

LITIGATION ALERT



CONGRESS PASSES NEW ATTORNEY-CLIENT PRIVILEGE, WORK PRODUCT WAIVER RULE

On September 8, the House of Representatives passed a new bill amending the attorney-client privilege and work product waiver provisions of the Federal Rules of Evidence. The new Rule 502, “Attorney-Client Privilege and Work Product; Limitations on Waiver,” is intended to enhance protection for the attorney-client privilege and work product doctrine and to create uniformity in the treatment of inadvertent disclosures of such privileged information. Passed by the Senate in February, the bill is expected to be signed by the president this month.

BACKGROUND

Current law with regard to waivers of attorney-client privilege and work product does not adequately protect the increasing likelihood of inadvertent disclosures in the information age. Technology has led to increases in both the amount of discovery materials produced to review and the associated costs. Discovery is increasingly dominated by the recovery and review of literally millions of pages of electronic mail and other electronically stored information. Substantial cost and time is involved in separating out privileged and non-privileged information. With such vast amounts of information to review, a greater chance exists that protected information will slip through the cracks and be inadvertently disclosed during discovery.

An inadvertent disclosure of attorney-client privileged or work product protected information could have severe and unpredictable consequences. An inadvertently disclosed document could result in a waiver of the privilege or protection, not only in respect to the document produced, but also to all documents and communications on the same broad subject matter. Some courts have found a waiver even when the producing party took reasonable steps to prevent the disclosure. A waiver not only affects the case in which the inadvertent disclosure is made, but it also applies to future cases in both federal and state courts. Such high risks and grave consequences lead to parties expending greater resources in the discovery process and making overbroad claims of privilege. Both results serve only as a hindrance to the litigation process.

ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT WAIVERS UNDER THE NEW RULE

Rule 502 limits the circumstances in which disclosure of information covered by the attorney-client privilege or work product doctrine is considered a waiver. Under the new rule, disclosure of information otherwise covered by the privilege or protection does not operate as a waiver if the disclosure was inadvertent and the holder of the privilege or protection took reasonable steps to prevent the disclosure and to quickly rectify the disclosure under Federal Rule of Civil Procedure 26(b)(5)(B). In a state proceeding, a disclosure that is not the subject of a state court order concerning waiver does not operate as a waiver in federal court if the disclosure would not have been a waiver under this rule in federal court, or if the disclosure is not a waiver under the law of the state where the disclosure occurred.

Significantly, Rule 502 also limits the effect of disclosures that do waive the attorney-client privilege or the work product protection. The rule provides for limited disclosure of privileged or protected information. A waiver will not extend to additional undisclosed information unless the waiver of the disclosed information was intentional, the disclosed and undisclosed information concern the same specific matter and, in fairness, the information should be considered together. The waiver of the privilege is not extended to the broader subject matter unless the holder intentionally used the privileged information in bad faith or in a misleading fashion. This provision allows parties and courts to manage the effects of disclosures in current and future litigation by providing predictability.

Under the new rule, the federal court may order that the privileged or protected information is not waived by disclosure connected with the present litigation. If the federal court enters an order finding that an inadvertent disclosure of privileged information does not constitute a waiver, the disclosure cannot be considered a waiver in any other federal or state proceeding. Also, any agreement between parties on the effects of disclosure in a federal proceeding is binding only on the parties to the agreement, unless the agreement is incorporated into a court order. Rule 502 applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings. Rule 502 applies even if state law provides the rules of decision.

PRACTICAL IMPACT OF THE NEW RULE

Rule 502 attempts to diminish the consequences of inadvertent disclosures made during discovery and sets forth clear guidelines for litigants. No waiver will result as long as the holder takes reasonable steps to prevent a disclosure and to rectify or retrieve disclosed information. Although Rule 502 does not directly ameliorate the costs of recovery and review of electronic discovery, in the long term the Rule may lead to more efficient use of client resources by reducing overbroad privilege claims and the effects of waiver. Finally, Rule 502 does not affect the criteria for application of the attorney-client privilege or the work product doctrine.

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