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Protecting the Privilege

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Fabian & Clendenin, P.C.

From 1919 when Fabian & Clendenin was started, to 1926 when Harold Fabian helped the Rockefeller Family acquire the land to create Teton National Park, to the present, Fabian has had local, national and international impact. Our attorneys enjoy expertise in a wide range of practice areas. Each of us, individually, recognizes the legacy of quality and integrity established by our founders. As a firm and as individuals, we are committed to always doing our best as we honor the tradition of the Fabian name. The practice of law obligates us to public service at every opportunity. But foremost, our focus is on our clients — to whom we offer our dedication.

Kevin N. Anderson, Esq.

Kevin Anderson is one of Fabian's most experienced and successful trial attorneys. He has almost twenty-eight years of litigation experience in state and federal courts, arbitration, and administrative forums. Kevin has experience in a variety of complex commercial disputes, has taken on the FBI and the NCAA, and represented Victoria's Secret, among other well-known clients.

A substantial portion of Kevin's work has been for energy-related companies in a variety of litigation, arbitration and regulatory matters. Of significance, Kevin recently represented Murray Energy Corporation and its subsidiaries and helped orchestrate the settlement of all of the civil lawsuits stemming from the August 2007 accidents at the Crandall Canyon Mine.

Kevin was named one of the Mountain States Super Lawyers for complex commercial litigation, based on peer recognition and his professional achievements.

Doing a “privilege review” is no privilege.

Think a trained monkey could do this work?

It's not monkey business



Topics to Be Covered

- Preservation of the Privilege
- Waiver of the Privilege
 - Dealing with Inadvertent Disclosure
 - Claw Back Privileged Documents, Along With Your Reputation ...
- Privilege Logs

Preservation of the Privilege

Take *Loving Care*

- Former employee's e-mails to her attorney prior to resigning and filing suit for hostile work environment, using a personal, password protected, web-based e-mail account, from a company issued laptop using the company network, during business hours, are not protected by the attorney-client privilege

Stengart v. Loving Care Agency, Inc., No. BER-L-858-08 (Superior Court, Law Div., March 6, 2009)

Preservation of the Privilege (continued)

Reasonable Precautions

- Must take reasonable steps to prevent disclosure.
 - Implicates search
- If there is an inadvertent disclosure, must promptly take reasonable steps to rectify the error.
 - Fed. R. Civ. P. 26(b)(5)(B)

Waiver of the Privilege

The New Playing Field: Federal Rule of Evidence 502

- Changes the rules concerning waiver of privilege in all Federal and many State court cases
 - Section (a) limits subject-matter waiver of undisclosed documents to instances of intentional disclosure where similar subject communications “ought in fairness” be considered together.
 - Section (b) eliminates waiver for inadvertent disclosures when reasonable steps were taken to protect the privilege and to correct the error.
 - Section (d) extends the protections of court-ordered nonwaiver agreements to third parties.

Waiver of the Privilege (continued)

Federal Rule of Evidence 502 (continued)

- The rule makes no attempt to alter the law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter.
 - The rule governs only certain waivers by disclosure.
 - Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product – reliance on an advice of counsel defense; allegation of lawyer malpractice, etc.
- Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

Waiver of the Privilege (continued)

Federal Rule of Evidence 502 (continued)

– *Alcon Mfg. v. Apotex, Inc.*, 2008 U.S. Dist. LEXIS 96630 (S.D. Ind. Nov. 26, 2008)

- Plaintiff inadvertently disclosed a privileged document electronically and later complied with the protective order by making a good-faith representation that the disclosure was inadvertent and by taking prompt remedial action when they discovered the disclosure.

- Judge found non-waiver:

perhaps the situation at hand could have been avoided had Plaintiffs' counsel meticulously double or triple-checked all disclosures against the privilege log prior to any disclosures. However, this type of expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid.”

Waiver of the Privilege (continued)

FRE 502 Non-Waiver Cases:

- *Laethem Equip. Co. v. Deere & Co.*, 2008 U.S. Dist. LEXIS 107635 at 107728 (E.D. Mich. Nov. 21,2008)
- *Rhoads Industries, Inc. v. Building Materials Corp*, 254 F.R.D. 216, 2008 WL 4916026 (E.D. Pa. 2008)
- *Am. Coal Sales Co. v. N.S. Power Inc.*, 2009 U.S. Dist. LEXIS 13550, (S.D. Ohio *decided* February 23, 2009).
- *Reckley v. City of Springfield*, 2008 U.S. Dist. LEXIS 103663 (S.D. Ohio Dec. 12, 2008)

Waiver of the Privilege (continued)

FRE 502 Waiver Cases:

Sitterson v. Evergreen Sch. Dist. No. 114, 147 Wn. App. 576
(Wash. Ct. App. 2008)

- Applied five common law factors from *Alldread v. Gren.*, 988 F.2d 1425, 1433 (5th Cir. Miss. 1993):
 1. the reasonableness of precautions taken to prevent disclosure;
 - » Counsel for the disclosing party “offered no evidence of any precautions he or his office took to prevent the disclosures.”
 2. the amount of time taken to remedy the error;
 - » The panel was troubled by the “disclosing party’s failure to notice or remedy the error until three years after it was made.”
 3. the scope of discovery;
 - » The court found such a small document production of 439 documents manageable and not the enormous quantity of documents that FRE 502 intended to correct by excusing an inadvertent production of privileged documents.
 4. the extent of the disclosure; and
 5. the overriding issue of fairness.
 - » The Court ruled that the issue of fairness favored neither party.

Waiver of the Privilege (continued)

FRE 502 Waiver Cases:

Relion, Inc. v. Hydra Fuel Cell Corp., 2008 U.S. Dist. LEXIS 98400 at 9 (D. Or. Dec. 4, 2008)

- The court ruled that under FRE 502(b) disclosing counsel should have taken “all reasonable means” to protect privilege
- The disclosing party had several opportunities to inspect the documents in various formats

Waiver of the Privilege (continued)

Lessons from FRE 502

The most effective method to protect a client's privilege is to negotiate with your opponent for a protective order with a clawback provision that is now enforceable in both state and federal jurisdictions under FRE 502(d).

Waiver of the Privilege (continued)

Lessons from FRE 502 (continued)

Will attorneys and clients rely on Rule 502 to reduce review costs?

- Natural “risk avoidance” behavior of attorneys
- Professional responsibility to protect client confidences
- Informed consent of client
- Rule does not prevent **use** of factual information obtained through disclosure – only communication
- Will parties ever intentionally produce privileged documents subject to a claw-back agreement?

Lessons from FRE 502 (continued)

- A record retention program with a well thought out and tested protocol to identify and segregate privileged documents, well in advance of litigation, may help company counsel utilize FRE 502 to combat the tremendous discovery costs associated with privilege reviews.

Privilege Logs

- FRCP Rule 26(b)(5)
- E-mail strings
 - *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216, 2008 WL 4916026 (E.D. Pa. 2008)
 - Each privileged message within the string must be separately logged in order to claim privilege
 - Not required to indicate that the e-mail was part of a string
 - Disclosure could be a breach of attorney-client privilege by disclosing what was sent to the attorney and the nature of the privileged information



Thank you!