The Importance of Clawback Agreements in E-Discovery

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Clawback agreements are an integral part of any production involving electronically stored information (ESI). Given the large volume of ESI in some cases, and the possibility of inadvertently disclosing privileged information in the course of reviewing a large production of ESI, clawback agreements should be negotiated at the outset of a case. In a clawback agreement, the parties agree that the inadvertent production of privileged information will not automatically constitute a waiver of privilege.

What is Reasonable The starting point for a clawback agreement is Federal Rule of Evidence 502. Federal Rule of Evidence 502(b) explains the circumstances in which the inadvertent disclosure of privileged information in a federal proceeding does not operate as a waiver of the attorney-client privilege. According to Rule 502(b), the inadvertent disclosure of privileged information does not operate as a waiver where the holder of the privilege took reasonable steps to prevent disclosure and reasonable steps to rectify the error.

In negotiating a clawback agreement, the parties should consider what actions would be considered reasonable and how the parties would rectify any inadvertent disclosure. It is important to clearly spell out the reasonableness standard in order to avoid any potential disagreement in the event of a disclosure of privileged information.

Alternatively, the parties could consider waiving the reasonableness provision entirely. This would mean that the disclosure of privileged information could be clawed back without regard to the reasonability of the efforts made to prevent the disclosure.

Clawback as Part of Court Order Consider incorporating the clawback agreement as part of a Court Order. Federal Rule of Evidence 502(e) provides that an agreement between the parties as to the effect of the inadvertent disclosure of privileged information in a federal proceeding is binding only on the parties to the agreement, unless the agreement is incorporated into a Court Order. By incorporating a clawback agreement into a Court Order, a party would effectively make the clawback agreement apply to third parties who were not initially part of the agreement.

Insist on Clawback There may be circumstances in which a party to a federal proceeding will not agree to a clawback agreement. In such a situation, consider going to the Court directly and asking for the Court to enter an Order authorizing a clawback. Courts have authorized a clawback over the objections of one of the parties. By utilizing a clawback agreement in an ESI-intensive case, counsel can better protect the interests of the client in the event of an inadvertent disclosure. Originally published on i-Sight.com's blog: "The Importance of Clawback Agreements in E-Discovery"