News Release

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LEGAL NOTE Discusses New E-Discovery Rule and Privileged Document Protection

Absent intervention by Congress, new federal rules of procedure aimed at governing "electronic discovery" will go into effect on December 1. While the whole of these long-awaited changes will have a great impact on litigation, one amendment in particular, dealing with the status of privileged documents that are inadvertently produced, is of great interest to the business community. A new Washington Legal Foundation (WLF) CONTEMPORARY LEGAL NOTE focuses on this amendment, as well as a proposed new evidence rule pertaining to privileged documents, and how both will affect the management of e-mails and other electronic materials in high-stakes civil litigation.

The paper, **NEW E-DISCOVERY RULES & THE ATTORNEY-CLIENT PRIVILEGE: A MIDDLE GROUND FOR WAIVER?,** was authored *pro bono* by **Julie Anne Halter**, a partner with the Document Analysis Technology Group of the law firm Preston Gates & Ellis LLP in Seattle.

The new electronic discovery rules address a host of issues that the existing Federal Rules of Civil Procedure were ill-equipped to handle regarding requests for and production of electronic mails and other documents that exist only in or are most conveniently provided in digital form. As Ms. Halter states in the paper, with regard to documents protected by the attorney-client or work product privilege, "the volume of electronically stored information and the varying ways it is maintained make it very difficult and often cost-prohibitive to efficiently and effectively review it for privileged material prior to production." Currently, no procedure exists for seeking the return or protection of these materials.

The proposed rule establishes a procedure to assert privilege protection even after documents have been produced. It contemplates that the parties will enter into agreements that the inadvertent production of privileged materials does not represent a waiver of privilege protections, and that the protected materials should be returned.

As Ms. Halter explains, however, this *procedural* rule explicitly states that whether such non-waiver agreements are enforceable must be determined based upon *substantive* privilege law. This creates a problem for corporate defendants, as most federal jurisdictions do not uphold privilege waiver agreements. The same body which created the new e-discovery rules — the Federal Judicial Conference — has recently designed an amendment to the Federal Rules of Evidence to address this problem. The CONTEMPORARY LEGAL NOTE reviews the development of this amendment, and examines one portion of it which states that a privilege is not selectively waived as to third parties if a defendant voluntarily provides privileged documents to a government agency.

Advocates for corporations' attorney-client privileges are concerned that this part of the proposed Rules of Evidence amendment will legitimize recent federal and state enforcement officials' aggressive pursuit of privileged documents during investigations. Ms. Halter notes "while many oppose the selective waiver rule because it seems to provide official support for the 'culture of waiver' and implicitly sanctions the government's practice of seeking and giving credit for waivers, the rule would at least eliminate the possibility that the governmental disclosure will waive the privilege or protection as to the rest of the world. Removing that impediment provides at least some protection to the corporate holder of these protections in the face of private litigation."

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Copies of WLF CONTEMPORARY LEGAL NOTE Number 53 can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

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