Best Practices for Preparing a Clawback Agreement

Scenario
A large corporation is sued over the alleged breach of a substantial contract. Due to the complex nature of the contract, the corporation’s business executives frequently sought advice from in-house counsel when entering into, and performing under, the agreement. The corporation’s in-house counsel has concerns that sensitive documents reflecting attorney-client communications—or even in-house counsel’s own work product—may be produced by mistake, given the volume of email and electronic documents that must be reviewed quickly.

Clawback Provisions Provide Protections and Cost Savings
Even when a party to a litigation employs precautions to prevent the inadvertent disclosure of privileged documents, some privileged materials are likely to slip through. Recognizing this likelihood, litigants commonly enter into “clawback agreements” at the start of discovery. Typically, a clawback agreement permits either party to demand the return of (that is, to “claw back”) mistakenly produced attorney-client privileged documents or protected attorney work product without waiving any privilege or protection over those materials.

Clawback agreements allow parties to specifically tailor their obligations (if any) to review and separate privileged or protected materials in a manner that suits their needs. For example, before discovery begins, the parties can agree on how they will search for and separate privileged or protected materials from their document productions. So long as the parties abide by the agreement, they will be permitted to take back any privileged or protected material inadvertently produced. Thus, parties can reduce their exposure to costly and time-consuming discovery disputes over whether the protection of privileged material was waived by its production.

Clawback agreements can work in conjunction with the protections of Federal Rule of Evidence 502, which provides that the inadvertent disclosure of privileged or protected information does not operate as a waiver of the privilege or protection if the inadvertently disclosing party took reasonable steps to prevent the disclosure and rectify the error. Indeed, Rule 502 expressly provides for the enforcement of clawback agreements. Further, clawback agreements can be useful in those situations, such as state court litigation, arbitrations or investigations, where the protections similar to those under Rule 502 may not be available.

Clawback agreements often include “no fault” or “irrespective of care” provisions. These clauses allow privileged or protected materials to be returned, without a waiver of privilege for the document and the subject of its contents, regardless of the steps the producing party did (or did not) take to prevent the disclosure. These provisions can provide benefits, but should not be relied upon in lieu of a privilege review altogether. Not only are there often important strategic
benefits to withholding privileged material, but the savings realized from avoiding an initial privilege review may be negated if the parties must continuously sift privileged material out of their opponents’ production. Moreover, some courts, as a matter of public policy, may not enforce such provisions if they believe one party exploited the provision to engage in a “document dump” that, essentially, shifted the costs and responsibility of a privilege review entirely upon its opponent.

**Best Practices When Preparing a Clawback Agreement**

- **Establish that inadvertent production is not a waiver.** The goal of any clawback agreement is to ensure that mistakenly producing attorney-client communications or attorney work product will not result in a waiver of any protections over the material or subject matter. This concept should be clearly stated in the agreement.

- **Incorporate the clawback agreement into a protective order.** Clawback agreements are binding only on the parties to the agreement, they typically cannot be enforced against third-parties who may seek to obtain protected materials inadvertently produced during the litigation. To protect against this, ask the court to enter a protective order that incorporates the terms of your clawback agreement. Once entered, the order is binding against non-parties as well.

- **Head off any dispute about “reasonable steps.”** Clawback agreements allow the parties to define the steps they will take to prevent the mistaken disclosure of privileged or protected materials. Defining these steps in the agreement can reduce your exposure to discovery-related litigation, and it allows you to tailor the steps to best suit your needs. Sometimes, it may make sense to eliminate any required steps altogether—i.e., “no fault” or “irrespective of care” provisions. Other times, the parties agree to use targeted keyword searches of electronically stored information (or other advanced methods of screening privileged materials) as the preferred method of conducting a privilege review.

- **Establish procedures for invoking the clawback.** A clawback agreement can define the steps required to invoke its protections including: whether a party must request the clawback within a certain period of time after learning of its inadvertent production; whether the clawback request must be in writing; and whether the requesting party must explain the grounds on which the document is privileged or protected.

- **Agree to disagree.** The parties may disagree whether an inadvertently produced document is privileged or protected. The clawback agreement can establish a framework for resolving such disputes in a cost-effective manner.

- **Do not limit yourself to documents.** Concerns over the attorney-client privilege are not limited to your document production. Witnesses may reveal privileged or protected information during the course of their deposition testimony. To address this, consider adding provisions in your clawback agreement that provide a method of striking such testimony from the record.

- **Keep it confidential.** Attorney-client communications and attorney work product are not the only types of materials a clawback agreement should seek to protect. Complex commercial litigation can involve producing materials with “confidential,” “highly confidential,” and “attorneys’ eyes only” designations. If this is an issue in a litigation, a clawback agreement can provide a method of reassigning document designations in the event that a highly sensitive document (such as a trade secret) is mistakenly produced without the proper designation.
A well designed clawback agreement can save time and expense, especially in a complex business litigation where internal counsel were involved in matters relevant to the litigation.

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