client privilege or the work-product doctrine, but rather limits the consequences when privileged information is disclosed.

Rule 502 provides the following:

- When waiver has occurred, subject matter waiver will not result unless the disclosure was intentional and produced for an unfair advantage.
- Inadvertent disclosure will not result in waiver as long as reasonable steps were taken to protect the privilege.
- Non-waiver agreements signed by the parties will be given their full effect with respect to those parties in the proceedings in which the agreements are entered.
- Non-waiver agreements entered as an order of a federal court will be given full effect in both federal and state proceedings.

There has been a lot of press about new Rule 502, but contrary to popular belief, while the new rule does provide additional protection to parties, it does not eliminate the need for some reasonable, manual review to protect client confidences and attorney work product. This article will discuss the history and purpose of the rule and its practical implications as well as offer a few practice guidelines in light of its provisions.

Procedural History of Federal Rule of Evidence 502

Rule 502 was first contemplated in March 2006 by House Judicial Committee Chair F. James Sensenbrenner, who recognized the need to address the rising costs of litigation due in part to the privilege review required of vast amounts of electronic information.[1] A new rule of evidence was sought to mitigate these costs by substantially limiting subject matter waiver, restricting waiver to intentional or unreasonable disclosures, and giving full effect to non-waiver agreements, which were then the subject of proposed amendments to Federal Rule of Civil Procedure (FRCP) 26(b)(5). These issues were raised by Magistrate Judge Paul Grimm in *Hopson v. Mayor*,[2] a decision cited in the notes to Rule 502.

Pursuant to the Rules Enabling Act, because the rule affects an evidentiary privilege, it could not be adopted via the traditional rule-making process. Rather, Congress had to enact it (and the President had to sign it) into law through its authority under the Commerce Clause.[3]

The original draft of the rule was the subject of hearings at Fordham University in April 2006, which was moderated by the Honorable Jerry E. Smith, Fifth Circuit Court of Appeals, and Dan Capra, Fordham School of Law, and attended by several distinguished speakers, including Judge Grimm, to testify about the need for the proposed rule.[4] From the Fordham hearings, a series of recommendations were made by the Advisory Committee on Evidence Rules (Advisory Committee) in May 2006 to the chair of the Federal Standing Committee on Rules of Practice and Procedure (Standing Committee). On June 22, 2006, the Standing Committee approved a proposed amendment (that incorporated input from the Fordham hearings) with a recommendation that it be published for public comment. After a public comment period from August 2006 to February 2007, which included 70 public comments and two additional hearings, the Advisory Committee issued a revised rule that was approved by the Standing Committee and the Judicial Conference.[5]

On September 26, 2007, the Honorable Lee H. Rosenthal, the chair of the Committee on Rules of Practice and Procedure, submitted the final proposed amendment to the Senate Committee on the Judiciary.[6] And on December 11, 2007, Senator Patrick Leahy (D-VT) introduced S.2450 to the Senate Judiciary Committee, which incorporated the language forwarded by the Judicial Conference.

Upon introducing the bill, Senator Leahy noted: "Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials. With the routine use of email and other electronic media in today's business environment, discovery can encompass millions of documents in a given case, vastly expanding the risks of inadvertent disclosure. . . . Our proposed legislation would set clear guidelines regarding the consequences of inadvertent disclosure of privileged material and provides that so long as reasonable steps are taken in the prevention of such a disclosure . . . no waiver will result."[7]

Senator Leahy was joined in his support of the bill by Senator Arlen Specter (R-PA), the ranking member of the committee, who noted that "the proposed rule enjoys wide support from parties on both sides of the 'v.' Both plaintiffs and defendants want this rule because it makes litigation more efficient and less costly; it ensures that the wheels of justice will not become bogged down in the mud of discovery."[8] Both senators urged the Senate to pass the proposal.

On February 27, 2008, the Senate passed the bill without amendment by unanimous consent, and the next day, it was received in the House, where Representative Sheila Jackson-Lee (D-TX) stated that "the plaintiff bar and the defendant bar have come together in a unanimous voice, indicating that this will in fact enhance their ability to represent their clients and to ensure that they may

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have the broadest based discovery possible."[9] The House then passed the bill on September 8, 2008,[10] and President Bush signed the bill into law on September 19, 2008. Rule 502 applies to all proceedings initiated after that date and to earlier-initiated proceedings "in so far as [they are] just and practicable."[11]

Key Provisions of Rule 502

Subsection (a): Subject Matter Waiver

This section of Rule 502 all but eliminates subject matter waiver, a common law doctrine that provides that "any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to *all information related to the same subject matter*."[12]

According to the Judicial Conference, the Advisory Committee recognized that the current law of privilege waiver "is responsible in large part for the rising costs of discovery. . . . In complex litigation the lawyers spend a significant amount of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well."[13]

Rule 502(a) effectively eliminates this risk by restricting subject matter waiver only to intentional disclosures; thus, parties need no longer fear broad waiver from inadvertent disclosure. According to the committee's notes, the "rule does not attempt to alter federal or state law on whether a communication is protected as attorney client privilege or work product as an initial matter," but the rule rejects the notion that inadvertent disclosure automatically constitutes a subject matter waiver.[14]

In fact, Rule 502(a) goes even further by rejecting automatic subject matter waiver even for intentional disclosure. The rule permits subject matter waiver only where undisclosed communications concerning the same subject matter "ought in fairness to be considered together" with the intentionally disclosed communications. The Judicial Conference explained that fairness demands subject matter waiver when a party "intentionally puts protected information into the litigation in a selective, misleading and unfair manner."[15] Therefore, even intentional disclosure of privileged material is unlikely to lead to waiver beyond the disclosed materials unless done with a motive akin to mal-intent.

Subsection (b): The Middle-Ground Approach to Waiver and Inadvertent Disclosure

This section of the rule changes the substantive law of waiver in the context of inadvertent disclosure. The courts have developed three basic approaches to inadvertent disclosure and waiver: (1) the "strict accountability" approach, which nearly always finds waiver; (2) the lenient "to err is human" approach, which typically finds no waiver has occurred because inadvertent production is unintended; and (3) the "balancing test" or middle-ground approach, which looks to see if the conduct is excusable and thus does not warrant waiver.[16] Rule 502(b) has eliminated the first two approaches, requiring all federal courts to now take the middle-ground approach to waiver for inadvertently disclosed information. The court must consider whether the holder of the privilege took reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error once the holder knew or should have known of the disclosure, which may include following the procedures in FRCP 26(b)(5)(B).

A number of courts in the Fourth Circuit have applied the middle-ground approach to inadvertent disclosure and waiver, and those decisions may provide some insight into how courts will apply Rule 502(b).[17] Judge Grimm, one of the contributors to Rule 502, recently shed some light in *Victory Stanley, Inc. v. Creative Pipe, Inc*. on what courts may consider reasonable precautions and a reasonably prompt response to inadvertent disclosure.[18] In *Victory Stanley*, the defendants produced to the plaintiff 165 electronic records that they subsequently demanded be returned as privileged upon the claim that the records had been inadvertently produced.[19] Judge Grimm found that any privilege had been waived because the defendants had not taken reasonable steps to protect the privilege before disclosure and had not acted reasonably promptly in correcting the error after disclosure.[20]

In *Victor Stanley*, the defendants claimed that they used electronic search processes and keyword searches to identify potentially privileged documents and had not manually reviewed the documents for privilege, except those that were not text-searchable. (The defendants claimed that they primarily reviewed the names of these documents rather than their full contents.)[21] In finding the defendants' search-and-review protocol "not reasonable" to protect privilege, Judge Grimm acknowledged that "keyword searches have long been recognized as appropriate and helpful" for search and retrieval of electronically stored information (ESI), but he emphasized that parties must take certain steps to ensure the sufficiency of these searches and be prepared to defend the searches before the court if challenged.[22] Two significant steps stressed by Judge Grimm were: (1) the search protocol must be designed by persons with "the requisite qualifications and experience based on sufficient facts or data and using reliable principles or methodology"; and (2) manual review of at least some portion of both the documents to be produced and those to be withheld must be performed to determine whether the searches are under-inclusive or over-inclusive.[23]

In finding that the defendants in *Victor Stanley* had not reasonably promptly rectified the disclosure, the "more important period of delay" for Judge Grimm was not the period between the defendants learning of the disclosure and asserting privilege over the documents, but rather the one week that passed between production of the documents and identification of the disclosure by the plaintiff.[24] That is, the "reasonably prompt" response period did not run from when the defendants learned of the inadvertent disclosure but from when the disclosure was made. Judge Grimm's view seems to be that the defendants should have continued to test the quality of their search protocol and manually review their production after the documents were produced, and their failure to do so resulted in an unreasonable delay

in identifying and correcting the inadvertent disclosure. The fact that the defendants responded promptly to the plaintiff once they learned of the inadvertent disclosure was not sufficient.[25]

In short, *Victory Stanley* sends a warning that producing documents without at least some manual review of both the documents produced and the documents withheld and without relying on qualified persons to design the search protocol may not satisfy the reasonableness requirements of Rule 502(b).

Subsection (c): Disclosures Made in State Proceedings

This section of the rule enables parties to a prior state proceeding to belatedly avail themselves of the protections of Rule 502 or to invoke the protections of state law if they later find themselves in a federal proceeding. Rule 502(c) provides that when privileged material is disclosed in a state proceeding and is not subject to a court order in that proceeding, there will be no waiver in a federal proceeding if one of two conditions is met: (1) the disclosure would not have been a waiver under Rule 502, thereby retroactively applying Rule 502 to the disclosure; or (2) the disclosure is not a waiver under the applicable state law, thereby applying state law in a federal proceeding even where federal law would find waiver.

Subsections (d) and (e) may ultimately reduce discovery costs and burdens associated with privilege review and may expedite discovery.

Subsections (d) and (e): Non-Waiver Agreements and Court Orders

These sections of the rule ensure that parties that enter into non-waiver agreements, either in a stand-alone agreement or in an agreement that becomes an order of the court, receive the full protections of those agreements. Rule 502 makes clear, though, that the protections of such agreements are far greater when the agreement is entered as a court order. Subsection (d) provides that a federal court order concerning protection or waiver of privilege applies with full force and effect in any other federal or state proceeding and even as to third parties. Under subsection (e), on the other hand, non-waiver agreements between parties that are not entered as a court order apply only to the parties to the agreement, and thus, disclosure pursuant to such agreements may constitute waiver when challenged by third parties.

Subsections (d) and (e) of the rule are the heart of the cost-saving mechanisms provided by Rule 502, and it is these mechanisms—coupled with the near elimination of subject matter waiver—that ultimately may reduce discovery costs and burdens associated with privilege review and that may expedite discovery.

Before the enactment of Rule 502, parties that entered into non-waiver agreements did so at grave risk of waiver in other proceedings because there was no protection against waiver claims asserted in other courts or by third parties and findings of subject matter waiver. This concern was stressed by Judge Grimm in *Hopson*, and it was that opinion that prompted these provisions of Rule 502.[26] Judge Grimm opined that courts could alleviate this concern by issuing orders under FRCP 16 (scheduling orders), 26(c) (protective orders), or 26(b)(2) (discovery management orders) "that incorporate procedures under which electronic records will be produced without waiving privilege or work product that the courts have determined to be reasonable given the nature of the case, and that have been agreed to by the parties."[27] Rule 502(d) codifies the wisdom of Judge Grimm by guaranteeing full protection against waiver where a court has entered an order governing privilege waiver, thus validating and enforcing so-called "clawback" agreements and "quick-peek" arrangements, which have become popular cost-saving devices in e-discovery.[28]

Is the Selective Waiver Doctrine Still Viable?

The initial draft of Rule 502 also addressed the highly controversial issue of selective waiver.[29] Under the doctrine of selective waiver, intentional disclosure of protected information to a government agency in cooperation with an investigation does not necessarily constitute a waiver of privilege.[30] This provision was cut from the final draft of the rule as enacted, and it is unclear what this means for the survival of the selective waiver doctrine.[31] Although Rule 502 does not explicitly acknowledge selective waiver, neither does the rule explicitly eliminate it as a viable doctrine. Even though disclosure in selective waiver contexts is intentional, some courts nonetheless have held, under the selective waiver doctrine, that this intentional disclosure does not waive privilege.[32] And nothing in Rule 502 provides the contrary—namely, that intentional disclosure necessarily waives privilege. The only reference to intentional disclosure in the rule as enacted is in subsection (a), but this section merely defines the scope of waiver for when the disclosure is intentional (i.e., once a court has determined there has been waiver, the rule defines whether that intentional disclosure rises to a level that justifies full subject matter waiver). It does not identify the circumstances that give rise to waiver. Thus, the determination of when intentional disclosure constitutes waiver seemingly remains with the courts.

Subsection (d) arguably provides a vehicle for parties to apply selective waiver. If a company were to enter into a non-waiver agreement as an order of a federal court with the government agency conducting the investigation, the company arguably then could disclose to the government privileged documents and be insulated from claims of waiver in any federal or state proceedings.[33] Therefore, courts—including those that applied the selective waiver doctrine before Rule 502—may be reluctant to apply the doctrine in the absence of a court-ordered non-waiver agreement.

While some may argue that the demise of the selective waiver doctrine is implicit in the rule and the refusal to include language acknowledging the doctrine—and some courts ultimately may agree—it remains to be seen whether selective waiver will survive Rule 502.

Practice Guidelines under Rule 502

It is particularly important that in the absence of a court-ordered non-waiver agreement, parties take reasonable steps to protect privileged information from disclosure. This means that they must perform at least some reasonable manual review of potentially privileged documents. Nothing in the text or legislative history of Rule 502 suggests that it was intended to eliminate manual review entirely, and indeed, decisions such as *Hopson* and *Victory Stanley* make it clear that at least some courts will require some sort of privilege review to satisfy the reasonableness requirements of Rule 502(b). What constitutes a reasonable review is within the discretion of the courts. In some cases, it may be sufficient, for example, to perform sampling on the documents using keyword searches or another search device and then manually review only those documents captured in the sample; in other cases, a full document-by-document review may be required. Given Congress's express intention in enacting Rule 502 to reduce the significant costs associated with manual privilege reviews, one would expect courts to require document-by-document review now only in rare or unusual circumstances, but this remains to be seen.

Even with a court-ordered non-waiver agreement, it still may be necessary to conduct some sort of privilege review. It is unclear whether Rule 502(d) is subject to the reasonableness requirements of Rule 502(b) regarding inadvertent disclosure. On the one hand, courts may interpret Rule 502(d) as standing apart from 502(b) such that courts will not analyze whether the parties took "reasonable steps" to protect privilege where they have a court-ordered non-waiver agreement. In other words, a court-ordered non-waiver agreement would eliminate the need to take any other steps, including manual review, to protect privilege. On the other hand, courts may interpret Rule 502(b) as applying to all inadvertent disclosures, such that even where the parties have a court-ordered non-waiver agreement, they still would be required to have taken some additional steps to protect privilege and avoid waiver. Under this interpretation of the rule, parties with court-ordered non-waiver agreements nonetheless would have to perform at least some sort of privilege review. Until this question has been answered by the courts, parties may be wise to continue to perform at least some reasonable manual review even when they have a court-ordered non-waiver agreement to avoid the risk of waiver.

Parties often will be well-served by entering into court-ordered non-waiver agreements. In *Victor Stanley*, one of the factors stressed by Judge Grimm in support of his finding of waiver was the defendants' decision not to enter into a "clawback" agreement.[34] Judge Grimm observed that had the defendants "not voluntarily abandoned their request for a court-approved non-waiver agreement, they would have been protected from waiver."[35] If courts ultimately interpret Rule 502(d) as not subject to Rule 502(b), one substantial benefit of a court-ordered non-waiver agreement would be that it would eliminate in such cases the uncertainty (and risk) as to what the court will require as "reasonable steps" under Rule 502(b). And even if courts were to require "reasonable steps" under Rule 502(b) in all cases, a court-ordered non-waiver agreement still may help avoid uncertainty and risk if the parties were to identify in the order the specific steps they will take to protect privilege, thereby having these steps acknowledged up front as reasonable and sufficient by the court in the order incorporating the non-waiver agreement.

Regardless of whether courts ultimately require manual review, pre-production review may still be the most prudent approach in many cases. Indeed, waiver or not, privileged information once released can put a party at a strategic disadvantage. Although the inadvertently disclosed document must be returned, the information is still known to the other side, and a clever adversary may figure out a way to properly use that information to its advantage. For example, the adversary could depose a sender or recipient of the document about the facts reflected in the document without referencing the document itself or the privileged communication contained in the document, and the witness would be compelled to testify to those facts.[36] Ultimately, clients and counsel will have to make cost-benefit assessments on a case-by-case basis to determine what type of review, if any, is needed. In some cases, with a court-ordered non-waiver agreement, it may be sufficient only to review documents from certain custodians, such as those who communicate regularly with counsel, and perhaps in other cases, the risk of harm from inadvertent disclosure may be so small that review may not be warranted. Rule 502 now enables parties to make these assessments in a way that they could not before (at least not without substantial risk of waiver, including potentially devastating subject matter waiver), but the rule does not entirely eliminate the risks of disclosing privileged information to an adversary.

A lawyer has an obligation to engage in discovery in a responsible manner and to conduct a "reasonable inquiry" to determine whether discovery responses are sufficient and proper.

In addition to the practical concerns that may warrant manual review, counsel's ethical obligations also may require at least some manual review. A lawyer has an ethical obligation to protect client confidences, and this must be considered when entering into non-waiver agreements or taking other steps that increase the chance of disclosing client confidences to an adversary, even though the documents reflecting those confidences may be returned and not used by the adversary. A lawyer also has an obligation under FRCP 26(g) to engage in discovery in a responsible manner and to conduct a "reasonable inquiry" to determine whether discovery responses

are sufficient and proper.[37] It is at least possible that a court or state bar counsel could find that producing documents in response to discovery requests without any manual review does not constitute a "reasonable inquiry" or "reasonable diligence" in discovery. Indeed, it arguably may be difficult for a lawyer to certify under Rule 26(g) that document production is complete if nobody has set eyes on the documents to determine the completeness of the collection and production.

Parties relying on electronic search tools to identify privileged documents should be sure that those tasked with developing search protocols possess the requisite knowledge, experience, and expertise to do so. Magistrate Judge John M. Facciola's two recent decisions in *Equity Analytics, LLC v. Lundin*[38] and *U.S. v. O'Keefe*[39] have sparked significant controversy over whether parties need experts that meet the requirements of FRE 702 to design and defend electronic search protocols for document collections and productions.[40] Even if few courts ultimately decide that such expertise is required, the reasonableness requirements of Rule 502(b) nonetheless make it clear that parties relying on electronic search tools will have to show that the protocol was reasonably effective. To that end, while the most prudent course may be to agree with opposing counsel about search terms, in the absence of an agreement, litigation counsel typically would be wise in designing search protocols to consult key custodians on relevant terminology, IT personnel on where and how ESI is stored and can be searched, and possibly, in some cases, an expert on the matter who can offer insight on how to develop effective complex searches using such devices as Boolean and "fuzzy" searches.[41] Counsel also will need to take steps to ensure that the search protocol is neither under-inclusive nor over-inclusive, which may require sampling or some other measure.[42]

Parties should understand that an assessment under Rule 502(b)(3) of whether a privilege "holder promptly took reasonable steps to rectify" an inadvertent disclosure may possibly run from the moment of disclosure rather than from the discovery of the disclosure.[43] Under this approach, parties may be well served by conducting at least some post-production review of documents produced to ensure that any inadvertently produced privileged documents are quickly identified and measures are promptly taken to rectify the error.

Parties involved in an investigation by a federal agency likely need not fear broad subject matter waiver for disclosure of privileged documents, as long as the disclosure is not made in a "selective, misleading, and unfair manner."[44] But they nonetheless must consider that in light of Rule 502, selective waiver possibly has been relegated to the wastebasket of discarded legal doctrines and the resulting likelihood that disclosure to government agencies in the absence of a court-ordered non-waiver agreement will constitute waiver at least as to the documents disclosed.

Finally, counsel and clients should bear in mind that the provisions of Rule 502 expressly apply only "to disclosure of a communication or information covered by the *attorney-client privilege or work-product protection*."[45] This means that the provisions of Rule 502 do not apply to other privileges that the courts have recognized, such as the physician-patient privilege, spousal privilege, and executive privilege. Thus, parties will need to approach protection and waiver of other recognized privileges in the same manner that they have before enactment of Rule 502.

Only time will tell whether Rule 502 will achieve the cost-savings intended. This will depend in large part on what "reasonable steps" courts require to protect the privilege and to rectify inadvertent disclosures under Rule 502(b). If parties can satisfy the rule with less than a full-blown manual document-by-document review, then cost-savings should be forthcoming. On the other hand, parties may want to wait and see how the rule is tested in the courts before abandoning traditional review, and many may see manual review as the only way to avoid the harms of exposing their client's confidential and privileged information to their adversary. Moreover, if parties are required to retain experts to design and defend electronic search protocols in lieu of painstaking manual review, then review costs may be replaced by expert costs.

If nothing else, however, the substantial erosion of subject matter waiver and the security provided by court-ordered non-waiver agreements under Rule 502 are material changes in the law that should provide significant solace to counsel and clients dealing with the overwhelming burden of searching, retrieving, reviewing, and producing millions of electronic records in a timely fashion. At least now if the barn doors are inadvertently opened, an adversary can only get the horse that got away rather than the full stable of horses still inside the barn.

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Endnotes

1. *See* S. Rep.110-264 at 4 (2008).
2. 232 F.R.D. 228, 237 (D. Md. 2005).
3. 28 U.S.C. § 2074(b).
4. *See* Fordham University School of Law Advisory Committee on Evidence Rules: Hearing on Proposal 502, April 24, 2006.
5. *See* U.S. Judicial Conference's Letter to Congress on Evidence Rule 502, September 26, 2007. *Available at* www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.
6. *Id.*
7. 153 Cong. Rec. S 15140, *S15142 (Dec. 11, 2007).
8. *Id.*
9. 154 Cong. Rec. H7817 (Sept. 8, 2008).
10. *Id.*
11. Fed. R. Evid. 502.
12. Hopson v. Mayor, 232 F.R.D. 228, 237 (D. Md. 2005) (quoting In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988)) (emphasis added).
13. *See supra* note 5.
14. *Id.* As noted by the Judicial Conference, the rule rejects the holding in In Re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.
15. *See supra* note 5.
16. For a more detailed discussion of these approaches and key cases, *see Hopson,* 232 F.R.D. at 235.
17. *Id.*

18. 250 F.R.D. 251 (D. Md. 2008). Although *Victory Stanley* preceded the enactment of Rule 502, Judge Grimm certainly had the provisions of the new Rule in mind when he wrote the decision. *See Id*. at 258 n.5.

19. *Id.* at 253.

20. *Id.* at 262–63.

21. *Id.* at 254–58.

22. *Id.* at 259–61.

23. *Id.*

24. 250 F.R.D. at 263.

25. *Id.* at 255, 263. *See also Hopson*, 232 F.R.D. at 244–46 (observing that where "less than full pre-production privilege review" is warranted under the "cost-benefit balancing factors listed in Rule 26(b)(2)," some pre-production and post-production privilege review nonetheless are required in order to reasonably safeguard privilege by avoiding, and promptly rectifying, inadvertent disclosure).

26. 232 F.R.D. at 233–35 ("Although the use of 'non-waiver' agreements presently may be growing—and if the proposed changes to the discovery rules are adopted they can be expected to increase significantly—they certainly are not risk-free. Some commentators appear to be openly skeptical of their ability to insulate the parties from waiver, and even if they are enforceable as between the parties that enter into them, it is questionable whether they are effective against third-parties.") (citations omitted).

27. *Id.* at 239.

28. A "clawback" agreement is an agreement between the parties that the production of privileged information does not constitute a waiver. It typically sets forth a process for retrieval of inadvertently produced privileged information. A "quick-peek" arangement allows a requesting party to see a responding party's entire data collection before production and to designate those items that they believe are responsive to the discovery requests. The parties typically agree that any privileged information disclosed to the requesting party's counsel in the quick-peek review does not constitute a waiver. *See* Kenneth J. Withers, *Electronic Discovery Disputes: Decisional Guidance*, Civil Action (Nat'l Ctr. for State Courts, Williamsburg, Va.), 3(2), Summer 2004, at 4–5. *Available at* www.ncsconline.org/Projects_Initiatives/Images/CivilAction-Summer04.pdf.

29. In re Initial Public Offering Securities Litigation, 249 F.R.D. 457, 463 (S.D.N.Y. 2008).

30. *See, e.g.,* Diversified Industries v. Meredith, 572 F.2d 596, 607, 611 (8th Cir. 1978) (applying selective waiver to deny production to civil plaintiffs of a report prepared by outside counsel, hired to conduct an internal investigation, and produced to the Securities and Exchange Commission in response to a subpoena). Cf. In re Columbia/HCA Healthcare, 293 F.3d 289, 298–303 (6th Cir. 2002) (analyzing the case law on "selective waiver" and ultimately rejecting the doctrine upon the reasoning that parties should not be permitted to use privilege as both shield and sword by "picking and choosing" what may be disclosed and to whom).

31. 249 F.R.D. at 463–65 (discussing the various public comments offered for and against "selective waiver" during the drafting of Rule 502).

32. *See, e.g., Diversified Industries*, 572 F.2d at 607, 611. At least the First, Third, Fourth, Sixth and D.C. Circuits, however, have rejected selective waiver for attorney-client privilege. *See, e.g.,* United States v. Mass. Inst. of Tech., 129 F.3d 681 (1st Cir. 1997); Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991); In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988); In re Columbia/HCA Healthcare, 293 F.3d 289 (6th Cir. 2002); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). The Eighth Circuit, although acknowledging selective waiver for attorney-client privilege in *Diversified Industries*, has rejected selected waiver for attorney work-product protection. *See* In re Chrysler Motors Corp. Overnight Evaluation Program Lit., 860 F.2d 844 (8th Cir. 1988) (holding that work-product protection is waived by disclosure).

33. Because selective waiver typically occurs during a government investigation before any court action is commenced (and in fact is intended to avoid such action), there often is no pending action in which the company and the government can have a non-waiver agreement entered as a court order. But such an order might be obtained in such circumstances by having the government agree (or requiring the government) to subpoena the documents and move to compel their production, at which point the court ruling on the motion might be persuaded, either by stipulation between the company and the government or by motion practice, to enter an order containing a non-waiver agreement, which then would have the effect of the selective waiver doctrine.

34. 250 F.R.D. at 255, 262–63.

35. *Id.* at 262.

36. Were the witness to contradict the facts reflected in the inadvertently disclosed document, the court may think twice about precluding the use of the document as privileged given that the document would suggest that the witness had testified dishonestly (especially if it were the only means of impeachment).

37. *See* Qualcomm, Inc. v. Broadcom Corp., No. 05CV1958-B, 2008 WL 66932 at *13 (D.D. Cal. Jan. 7, 2008) (citing Fed. R. Civ. P. 26(g) and Advisory Comm. Notes (1983 Amendment), vacated on other grounds, No. 05CV1958-RMB, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). Lawyers have a similar obligation under the ethical rules. *See, e.g.,* ABA Model Rule of Professional Conduct, Rule 3.4 ("[A] lawyer shall not in pretrial procedure . . . fail to make [a] reasonably diligent effort to comply with a legally proper discovery request by an opposing party.").

38. 248 F.R.D. 331, 333 (D.D.C. 2008) ("[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony that meets the requirements of Rule 702 of the Federal Rules of Evidence.").

39. 537 F.Supp.2d 14, 24 (D.D.C. 2008) ("Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. . . . Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.").

40. *See Victory Stanley*, 250 F.R.D. at 261–62 n.10.

41. For a discussion of various search tools, *see id.* at 261 n.9.

42. *Id.* at 259–61.

43. *Id.* at 263.

44. U.S. Judicial Conference's Letter to Congress on Evidence Rule 502, September 26, 2007. *Available at* www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

45. Fed. R. Evid. 502 (emphasis added).