

Return of Privileged Information: Rule 26(b)(5)(B) and Proposed Rule of Evidence 502

Tenth Circuit Bench & Bar Conference
Colorado Springs, Colorado
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Presented by Shira A. Scheindlin
United States District Judge
Southern District of New York

Rule 26(b)(5)(B)

Privileged Information Inadvertently Produced

- Notice by Producing Party of Post-Production Privilege Claims
- Prompt Return, Sequestration, or Destruction by the Receiving Party
- Disputes May Be Presented to the Court Under Seal
- Receiving Party Must Take “Reasonable” Steps to Recover Disclosed Information
- Producing Party Must Preserve the Information Until the Claim Is Resolved

Rule 26(b)(5)(B): Open Questions

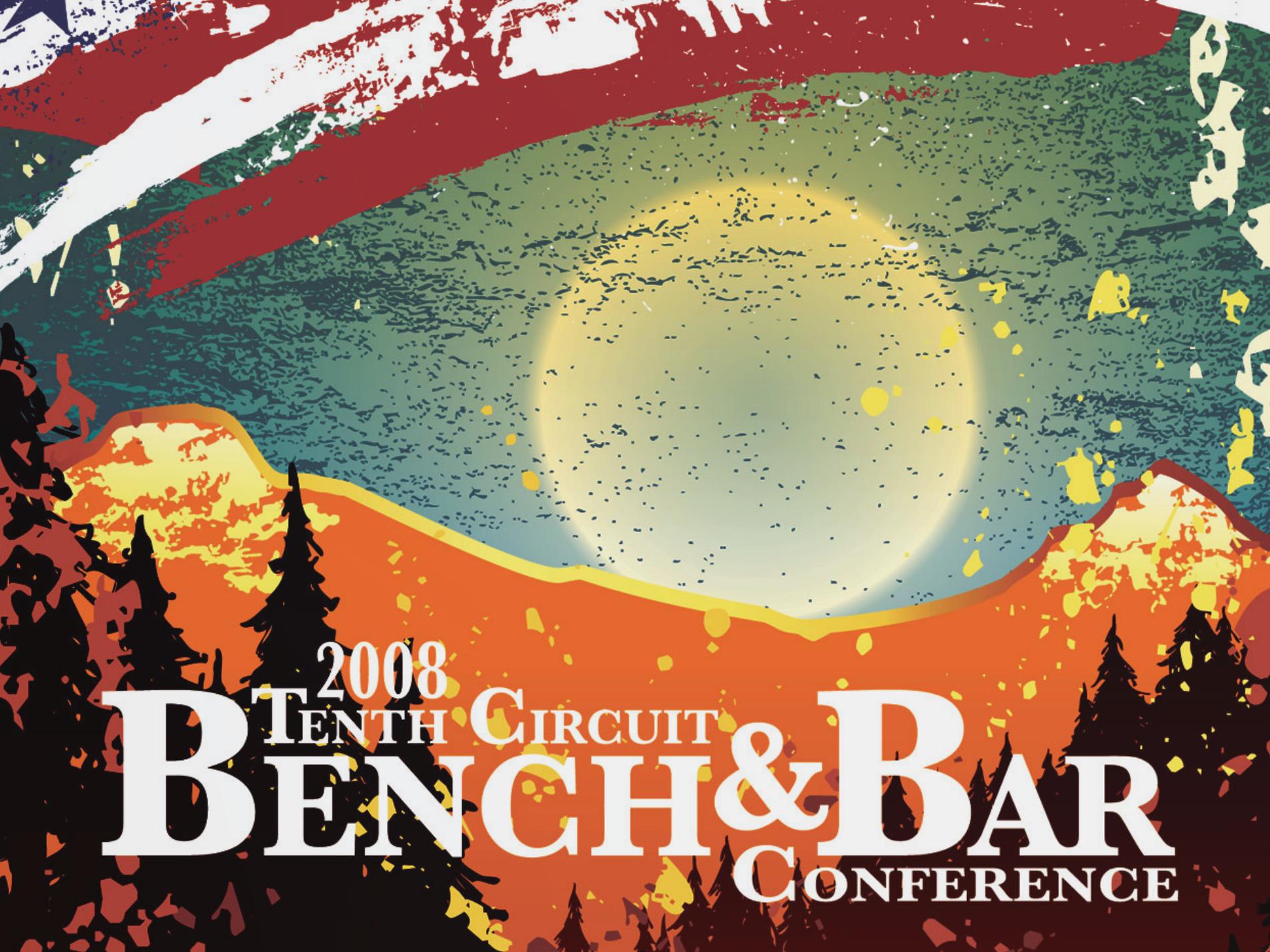
- 1) Can a Rule 26(b)(5)(B) Notice Be Too Late?
- 2) How Specific Must Notice Be?
- 3) What Recovery Efforts Are "Reasonable"?

Proposed FRE 502

- Limitation on the Scope of Waiver: Generally Only to the Information Disclosed
- Protection Against Inadvertent Disclosure: No Waiver When Reasonable Steps Are Taken
- Protection When Disclosure Is Made to a Federal Office or Agency: Waiver Only as to that Office or Agency

Proposed FRE 502 (Continued)

- Court May Sua Sponte or at Parties' Request Enter a Confidentiality Order Binding on Non-Parties in Any Other Federal or State Proceeding: Limits the Cost of Preproduction Privilege Review
- Confidentiality Agreements: Not Binding on Non-Parties Without a Court Order
- Disclosures Made in State Proceedings: Admissibility Is Determined by the Law Most Protective Against Waiver



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