Federal Rule of Evidence 502(b): Not to be Gutted Like a Fish

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Magistrate Judge Facciola addressed Federal Rule of Evidence Rule 502(b) with the inadvertent disclosure of a memorandum protected by the work product doctrine, in a case involving an officer with the DC Department of Corrections. *Amobi v. D.C. Dep't of Corr.,* 2009 U.S. Dist. LEXIS 114270, 20-21 (D.D.C. Dec. 8, 2009). The issue was whether the privileged had been waived by the inadvertent disclosure.

The inadvertently disclosed document was prepared for an arbitration hearing. *Amobi*, at *16. The Court quickly found it was prepared for litigation and contained an attorney's mental impressions. *Amobi* , at *16-17.

Rule 502: Burden to Prove Waiver

Federal Rule of Evidence 502 is silent on which party has the burden of proving waiver. *Amobi,* at *19. Judge Facciola applied the pre-502 District of Columbia rule that the "the proponent of the privilege. . . [had] the burden of showing that it [had] not waived attorney-client privilege." *Amobi,* at *19, citing *United Mine Workers of Am. Int'l. Union v. Arch Mineral Corp.,* 145 F.R.D. 3, 6 (D.D.C. 1992).

Three-Part Wavier Test

The three-part test for waiver under Federal Rule of Evidence 502(b) includes the following:

1) Was the waiver inadvertent?

2) Did the holder of the privilege take "reasonable steps to prevent disclosure of the privileged document"? Fed. R. Evid. 502(b)(2).

3) Did the holder take promptly reasonable steps to rectify the error?

FRE 502(b) does not define "inadvertent." Case law varies between District Courts, but the legislative intent of the Rule was to "protect privilege in the face of an innocent mistake." *Amobi,* at *20-21, citing *Coburn Group, LLC v. Whitecap Advisors LLC,* 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009) (citing Ltr. from Lee H. Rosenthal, Chair, Comm. on Rules of Practice and Procedure, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, and Hon. Arlen Specter, Member, Comm. on the Judiciary, U.S. Senate, at 2 (Sept. 26, 2007)).

The Court followed the simple "inadvertent" test of whether the party "intended to produce a privileged document or if the production was a mistake." *Amobi,* at *20. As one can imagine, the Defendants claimed the document was inadvertently produced.

How to Gut "Inadvertent Productions" Like a Fish

The Plaintiffs in essence argued that if a document was disclosed by a lawyer, then the disclosure was neither mistaken nor inadvertent. Additionally, if the document was disclosed by a non-lawyer, then no reasonable steps were taken to protect the privileged information. *Amobi,* at *22-23.

Judge Facciola pointedly stated the following on the Plaintiffs' arguments:

…to find that a document disclosed by a lawyer is never inadvertent would vitiate the entire point of Rule 502(b). Concluding that a lawyer's mistake never qualifies as inadvertent disclosure under Rule 502(b) would gut that rule like a fish. It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege. Amobi, *at *23-24.*

Reasonable Steps to Prevent Disclosure

Judge Facciola noted that this was not an ESI case where it would have been appropriate to consider "the software that was used to discriminate between the privileged and the non-privileged" information. *Amobi,* at *25. This arguably would have put the party into a Victory Stanly type case, with search terms being evaluated, what quality assurance testing was done to ensure no privileged documents were produced, and other factors to evaluate if reasonable steps were taken to prevent disclosure.

The Court summarized that the Defendants did not explain their methodology in conducting a privilege review. *Amobi,* at *25. Highlighting the situation that their ship was taking water fast, the Defendants did not state the number of documents they produced, which would have enabled the Court to "determine the magnitude of the error in producing this one document consisting of four pages." *Amobi,* at *25.

The Court's displeasure with the Defendants' privilege review is palatable throughout the opinion. There is no real explanation of what review was conducted, other than a passive voice statement that "several" privilege review were conducted. *Amobi,* at *25-26. As the Court stated:

Indeed, one keeps searching for some statement somewhere in the defendants' papers that speaks to what they did when they got the documents, how they segregated them so that the privileged documents were kept separate from the non-privileged, and how, despite the care they took, the privileged document was inadvertently produced. Amobi, *at *25.*

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Hence, the efforts taken are not even described, and there is no indication of what specific efforts were taken to prevent disclosure, let alone any explanation of why these efforts were, all things considered, reasonable in the context of the demands made upon the defendants. Amobi, *at *26.*

The Court bluntly stated, “There can be no reasonable efforts, unless there are efforts in the first place.” *Amobi,* at *26. The Court held the Defendants failed to prove the privilege was not waived, because there was no evidence of the Defendant taking any reasonable actions to prevent disclosure. *Id.*

Bow Tie Lessons

Attorneys, paralegals and litigation support professionals are extremely well served by having a privilege review methodology that takes “reasonable steps to prevent disclosure of the privileged document.” Fed. R. Evid. 502(b)(2). This is easier said then done when the e-Discovery is in the TeraBytes.

This process could include what one could call a privilege chain of custody, which tracks how the electronically stored information is reviewed for privilege, how the ESI is sequestered if determined to be privileged and quality assurance testing that production sets do not include any privileged electronically stored information.

Almost all litigation support products allow for issue tagging for privileges and export to Excel features for creating privilege or redaction logs. Understanding how a firm’s litigation support software functions for production should be tested prior to any production to ensure known privileged ESI is not being inadvertently produced. If something is inadvertently produced, these procedures most likely would need to be proven up over a battle whether the privileged was waived.