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How Rule 502 Affects Lawyers and E-Discovery

The new rules limit circumstances under which inadvertent disclosure waives attorney-client privilege

ROBERT A. SCHWINGER AND ERIC TWISTE

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On Sept. 19, 2008, President Bush signed into law a bill that, among other things, limits the circumstances under which the inadvertent disclosure of information protected by the attorney-client privilege or the work product doctrine will result in a waiver of those protections. The new law was intended to provide uniform and generally less onerous standards for determining whether a waiver has occurred, as well as the scope of any such waiver, and thus to reduce significantly the costs of pre-production document and privilege review, especially in cases involving electronic discovery.

The bill (known as S. 2450) amends the Federal Rules of Evidence to add a new Rule 502 entitled "Attorney-Client Privilege and Work Product; Limitations on Waiver." The rule applies in proceedings commenced after the rule's date of enactment (Sept. 19, 2008) and in proceedings pending on that date "insofar as is just and practicable."

The new rule resulted from congressional concerns that the current law on waiver "is far from consistent or certain" and is "responsible in large part for the rising costs of discovery, especially discovery of electronic information." The notes to Rule 502, provided by the Judicial Conference Advisory Committee, explain: "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."

Robert A. Schwinger is a partner in the litigation practice at Chadbourne & Parke, and **Eric Twiste** is an associate at the firm. They are reachable at (212) 408-5100 or rschwinger@chadbourne.com and etwiste@chadbourne.com.

THERE ARE SEVERAL KEY PROVISIONS TO RULE 502:

Limits on scope of waiver.

Under prior law, inadvertent disclosure of protected information risked waiver of privilege or work product protections not only as to the actual material disclosed but also to undisclosed material containing the same subject matter. Rule 502(a) now provides, however, that if a waiver is found, it applies only to the information disclosed unless "fairness" requires a broader waiver, such as, in the words of the Advisory Committee, "in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."

Protection against inadvertent disclosure. Prior law was in conflict over whether and the circumstances in which an inadvertent disclosure of protected information could constitute a waiver. Rule 502(b) provides that such an inadvertent disclosure "in a federal proceeding or to a federal office or agency"

is not a waiver if the holder "took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." The Advisory Committee explains that the "reasonable steps" requirement is "flexible." In addition to tests for reasonableness set forth in certain prior case law, the committee recognizes the practical



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realities of electronic document review by saying that a party that uses "advanced analytical software applications and linguistic tools" in screening for privilege and work product (e.g., searching for key names and terms) may be found to have taken "reasonable steps" to prevent inadvertent disclosure.

Disclosures in state courts. Rule 502(c) provides that, if a disclosure of protected information was made in a state proceeding, it will not be deemed a waiver in any federal proceedings if such disclosure would not be a waiver under Rule 502(c) or under the law of the state where the disclosure occurred. Put another way, in this instance the producing party would get the benefit of whichever law is most protective against waiver. Similarly, the protections against waiver provided by the rule apply when protected information disclosed in federal proceedings is subsequently offered in state proceedings. (See Rule 502(f) and Advisory Committee note.) Rule 502 does not provide any protection, however, when a disclosure made in a state proceeding is subsequently offered in another state proceeding.

Orders protecting privileged communications binding on nonparties. Rule 502(d) provides that if a federal court enters an order providing that a disclosure of privileged or protected materials in the litigation pending before the court did not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding, mooted (at least to some extent) the uncertainty in prior law over whether such orders entered in one proceeding were enforceable in another. Rule 502(e) also codifies the well-established rule that parties in a federal proceeding can enter into confidentiality agreements providing for (presumably expanded) protection against waiver in that proceeding, although such agreements will be binding only on the parties unless incorporated into a court order.

CERTAIN OTHER EXISTING WAIVER RULES LEFT UNAFFECTED

Rule 502 is not intended to supplant all existing waiver doctrine generally. For example, the rule does not:

- Alter existing law on whether information is protected by attorney-client privilege or work product protections to begin with;
- Govern waiver of protections in circumstances where there has been no disclosure of protected information, such as potentially where

the privilege holder seeks to rely on the advice-of-counsel defense or where there are allegations of attorney malpractice; or

- Govern application of the "selective waiver" doctrine.¹

CONCLUSION

Rule 502 brings some needed clarity and consistency to the law on waiver of attorney-client privilege and work product protections in the discovery process. As a general matter, the rule provides greater protections against waiver than existing law otherwise might have provided. Subsection (a), for example, should significantly reduce the potentially catastrophic risk that an inadvertent disclosure of a single privileged document would waive otherwise applicable protections on the entire "subject matter" of information contained in the document.

Of course, the rule is not perfect or all-encompassing, and some potentially problematic issues remain uncertain. The rule does nothing to address, for example, disclosures in state court proceedings that are then offered in other state proceedings. In addition, there might be fair ground for litigation over whether and when subject-matter waiver is required under the "fairness" standard in subsection (a). The "reasonable steps" provisions of subsection (b) are also potential sources of dispute that likely will only be worked out and developed through case law. And, in cases that are now already pending, there could be disputes over whether application of these new rules would be "just and practicable."



1. There were discussions about whether Rule 502 should codify the highly debated "selective waiver" doctrine by providing that disclosure of protected information to federal regulators would waive the protection only "selectively" -- to the government -- but not as to any other person or entity. According to the Judicial Conference, however, public comment from "the legal community" on selective waiver was "almost uniformly negative," while federal agencies and authorities "expressed strong support" for selective waiver. Courts are divided on the issue as well. The rule made no attempt to wade into this ongoing debate.

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