Congress Amends the Federal Rules of Evidence Concerning Privilege

On September 19, 2008, President Bush signed into law an Act (S. 2450) amending the Federal Rules of Evidence to address waiver of the attorney-client privilege and work product protection. The bill added to the Federal Rules of Evidence a new rule -- Rule 502 -- which in general provides that inadvertent disclosure of protected material (i) does not effect a subject matter waiver and (ii) will not effect a waiver as to the document produced itself so long as the holder of the privilege took reasonable steps to prevent disclosure and takes reasonable steps to rectify the error once discovered.

More specifically, Rule 502(a) addresses subject matter waiver by inadvertent disclosure, providing that disclosure of protected material in a Federal proceeding or to a Federal agency will not result in a subject matter waiver unless (i) "the waiver was intentional" (i.e. not inadvertent) and (ii) the disclosed and undisclosed communications "ought in fairness to be considered together."

Rule 502(b) addresses waiver with regard to the inadvertently disclosed communication itself, providing that inadvertent disclosure of protected material in a Federal proceeding or to a Federal agency does not effect a waiver of the applicable protection(s) so long as the holder of the protection(s) (i) "took reasonable steps to prevent disclosure" and (ii) "promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

Rule 502 also addresses certain ancillary matters, providing that:

- Disclosure in a State proceeding does not operate as a waiver in a Federal proceeding if the disclosure either (i) would not constitute a waiver if evaluated under Rule 502 or (ii) did not constitute a waiver under applicable State law;
- A Federal court may order that the applicable protection is not waived by disclosure in litigation pending before that court, in which case the disclosure shall not effect a waiver in any other Federal or State proceeding;
- An agreement between the parties on the effect of disclosure binds only those parties unless incorporated in a court order; and
- Rule 502 applies in accordance with its terms to State proceedings, Federal-annexed proceedings, and Federal court-mandated arbitration proceedings, and even if State law provides the rule of decision.

Rule 502 applies to all actions commenced after the date of enactment and to actions pending on such date "insofar as is just and practicable."

I. History and Purpose of Rule 502

In 2006, the House Judiciary Committee Chair suggested that the Judicial Conference of the United States consider proposing a rule addressing waiver in an attempt to limit skyrocketing discovery costs occasioned by the need to review each and every document (including emails and other electronic documents) for privilege and work product protection lest the inadvertent production of even a single protected communication effect a far-reaching subject matter waiver and drastically impact the producing party's case.

The Advisory Committee on Evidence Rules prepared a draft rule which was released for comments in Spring 2006. The Advisory Committee received more than 70 comments, heard testimony from more than 20 witnesses, and released a revised rule in April 2007. In September 2007, the Judicial Conference provided the revised rule to both Houses of Congress. Implementing legislation passed the Senate in February 2007 and was then proposed in the House of Representatives. The Act was passed on September 8, 2008 and signed into law on September 19, 2008.

II. Subject Matter Waiver By Inadvertent Disclosure

Subsection (a) addresses subject matter waiver by inadvertent disclosure, providing that disclosure of protected material in a Federal proceeding or to a Federal agency does not effect a subject matter waiver unless (i) "the waiver was intentional" (i.e. not inadvertent) and (ii) the disclosed and undisclosed communications "ought in fairness to be considered together."

Before the Act, some courts treated subject matter waiver as an all-or-nothing proposition.[1] Under such a view, when one asserting the attorney-client privilege has voluntarily disclosed some but not all communications on a subject matter, the privilege is waived as to all communications on that subject matter.[2] The policy underlying the concept of subject matter waiver is said to be one of fairness.

Rule 502 clarifies that non-intentional waiver (i.e. inadvertent disclosure) does not effect subject matter waiver. The congressional record clarifies that subsection (a) is not meant to apply when a litigant attempts to create an advantage through selective disclosure of otherwise protected information ("sword and shield"). Rather, subsection (a) is intended to apply only to inadvertent disclosure.

III. Protection For The Inadvertently Disclosed Communication Itself

Subsection (b) addresses waiver with regard to the inadvertently disclosed communication itself, providing that inadvertent disclosure of protected material in a Federal proceeding or to a Federal agency does not effect a waiver of the applicable protection(s) so long as the holder of the protection(s) (i) "took reasonable steps to prevent disclosure" and (ii) "promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

Before Rule 502 was enacted, Federal courts split between three basic approaches to inadvertent disclosure of otherwise privileged information: (i) strict responsibility, where any disclosure constitutes a waiver of the attorney-client privilege; (ii) no waiver, whereby the client's intent to waive the attorney-client privilege governs absolutely, leading to the result that no inadvertent disclosure can result in waiver since inadvertent disclosures are, by definition, unintended; and (iii) a balancing approach that examines the facts surrounding the disclosure. The majority of jurisdictions utilize some form of balancing test, albeit each with its own nuances. Rule 502 codifies that majority approach.

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1 In re Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000)

2 See Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 1997 WL 801454 (S.D.N.Y. Dec. 31, 1997)

IV. Ancillary Provisions

Rule 502 also contains a number of ancillary provisions.

- Subsection (c) provides that in a State court proceeding, the most protective rule applies as between Rule 502 and applicable state law.
- Subsection (d) provides that a Federal court's order regarding the impact of disclosure will govern in any other Federal or State court proceeding.
- Subsection (e) provides that an agreement of the parties with regard to the impact of disclosure is effective only as to those parties (and not as to third parties) unless embodied in a court order.
- Subsection (f) provides that Rule 502 applies broadly across State proceedings, Federal-annexed proceedings, and Federal court-mandated arbitration proceedings, and even if State law provides the rule of decision.

V. The Potential Impact of Rule 502

Rule 502 attempts to obviate the need for painstaking and expensive document-by-document privilege review by giving a producing party comfort that inadvertently disclosed protected material (i) will not effect a subject matter waiver and (ii) will itself remain protected so long as the holder of the privilege takes reasonable steps before and after the inadvertent disclosure. Whether it will accomplish that objective remains to be seen.

The congressional record appears to indicate that the legislators believe that Rule 502 will result in parties obtaining "disclosure management" orders before discovery that will enable them to produce documents without first conducting a painstaking (and expensive) document-by-document privilege review. The congressional record also appears to indicate that the legislators believe that, even absent such an order, the provisions of Rule 502 will act as a sufficient guarantee against waiver by inadvertent production that parties will nevertheless be willing to produce documents without incurring the cost of a document-by-document privilege review.

While subsection (a) makes it reasonably clear that inadvertent disclosure will not effect a subject matter waiver, subsection (b) appears to do little to clarify what a producing party must do to be found to have taken "reasonable steps" sufficient to avoid waiver with regard to the inadvertently produced material itself. Different courts have adopted different balancing tests, and some courts have at least implied that a party conducting a manual document review has not taken "reasonable steps" to prevent disclosure unless they have reviewed each document.[3] Thus, while subsection (a) should provide considerable comfort with regard to subject matter waiver by inadvertent production, the risk of waiver as to the inadvertently disclosed material itself under subsection (b) may nevertheless lead privilege-holding parties to continue performing document-by-document privilege reviews.

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[3] See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc., 2008 WL 2221841 (D.Md. May 29, 2008) (finding waiver of the attorney-client privilege through inadvertent production when producing party used inadequate electronic search protocol to segregate potentially privileged documents, then performed a manual privilege review resulting in inadvertent production of numerous documents)

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; or Aryeh Haselkorn at 212.701.3239 or ahaselkorn@cahill.com.