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New Rule of Evidence Aims to Limit Consequences of Inadvertent Waivers of Attorney-Client Privilege and Work Product Protection

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On September 19, 2008, President Bush signed into law a bill creating Federal Rule of Evidence 502, which is designed to protect parties from inadvertently waiving the attorney-client privilege or work-product protection when disclosure of privileged or protected information in a federal action results from an innocent mistake. It is effective immediately, will apply to proceedings commenced after September 19, 2008, and, "insofar as is just and practicable," to proceedings pending on that date. The text of Rule 502 and Committee Note may be found at:
http://www.uscourts.gov/rules/index2.html#502pass

Problems Rule 502 Was Designed to Address

Rule 502 was adopted for two major purposes, according to the Explanatory Note accompanying it. The first was to resolve longstanding conflicts in the courts regarding the effect of disclosures, in particular, disputes about inadvertent disclosure and subject-matter waiver. The second was to respond to widespread discontent over litigation costs associated with protecting against waiver, when even the most minimal or innocent disclosure may have disastrous consequences. As stated in the Note, "the rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection."

The cost of undertaking privilege reviews has skyrocketed with the proliferation of electronically stored information (ESI), particularly email. While methods and tools are developing to expedite the review of electronic documents, the inordinate risk associated with inadvertent disclosure still prompts many attorneys and clients to opt for manual document-by-document review, the cost of which can be exorbitant. As an illustrative example, Verizon representatives who testified during one of the public hearings on the new Rule described spending $13.5 million on one privilege review in the course of a government antitrust investigation. The fear of waiver also can lead to

"extravagant claims of privilege" which can further undermine the discovery process. In many cases the costs of privilege review are wholly disproportionate to the overall costs of the case.

Content of Rule 502

Rule 502 contains seven substantive sections:

- Section (a) limits the effect of disclosures that waive the attorney-client privilege or work-product protection when such disclosures are made in a federal proceeding, or to a federal officer or agency. Rule 502(a) limits the waiver to the information actually disclosed and prevents it from extending to other, undisclosed information (the subject-matter waiver described above) or to other proceedings (state or federal) unless the waiver was intentional, or if in fairness, the undisclosed and disclosed information should be considered together.

- Section (b) provides that a disclosure will not be deemed a waiver of the attorney-client privilege or work-product protection if the disclosure was inadvertent and the holder of the privilege took reasonable steps to prevent the disclosure and to rectify it after the fact pursuant to Federal Rule of Civil Procedure 26(b)(5)(B) (which provides for the destruction or return of privileged material by a receiving party after being notified by a producing party that the information produced was privileged).

- Section (c) provides that if the initial disclosure occurs in a state proceeding, admissibility in a subsequent federal proceeding will be governed by whichever law—state or federal—is most protective against waiver.

- Section (d) provides that if a federal court enters an order (either on its own or at the request of the parties) providing that a disclosure of privileged or protected communications or information does not constitute a waiver in the instant proceeding, the order is enforceable in all other federal or state proceedings.

- Section (e) requires that if parties enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding, that agreement must be incorporated into a court order for it to be binding on non-parties. Sections (d) and (e) thus allow parties to enter into so-called "clawback" or "quick-peek" agreements with the assurance that those agreements will be binding in other matters, as long as the agreements are made part of a court order.

- Section (f) provides that if there is an inadvertent disclosure at the federal

level, state courts must honor Rule 502 in subsequent state proceedings.

- Section (g) defines “attorney-client privilege” as “the protection that applicable law provides for confidential attorney-client communications” and defines “work-product protection” as “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”

What New Rule 502 Does and Does Not Do

The new Rule does not change the underlying law of privilege or work product protection; that is, it has no bearing on whether the privilege or protection applies in the first instance. It merely seeks to reduce the adverse consequences of inadvertent disclosure once a privilege is found to exist. It applies to government investigations as well as to proceedings in federal court. Rule 502 is not intended to alter federal common law concerning waiver outside of the context of disclosure.

The drafters of Rule 502 initially considered including a provision allowing for “selective waivers,” whereby a party could voluntarily waive privilege when cooperating with government investigations without losing the right to assert privilege as to other parties in subsequent litigation. This provision was rejected, however, as beyond the scope of what Rule 502 was designed to address, namely, inadvertent (not voluntary) waiver and the astronomical costs of avoiding it.

Rule 502 Practice Pointers

Parties involved in litigation should consider entering into agreements with their opponents which protect against waiver. Such agreements should be entered as court orders whenever possible so as to make them binding on other parties and applicable in other proceedings.

To the extent possible, parties responding to electronic discovery requests should utilize industry standard review tools and protocols and document their application. This will serve to provide evidence that the company took reasonable steps to avoid disclosure of privileged or protected information, increasing the likelihood that a court will not find a broad waiver in the event an inadvertent disclosure is made. The Explanatory Note to Rule 502 states that “depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.” Considerations that will be part of courts’ reasonableness determinations may include how electronic searches were set up and executed, the search terms employed, the technology and software utilized, and whether any manual spot-checking or follow-up occurred.

Finally, some level of post-production review of documents will still be necessary so that any inadvertent disclosure of privileged or protected documents can be detected as early as possible and the appropriate steps taken to retrieve information and avoid a finding of waiver.

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