Summary of New Federal Rule of Evidence 502

October 1, 2008

McGuireWoods normally sends out weekly Privilege Points limited to three paragraphs. However, final Congressional approval of new Federal Rule of Evidence 502 justifies a lengthier summary of this new rule which should help reduce the disastrous effects that can come from an inadvertent production of protected documents during litigation.

The House of Representatives approved the new rule (in S. 2450) on September 8, and sent it to President Bush on September 11. The President signed the bill eight days later. Pub. L. No. 110-322, § 1(a), 122 Stat. 3537 (Sept. 19, 2008). Rule 502 will become effective on December 1, 2008.

Executive Summary

Federal Rule of Evidence 502:

1. Does not change any substantive attorney-client privilege rules.

2. Although disclaiming any intent to change the work product doctrine, follows the majority rule in extending work product protection to intangible work product.

3. Does not alter the current law governing implied waiver (which can occur without the disclosure of protected documents or information, such as with pleading an "advice of counsel" defense).

4. Adopts the majority "multi-factor" standard in analyzing the waiver effect of inadvertent disclosure (which focuses on the producing person's review process, the number of disclosures, and the promptness of attempted remedial measures).

5. Adopts the majority view that an inadvertent disclosure does not trigger a subject matter waiver.

6. Requires that all federal and state courts comply with a federal court's non-waiver order (which might include claw-back and quick-peek arrangements).

7. Assures that disclosure in a state proceeding does not trigger a waiver allowing use of the protected material in a federal proceeding, if the disclosure would not have triggered a waiver in either the state or federal proceeding.

8. Applies when a party in federal or state proceedings offers material based on its earlier inadvertent disclosure in any federal context (including in a proceeding or to the federal government outside a proceeding), but apparently does not apply when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in a state context other than a state proceeding, or when a party in a state proceeding offers material based on its earlier inadvertent disclosure in another state court proceeding.

"Scope of A Waiver"

Disclosure of privileged or work product "communication or information" in a "Federal proceeding" or "to a Federal office or agency" triggers a subject matter waiver only if (1) the disclosure is intentional; (2) the undisclosed protected communications or information "concern the same subject matter" as those disclosed; and (3) the disclosed and undisclosed communications or information "ought in fairness to be considered together." Fed. R. Evid. 502(a).


- The rule protects against a subject matter waiver "except where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party." 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008).

- A 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." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (a) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820) (emphasis added).

- Thus, under the rule "an inadvertent disclosure of protected information can never result in a subject matter waiver." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (a) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

- To "assure protection and predictability," the rule governs "subsequent state court determinations on the scope of the waiver" caused

"Inadvertent Disclosure"

An "inadvertent" disclosure in a "Federal proceeding" or "to a Federal office or agency" does not cause a waiver in a "Federal or State proceeding" if the holder took "reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error." Fed. R. Evid. 502(b).

- The rule follows the "majority rule" in the federal courts governing the waiver effect of an inadvertent disclosure. However, the rule's "distillation" of the majority rule "is not intended to foreclose notions of fairness from continuing to inform application of the standard" applicable in any particular case. For example, courts can examine whether the producing party's remedial measures were "sufficiently prompt" in situations "where the receiving party has relied on the information disclosed." 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

- The rule covers an "inadvertent disclosure" to a federal office or agency in any setting, "including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority." (emphasis added). Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).


- The rule does not require the producing party "to engage in a post production review," but does require the producing party "to follow up on any obvious indications that a protected communication or information has been produced inadvertently." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

"Disclosure Made in a State Proceeding"

A disclosure in a "State proceeding" (which is not subject to a "State court order concerning waiver") does not cause a waiver in a federal proceeding, if the disclosure (1) would not have caused a waiver if made in a federal proceeding, or (2) does not cause a waiver under the law of the state "where the disclosure occurred." Fed. R. Evid. 502(c).

- A federal court dealing with a litigant's argument that its adversary's earlier disclosure in a state court caused a waiver (allowing introduction of the communication or information in the federal proceeding) should apply "the law that is most protective of privilege and work product" state or federal law. Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

"Controlling Effect of Court Order"

A federal court's non-waiver order in connection with "litigation pending before the court" applies in all federal or state proceedings. Fed. R. Evid. 502(d).

- The rule "does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information." Thus, a disclosing party's "acquiescence" to a federal agency's use of information would be treated "as under current law." 154 Cong. Rec. H7817, H7818-19 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

- For example, the rule "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information." 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

- Instead, the rule allows court orders permitting the parties to respond to discovery "without the need for exhaustive pre production privilege reviews," while preserving the right to claim privilege protection. 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

- The court order may include "claw-back" and "quick peek" arrangements, and may "provide for return of documents without waiver irrespective of the care taken by the disclosing party." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (d) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

"Controlling Effect of a Party Agreement"

The parties' agreement about the "effect of disclosure" binds the parties, but does not bind anyone else unless it is incorporated into a court order. Fed. R. Evid. 502(e).

"Controlling Effect of This Rule"
Any waiver protection in the rule applies in all state proceedings, in all federal proceedings (even if "state law provides the rule of decision"), and in all federal court annexed and court mandated arbitrations. Fed. R. Evid. 502(f).

**Other Issues**

*No Effect on the Initial Protections*


The rule "does not alter the law regarding when the attorney client privilege or work product protection applies in the first instance." 154 Cong. Rec. H7817, 7819 (daily ed. Sept. 8, 2008).

The rule "makes no attempt to alter federal or state law" governing the privilege's or work product doctrine's applicability to "a communication or information" as "an initial matter." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

*Intangible Work Product*

Although disclaiming any intent to alter existing work product doctrine law, the rule defines "work product protection" to include the "intangible equivalent" of "tangible material" protected by applicable law. Fed. R. Evid. 502(g)(2).

*Implied Waiver*

The rule "is not intended to displace or modify federal common law concerning waiver of privilege or work product protection where no disclosure has been made." Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

*Predictability*

The rule "seeks to provide a predictable, uniform set of standards" under which litigants can act. For example, litigants should know that a federal court's confidentiality order governing the production of "privileged information" will be enforceable in all federal and state courts. Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

**Summary of Applicability**

Federal Rule of Evidence 502:

- Applies when a party in a federal or state court proceeding offers material based on its earlier inadvertent disclosure in a federal context (either a federal proceeding or to a federal office or agency).

- Applies when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in a state court proceeding.

- Does not apply when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in other state contexts (not a state court proceeding).

- Does not apply when a party in a state court proceeding offers material based on its earlier inadvertent disclosure in an earlier state court proceeding.