New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com

An incisivemedia publication
VOLUME 240—NO. 68
MONDAY, OCTOBER 6, 2008

OUTSIDE COUNSEL

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Evidence Rule 502 Revamps Waiver-of-Privilege Analysis

Federal Rule of Evidence 502 establishes ground-breaking federal law regarding waiver of attorney-client privilege and work-product protection.[1] Rule 502 applies in all federal proceedings commenced after its date of enactment, Sept. 19, 2008, and "insofar as is just and practicable, in all proceedings pending on" that date. Thus, it brings immediate reform to the way federal courts determine issues of waiver of privilege.

The Intentions

Rule 502 is intended to bring nationwide uniformity and to create predictable outcomes regarding waivers of privileges for disclosures made in federal proceedings and to federal agencies and offices. (For ease of reference, the word "privilege" refers, in this article, to both the attorney-client privilege and work-product protection.) The drafters aimed at reducing litigation expense by lessening the need for intensive, and costly, privilege reviews of documents and data. Senator Patrick Leahy, D-Vt., who introduced the legislation, stated:

> Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials. With the routine use of e-mail and other electronic media in today's business environment, discovery can encompass millions of documents in a given case, vastly expanding the risks of inadvertent disclosure. The rule proposed by the Standing Committee is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens associated with the conduct of diligent electronic discovery.[2]

One problem that Rule 502 mitigates was the need for exhaustive and—especially cases involving large-scale electronic discovery—expensive reviews of documents and data to ensure that no privileged information was inadvertently disclosed.[3] Even documents/data that were otherwise insignificant to the merits of the dispute had to be reviewed for privilege because an inadvertent disclosure of any privileged information might have been deemed to waive the client's privilege for that information and also for all undisclosed communications concerning the same subject matter.[4]

Fueling this problem was the inconsistent

treatment that state and federal courts had given to the issue of waiver. Some courts applied a "strict liability" test and held that any inadvertent production of privileged materials waived the privilege; other courts were more lenient.

Rule 502 should reduce the costs of discovery by, among other things, providing nationwide uniformity for determining (a) when an inadvertent disclosure made in a federal proceeding (or to a federal office or agency) waives the privilege (Rule 502(b)); and (b) when a disclosure in a federal proceeding (or to a federal office or agency) waives privilege for undisclosed information. (Rule 502(a).)

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The rule also enables parties to have greater control over whether a disclosure of privileged material will waive a privilege. Federal courts can enter orders (such as stipulated discovery orders) allowing disclosure of privileged information to an adversary while maintaining the privilege, and such orders will be binding on all other courts. (Rule 502(d).) Thus, parties in a federal proceeding can fashion their own rules to provide practical, and less costly, means of discovery while preserving the privilege (provided the court implements their agreement in an order).

Before enactment of Rule 502, protective orders having "claw-back" and "quick-peek" terms may have facilitated discovery among the parties to the case, but they did not prevent others from asserting that disclosures made pursuant to such orders waived the privilege.[5] Litigants in newly filed cases will enjoy the certainty afforded by Rule 502 and will be able to rely on protective orders to preserve the privilege.

For Pending Cases

The rule's application in pending cases is less certain, however. What would satisfy the "just and practicable" test for applying Rule 502 to pending cases? What factors are relevant? The drafters did not say. Courts will have to make a case-by-case determination and are given no guidance by Congress except the motive for implementing the rule.

Also unclear is the effect that Rule 502(d) will have on disclosures made pursuant to "quick-peek," "claw-back" and other court orders that were entered before its enactment. Are those orders binding on all other courts? Does the timing of a disclosure (whether before or after enactment of Rule 502) affect whether the disclosure enjoys the certainty provided by Rule 502(d)? Parties in those cases might consider asking courts to enter a "Rule 502(d) order" to avoid uncertainty. But be prepared to demonstrate that the order would be "just and practicable."

Summary of Rule 502

Rule 502:

- applies only to communications and information that are subject to either the "attorney-client privilege" or the "work-product protection," i.e., it does not alter state law concerning whether communications or information are privileged in the first instance;
- establishes a uniform test, to be applied in all federal and state courts, for determining whether a waiver of privilege results from inadvertent disclosure made in a federal proceeding or to a federal office or agency (Rule 502(b));
- establishes a uniform test—to be applied in all federal and state courts—for determining the scope of waiver as it relates to undisclosed

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information when a privileged communication/information is disclosed in federal proceedings or to a federal office or agency (Rule 502(a));

- requires federal courts to apply the "most protective" test (between applicable state law and Rule 502) to determine whether a disclosure in a state court proceeding has resulted in a waiver (Rule 502(c));
- gives federal courts power to enter orders allowing disclosure of privileged information without waiver of the privilege (Rule 502(d));
- applies "to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings," and "applies even if State law provides the rule of decision" (Rule 502(f));
- applies in all proceedings commenced after the date of enactment—Sept. 19, 2008—and "insofar as is just and practicable, in all proceedings pending on" that date; and
- does not provide for or address the issue of selective waivers of privilege in connection with government investigations. It also is important to note that Rule 502 does not address the issue of waiver resulting from a client's acquiescence in the federal agency's/office's use of disclosed information; the rule deals only with whether a waiver results from a disclosure.

Analysis of Rule 502

State Law Provides the Test for Determining Existence of Privilege Initially. Rule 502 does not alter state law concerning whether communications or information qualify for a privilege in the absence of a disclosure. Parties must look to state law to determine whether such materials qualify for a privilege in the first instance. Once a disclosure of privileged information has occurred in a federal proceeding or to a federal office or agency, Rule 502 provides the test to determine whether that disclosure has waived the privilege and, if so, how far the waiver extends to undisclosed information.

Scope of Waiver

Rule 502(a) deals with the "scope" of waiver resulting from a disclosure of privileged information in a federal proceeding or to a federal agency or office. The rule establishes a three-part test for determining whether such a disclosure waives a privilege for "an undisclosed communication or information":

> the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

Thus, the privilege protecting undisclosed materials cannot be waived absent an intentional disclosure of privileged communications/information. The Rules Advisory Committee's Explanatory Note on Evidence Rule 502 (Explanatory Note) indicates that the rule applies only to a "voluntary disclosure" and that "subject matter waiver is limited to situations in which a party *intentionally puts protected information into the litigation* in a selective, misleading and unfair manner."[6] The Explanatory Note further states: "It follows that an inadvertent disclosure of protected information *can never* result in a subject matter waiver."[7]

The second and third parts of the test are closely linked and are meant to discourage a selective and misleading presentation of evidence.

Inadvertent Disclosures

Rule 502(b) provides a three-part test for determining whether a disclosure waives a privilege as to the disclosed material(s):

> the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

What are "reasonable steps to prevent disclosure?" Courts must examine the facts of each circumstance. Relevant factors may include the scope of discovery; the number of documents or amount of electronic information to be reviewed; the time constraints for production; the use of "advanced analytic software…and linguistic tools" to screen electronic information for privilege; and the "implementation of an efficient system of records management before litigation has commenced."[8]

The rule does not require a holder of a privilege to conduct a post-production review of materials to determine whether information was inadvertently disclosed. But if the privilege holder has reason to suspect that an inadvertent disclosure occurred, a reasonable investigation/inquiry would be wise.[9] Upon discovering that a disclosure occurred, prompt action must be taken to retrieve such inadvertently disclosed material, or the privilege holder risks a finding of waiver.

State Court Proceedings

Congress was wary of encroaching upon states' policies governing privilege, so nothing in the rule alters a state court's application of state law to disclosures occurring in a state court proceeding. But when a party in a federal proceeding argues that those disclosures waived the privilege, and when the disclosures are not the subject of a state court order concerning waiver, Rule 502(c) directs the federal court to apply the law most protective of the privilege. Accordingly, a federal court cannot find that a waiver has resulted from a disclosure in a state proceeding if either (1) the disclosure would not be a waiver under the law of that state or (2) the disclosure would not be a waiver if it had been made in a federal proceeding. In this way, uniformity and predictability in federal proceedings is maintained—litigants do not have to fear that a disclosure in a state proceeding would be subject to waiver in federal court, though not in the state proceeding.

Federal Court Orders

Subsection (d) is the most far-reaching and novel provision in the rule. It allows parties and courts to fashion, on a case-by-case basis and tailored to the circumstances of each case, rules limiting the waiver of privileges. Before enactment of Rule 502, litigants who disclosed privileged information under the aegis of a "claw back" or "quick peek" confidentiality agreement/order risked a later finding by another court that the privilege had been waived by such disclosure. Under Rule 502(d), however, a federal court order that allows disclosure without waiver of the privilege would be binding in all other courts.

Litigants who reach agreement on terms of disclosure and waiver can ask the court to enter their agreement as a protective order. But no agreement of the parties is required. One party who feels burdened by its adversary's discovery demands may seek a court order allowing disclosure of certain privileged materials without waiver of the privilege. Although the rule does not provide a test for determining when such an order would be appropriate, courts likely will look to Federal Rule of Civil Procedure 26(c)(1), which requires "good cause" for issuing a protective order.

Subsection (e) provides that any agreement regarding disclosure and waiver is binding only on the parties to the agreement, unless made part of a court order.

Effect on Evidence Rule 501

Rule 502 applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings. The rule expressly supplants the last sentence of Federal Rule of Evidence 501, which states: "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege…shall be determined in accordance with State law." Rule 502(f) provides, "notwithstanding Rule 501, this rule applies even if State law provides the rule of decision."

1. The statute implementing Rule 502 was signed by the president on Sept. 19, 2008, as Pub. L. No. 110-322; 122 Stat. 3537. The text of the rule can be viewed online at http://www.uscourts.gov/rules/S2450.pdf.
2. S. Rep. No. 110-264 at 2 (2008).
3. See, e.g., *Victor Stanley Inc. v. Creative Pipe Inc.* 250 F.R.D. 251 (D.Md. May 29, 2008) (holding that the attorney-client privilege was waived for documents that the defendant claimed to have inadvertently produced to the plaintiff).
4. See, e.g., id.; *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (Electronic discovery may include "millions of documents"; a "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation.").
5. See generally *Hopson*, 232 F.R.D. 228.
6. See Explanatory Note on Evid. Rule 502 set forth at 154 Cong. Rec. S1317 (Feb. 27, 2008); see also 154 Cong. Rec. H7819 (Sept. 8, 2008) ("It protects against a waiver extending to other, undisclosed documents except where privileged information is being intentionally used to mislead the fact finder…."). (emphasis added).
7. 154 Cong. Rec. S1317 (Feb. 27, 2008). (emphasis added).
8. See Explanatory Note on Evid. R. 502, 154 Cong. Rec. S1318 (Feb. 27, 2008).
9. See, e.g., *SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999).