

Federal Rule 502(b) Inadvertent Disclosure

Robert M. Manley McKool Smith, P.C.

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Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir.1993)

Facts

- -City Exec. Session tapes
- -Adopted N.D. Cal.
- "Hartford" 5 factors:
- No reasonable precautions
- Limited discovery scope
- Complete disclosure -but-
- -Disclosure was inadvertent
- -Priv. asserted upon discovery
- -Fairness leans to non-waiver

Ruling: NO WAIVER

- 1 the reasonableness of precautions taken to prevent disclosure;
- 2 the amount of time taken to remedy the error;
- 3 the scope of discovery;
- 4 the extent of disclosure; and
- 5 the overriding issue of fairness.

Rule 502(b): Inadvertent Disclosure

Disclosure in a Federal proceeding does not waive in a Federal or State proceeding if:

- 1. Inadvertent;
- 2. Privilege holder took reasonable steps to prevent disclosure;
- 3. Privilege holder took prompt, reasonable steps to rectify the error, including following Rule 26(b)(5)(B)

Rule 26(b)(5)(B): Information Produced

If inadvertent disclosure is made in Federal proceeding:

- 1. The party claiming privilege may notify the party receiving the materials of the claim and the basis for same.
- 2. The receiving party:
 - a. Must return, sequester or destroy the material;
 - b. Must not use or disclose until claim resolved;
 - c. Must take reasonable steps to retrieve if previously disclosed; and
 - d. May promptly present the material under seal to the Court for resolution of the claim.
- 3. Producing party must preserve the information until claim us resolved.

Rule 502(b): Applicability

As adopted September 19, 2008, Pub.L. No. 110-322, § 1, 122 Stat. 3531.

Effective Date:

The amendments made by this Act shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.

Rule 502(b): Purpose

- [¶8] Courts are in conflict over whether inadvertent disclosure waives privilege/protection.
- [¶9] Rule opts for the middle ground.
- [¶10] Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985) sets forth multi-factor to determine whether there is waiver.
 - Rule does not explicitly codify test
 - Rule is flexible to accommodate other factors

Fed.R.Evid. 502(b) advisory committee's note.

Rule 502(b): Additional Considerations

[¶10] A court may consider several factors, including:

a. the number of documents to be reviewed and the time constraints for production;

b. whether a party that used advanced analytical software applications and linguistic tools in screening for privilege and work product; and

c. whether the implementation of an efficient system of records management before litigation.

Fed.R.Evid. 502(b) advisory committee's note.

Am. Coal Sales Co. v. Nova Scotia Pwr. Inc., 2009 WL 46576 (S.D. Ohio Feb. 23, 2009)

Facts

- -1 counsel's email produced
- -2 attnys. rev.'d docs. prior
- -1 doc. out of over 2000
- -Doc. had not "worked its way into fabric of litigation"
- -Prompt measure to rectify taken
- -Fairness toward non-waiver

Ruling NO WAIVER

- -Used 5-factor test
- -Found test consistent with Rule 502

Heriot v. Byrne, 2009 WL 742769 (N.D. III. Mar. 20, 2009) Facts

- -Ps hired document vendor
- -"Master" DB created
- -Paralegals and non-lawyers reviewed and coded MDB
- -"Immigration" used as code
- -Ps search for responsive docs
- -Coded for "Production" DB
- -Coded for confidentiality

Ps gave vendor paper visa Instructed vendor to:

- -Scan and add to MDB
- -Copy scan to PDB
- -Stamp "highly confidential"
- -Put sensitive papers in front

Heriot v. Byrne

Facts

- -Vendor miscoded scans
- -Vendor copied all miscoded scans into PDB
- -Vendor inadvertently produced additional attorney client privileged emails with miscoded immigration scans
- -1499 docs (6952 pages)

- -D's counsel confirmed nothing withheld on privilege basis
- -Prior to deposition, P's counsel discovered production
- -Next day P's counsel requested return
- -D's counsel sequestered
- -D's counsel tendered for in camera inspection

Heriot v. Byrne

Holding: NO WAIVER

Extent of disclosure

Prompt remedy

Pre-disclosure efforts

Post production review

13% not insubstantial -

Letter within 24 hrs +

Non-lawyers' review ø

No analytic software ø

No comment on how Ps

kept records prior to

litigation ø

[Documents properly id.'ed]

No duty to re-review

Heriot v. Byrne Additional Analysis

- 1. Focuses on the 502 elements and uses the Judson [five] factors, where appropriate, to supplement this analysis.
- 2. "Court decline to hold that using paralegals or non-lawyers to review documents was per se unreasonable."
- 3. "Ps relied, and should be able to rely, on the vendor faithfully carrying out its instructions."
- 4. "Ps had no duty to re-review the documents after providing them to the Vendor. That would be duplicative, wasteful, and against the spirit of FRE 502."

AHF Cmty. Dev., L.L.C. v. City of Dallas, 2009 WL 348190 (N.D. Tex. Feb. 12, 2009) (Chief Judge Fitzwater)

Facts

- -Emails produced
- -New lit. mgmt. software
- -Emails marked as exhibits
- -Witness testified on emails
- -No objection in depo.
- -A/C priv. claimed afterwards
- -Revised priv. log produced

Ruling WAIVER

- -Production was inadvertent
- -Privileged waived at depo.
- -Court noted New Rule 502
- -No need to "specifically address" Rule 502(b)
- -Used *Alldread/Hartford* factors

Relion, Inc. v. Hydra Fuel Cell Corp., 2008 WL 5122828 (D. Or. Dec. 4, 2008)

Facts

- -P assembled 40 feet docs.
- -P attnys & staff rev.'d docs.
- -D flagged re-exam files as inadvertently produced
- -P files removed
- -D provided P text searchable copies of selected docs
- -2 emails produced
- -D sent letter 3 days after discovery demanding return

Ruling WAIVER

- -P had 3 opportunities to review
 - Prior to D's review
 - When hard copies rec'd.
 - When elec. copies rec'd.
- -No deception on D's part

 "D did not pursue all
 reasonable means of
 preserving confidentiality."

Rule 502 Cases: See also

B-Y Water District v. City of Yankton, 2008 WL 518837 (D. S.D. 2008) (Counsel became aware of an inadvertent production of attorney-client privileged materials at a deposition and immediately objected and stated production was inadvertent; there was only an inadvertent production of 3 pages from a total of 3,380 pages produced; no waiver).

Rhoads Industries v. Building Materials Corp., 254 F.R.D. 216 (E.D. Penn. 2008) (800 pages inadvertently produced when Rhoads hired an IT consultant and purchased a software program to assist with electronic discovery; the technical consultant and counsel were not sufficiently careful to review the software screening: mixed ruling).

Alcon Mfg v. Apotex, Inc., 2008 WL 5070465 (S.D. Indiana 2008) (deposition exhibit had marginalia to which, when recognized at second deposition as belonging to IP counsel, an objected was asserted; the protective order required counsel to promptly make a good faith representation that a production was inadvertent or mistaken).

Laethem Equipment Co. v. Deere and Co., 2008 WL 4997932 (E.D. Mich. 2008) (despite the "voluminous discovery" in the case, several discs containing privileged materials were inadvertently disclosed; at expert deposition counsel discovered inadvertent production and immediately asserted objections and requested return of the discs; no waiver).



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