

Special Bulletin

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ATTORNEY-CLIENT PRIVILEGE: FEDERAL RULE OF EVIDENCE 502 BECOMES LAW

by John M. O'Driscoll

In the past, the inadvertent production of even a single privileged document in some cases has resulted in a finding that the disclosing party waived the attorney-client privilege with respect to not only that document but to all other documents concerning the same subject matter. Consequently, discovery in recent years has become progressively time consuming, contentious and expensive.

On September 19, 2008, Federal Rule of Evidence 502 became law. Rule 502 protects litigants from subject-matter waivers, unless "fairness" requires otherwise. An inadvertent disclosure will not waive the privilege as long as the holder takes reasonable steps to prevent disclosure and acts promptly to retrieve the inadvertently disclosed documents. Rule 502 will also allow parties to seek court orders providing that the disclosure of privileged or protected information does not constitute a waiver. Further, parties in federal proceedings can enter into confidentiality agreements, which, if

incorporated into a court order, will bind nonparties. Rule 502 applies to all proceedings filed after September 19, 2008 and in all pending actions "insofar as is just and practicable". Highlights of Rule 502 and its Advisory Committee Notes are as follows:

RULE 502(A) - LIMITATION ON SUBJECT-MATTER WAIVER.

- The disclosure of attorney-client privileged information or work-product during a federal proceeding or when made to a federal agency triggers a subject-matter waiver only when:
 1. The waiver is intentional;
 2. The disclosed and undisclosed information concern the same subject matter; and
 3. The disclosed and undisclosed information "ought in fairness to be considered together."

- The Notes to Rule 502(a) indicate that subject-matter waiver should be limited to situations in which a party intentionally discloses protected information in litigation in a "selective, misleading and unfair manner" in order to gain a "tactical advantage."

RULE 502(B) - INADVERTENT DISCLOSURE OCCURRING IN A FEDERAL PROCEEDING OR MADE TO A FEDERAL AGENCY.

- Inadvertent disclosure of privileged information or work product during a federal proceeding or to a federal agency does not constitute a waiver in a federal or state proceeding if:
 1. The disclosure is inadvertent;
 2. The holder of the privilege initially took reasonable steps in an attempt to prevent the disclosure; and
 3. The holder promptly took reasonable steps to rectify the error once learned.

- The Advisory Committee Notes to Rule 502(b) indicate that it does not require post-production review to determine whether protected information has been produced by mistake, but does require the producing party to act with reasonable promptness once the inadvertent disclosure has been discovered.

RULE 502(C)-INADVERTENT DISCLOSURE MADE IN A STATE PROCEEDING.

- The inadvertent disclosure of privileged material made in a state proceeding does not constitute a waiver in a federal proceeding if the disclosure:
 1. Would not be a waiver under Rule 502 had it been made in a federal proceeding; or
 2. Is not a waiver under the law of the state where the disclosure occurred.
- Rule 502(c) requires a comparison of the applicable federal and state law on inadvertent waiver and applies the law which is more protective of privilege and work product.
- According to the Notes, where a state court order finds no waiver in connection with a disclosure made in a state court proceeding, that order

is enforceable in a subsequent federal proceeding.

RULE 502(D) - IMPACT OF A FEDERAL COURT'S NON-WAIVER ORDER.

- Rule 502(d) authorizes a federal court to enter a non-waiver order – that attorney-client privilege or work-product protection is not waived by the disclosure of protected information in connection with litigation pending before that court – in which event such a disclosure in that proceeding does not constitute a waiver in any other federal or state proceeding.
- The Notes explain that the agreement of the parties is not a prerequisite to the entry of a non-waiver order under the Rule 502 or to the enforceability of such an order.

RULE 502(E) - IMPACT OF PARTY AGREEMENTS ON WAIVER.

- A non-waiver agreement entered in a federal proceeding (e.g., clawback or a quick peek) only binds the parties to the agreement and not third parties – unless the agreement is incorporated into a court order.

RULE 502(F) - CONTROLLING EFFECT OF THE RULE.

- Rule 502 applies to any type of federal proceeding including mandated arbitration proceedings.

If you are interested in more information about the new Federal Rule of Evidence 502, please feel free to contact John M. O'Driscoll at (312) 627-4028.

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