

**Client Alert**

December 10, 2008

**Oregon Federal Court Holds that Careless Privilege Review Constitutes Waiver under Amended FRE 502****Areas of Interest****Electronic Discovery & Records Management****White Collar Defense & Compliance****United States**

The Federal District Court of Oregon has ruled that under recently amended Federal Rule of Evidence (FRE) 502, the attorney-client privilege was waived when privileged materials were produced because of the disclosing party's careless privilege review. *Relion, Inc. v. Hydra Fuel Cell Corp.*, 2009 WL 5122828 (D. Or. 2008).

In preparation for opposing counsel's inspection and copying of documents at Relion's offices, Relion's attorneys reviewed the requested documents to remove attorney-client and work product materials. Following the inspection, Hydra's counsel provided Relion with a complete hard copy set of the documents Hydra selected and copied off-site, and provided Relion's outside counsel with electronic, text-searchable copies of the selected documents.

Four months following the inspection, Relion's counsel received a letter from Hydra's counsel that discussed two privileged emails that Hydra had copied during the document inspection. In response to the letter, Relion's counsel asserted that the two emails were privileged. A subsequent review by Relion's counsel of Relion's files determined that the emails had been inadvertently left among the documents provided to Hydra for inspection. Relion moved to have the emails returned pursuant to an existing protective order.

The district court relied on newly amended FRE 502 to hold that Relion had waived the attorney-client privilege protecting the two emails — specifically FRE 502(b)(2), which establishes that an inadvertent production of privilege material will not constitute waiver if "the holder of the privilege or protection took reasonable steps to prevent disclosure." According to the court, Relion had three opportunities to identify, remove, and protect the two privileged emails: the pre-inspection privilege review, the post-inspection hard copy production to Relion by Hydra, and the post-inspection production to Relion's outside counsel of electronic, searchable copies of the selected documents. Relion's failure to identify and remove the two privileged emails during these three opportunities led the court to hold that Relion had fallen short of its FRE 502(b)(2) duty.

The *Relion* decision gives notice that as part of their FRE 502 analysis, courts will be scrutinizing attorneys' privilege review procedures. *Relion* also makes clear that whether an attorney (or privilege holder) *re-reviews* produced materials *after production* to identify inadvertently produced privileged materials will bear on not just the FRE 502(b)(3) question (rectifying inadvertent disclosure), but also the FRE 502(b)(2) question of whether the privilege holder took reasonable steps to protect the privileged material.

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