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Litigation Alert: New Federal Law to Reduce Litigation Expense

Federal Rule of Evidence 502

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On September 19, 2008, the President signed into law a bill aimed at reducing litigation expense.[1] If you have experienced litigation, you know that a large amount of time and money is spent reviewing documents and data—not just for relevant evidence, but to preserve attorney-client privilege and work-product protection.[2] A careful review must be made to ensure that no privileged communications are inadvertently disclosed.[3] Clients prudently make costly efforts to prevent disclosure of any privileged documents, because a court may find that an inadvertent production of an otherwise inconsequential document has waived the client's privilege for that document and also for *all communications concerning the same subject matter*.

Fueling this problem is the inconsistent treatment that state and federal courts have given to the issue of waiver. Some courts apply a "strict liability" test and hold that any inadvertent production waives the privilege; other courts are more lenient. The problem and expense is further heightened in cases involving large-scale electronic discovery.[4] Congress has taken notice of these rising costs and has enacted a law aimed at reducing them.

The new law creates a Federal Rule of Evidence 502, which brings nationwide uniformity and establishes a standard of "fairness" concerning the waiver of the attorney-client privilege and work-product protection for disclosures made in federal proceedings and to federal offices or agencies. The Rule also enables parties to have greater control over whether a disclosure of privileged material will waive a privilege.

Summary of Federal Rule of Evidence 502

Rule 502:

- applies only to communications and information that are subject to either the "attorney-client privilege" or the "work-product protection"—*i.e.*, it *does not* alter state law concerning whether communications or information are privileged in the first instance;
- establishes a uniform test—to be applied in all federal and state courts—for determining whether a waiver of privilege results from inadvertent disclosure made in a federal proceeding or to a federal office or agency;
- establishes a uniform test—to be applied in all federal and state courts—for determining the scope of waiver as it relates to undisclosed information when a privileged communication/information is disclosed in federal proceedings or to a federal office or agency;
- requires federal courts to apply the "most protective" test (between applicable state law and Rule 502) to determine whether a disclosure in a state court proceeding has resulted in a waiver;
- allows federal courts to enter orders allowing disclosure of privileged information without waiver of the privilege. Thus, parties in a federal proceeding can agree to a protective order with a claw-back provision, and upon entry as a court order, it would be binding in all other state and federal proceedings. In the absence of a court order, any such agreement is binding only on the parties to the agreement;
- applies "to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings," and "applies even if State law provides the rule of decision";
- applies in all proceedings commenced after the date of enactment—September 19, 2008—and "insofar as is just and practicable, in all proceedings pending on" that date; and
- *does not* provide for or address the issue of selective waivers of privilege in connection with government investigations.

Analysis of Federal Rule of Evidence 502

State Law Provides the Test for Determining Existence of Privilege Initially

As a starting point, it is important to realize that Rule 502 does not alter state law concerning whether communications or information qualify for a privilege in the absence of a disclosure. Parties must look to state law to determine whether such materials qualify for a privilege in the first instance. Once a disclosure of privileged information has occurred in a federal proceeding or to a federal office or agency, Rule 502 provides the test to determine whether that disclosure has waived the privilege and, if so, how far the waiver extends to undisclosed information.

Scope of Waiver

Subsection (a) deals with the "scope" of waiver resulting from a disclosure of privileged information in a federal proceeding or to a federal agency or office. The Rule establishes a three-part test for determining whether such a disclosure waives a privilege for "an undisclosed communication or information." The three elements that must be met are:

- the waiver (as to the disclosed material) must be intentional;
- the disclosed and undisclosed communications or information must concern the same subject matter; and
- the disclosed and undisclosed communications or information ought in fairness to be considered together.

It is worth emphasizing that the privilege as it relates to undisclosed materials cannot be waived absent an intentional disclosure of privileged communications/information. The Rules Advisory Committee's Explanatory Note on Evidence Rule 502 ("Explanatory Note") indicates that the Rule applies only to a "voluntary disclosure" and that "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."[5] The Explanatory Note further states: "It follows that an inadvertent disclosure of protected information *can never* result in a subject matter waiver."[6]

The second and third elements of the test are closely linked. The waiver does not extend beyond the disclosed communication/information unless "the disclosed and undisclosed communications or information concern the same subject matter" and "they ought in fairness to be considered together." This test discourages a selective and misleading presentation of evidence. Under the Rule, judicial review of the undisclosed documents implicitly is required.

Inadvertent Disclosures

Subsection (b) provides a three-part test for determining whether a disclosure waives a privilege as to the disclosed material(s). No privilege is waived if:

- the disclosure is inadvertent;
- the holder of the privilege took reasonable steps to prevent disclosure; and
- the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B) (which describes steps to be taken when

privileged material has been produced).

What are "reasonable steps to prevent disclosure?" Courts must examine the facts of each circumstance. Relevant factors may include the scope of discovery; the number of documents or amount of electronic information to be reviewed; the time constraints for production; the use of "advanced analytic software … and linguistic tools" to screen electronic information for privilege; and the "implementation of an efficient system of records management before litigation has commenced."[7]

The Rule does not require a holder of a privilege to conduct a post-production review of materials to determine whether information was inadvertently disclosed. But if the privilege holder has reason to suspect that an inadvertent disclosure occurred, a reasonable investigation/inquiry would be wise.[8] Upon discovering that a disclosure occurred, prompt action must be taken to retrieve such inadvertently disclosed material, or the privilege holder risks a finding of waiver.

Disclosures in State Court Proceedings

Nothing in the Rule affects a state court's application of state law to disclosures occurring in a state court proceeding.[9] But when those disclosures become the subject of discovery in a federal proceeding and are not the subject of a state court order concerning waiver, Subsection (c) of Rule 502 directs the federal court to apply the law most protective of the privilege. Accordingly, a federal court cannot find that a waiver has resulted from a disclosure in a state proceeding if either (1) the disclosure would not be a waiver under the law of that state *or* (2) the disclosure would not be a waiver if it had been made in a federal proceeding. In this way, uniformity and predictability in federal proceedings is maintained—litigants do not have to fear that a disclosure in a state proceeding would be subject to waiver in federal court, though not in the state proceeding. This allows greater efficiency in deciding the risks of disclosure and the level of privilege review that is needed before disclosure is made.

Federal Court Orders Regarding Privilege

Subsection (d) is the most far-reaching and novel provision in the Rule. It allows parties and courts to fashion, on a case-by-case basis and tailored to the circumstances of each case, rules limiting the waiver of privileges. Before enactment of Rule 502, litigants who disclosed privileged information under the aegis of a "claw back" or "quick peek" confidentiality agreement/order risked a later finding by another court that the privilege had been waived by such disclosure. Under Rule 502(d), however, a federal court order that allows disclosure without waiver of the privilege would be binding in all other courts.

Litigants who reach agreement on terms of disclosure and waiver can ask the court to enter their agreement as a protective order. But no agreement of the parties is required. One party who feels burdened by its adversary's discovery demands may seek a court order allowing disclosure of certain privileged materials without waiver of the privilege. Although the Rule does not provide a test for determining when such an order would be appropriate, courts likely will look to Federal Rule of Civil Procedure 26(c)(1), which requires "good cause" for issuing a protective order.

Subsection (e) codifies the common law; it provides that any agreement regarding disclosure and waiver is binding only on the parties to the agreement, unless made part of a court order.

Effect on Evidence Rule 501

Rule 502 applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings. The Rule expressly supplants the last sentence of Federal Rule of Evidence 501, which states: "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege … shall be determined in accordance with State law." Rule 502(f) provides, "notwithstanding Rule 501, this rule applies even if State law provides the rule of decision."

Mintz Levin's Electronic Discovery Practice Group

Mintz Levin's electronic discovery practice group is comprised of a multidisciplinary team of attorneys and information technology professionals dedicated to finding innovative solutions to each client's electronic discovery needs and the demands of each litigation or document production. By employing cutting-edge technology, in-house document management and review software, and maintaining a close relationship with vendors and third parties associated with the electronic discovery process, the electronic discovery practice group is able to adapt to the ever-changing landscape of electronic discovery and ensures that our solutions comport with the unique discovery requirements and client expectations associated with each matter.

Endnotes

[1] A Bill to Amend the Federal Rules of Evidence to Address the Waiver of the Attorney-Client Privilege and the Work Product Doctrine, S.2450, 110th Cong. (2008). The bill can be viewed online at http://www.govtrack.us/congress/billtext.xpd?bill=s110-2450.

[2] For ease of reference, the word "privilege" refers, in this Litigation Alert, to both the attorney-client privilege and work-product protection.

[3] *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.* 250 F.R.D. 251 (D.Md. May 29, 2008) (holding that the attorney-client privilege was waived for documents that the defendant claimed to have inadvertently produced to the plaintiff). For an in depth discussion of the *Victor Stanley* decision, see the Mintz Levin Litigation Alert dated July 21, 2008.

[4] *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (Electronic discovery may include "millions of documents"; a "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation.").

[5] *See* Explanatory Note on Evid. Rule 502 set forth at 154 Cong. Rec. S1317 (Feb. 27, 2008) (emphasis added); *see also* 154 Cong. Rec. H7819 (Sept. 8, 2008) ("It protects against a waiver extending to other, undisclosed documents except where privileged information is being intentionally used to mislead the fact finder ....").

[6] 154 Cong. Rec. S1317 (Feb. 27, 2008) (emphasis added).

[7] *See* Explanatory Note on Evid. R. 502, 154 Cong. Rec. S1318 (Feb. 27, 2008).

[8] *See, e.g., SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999).

[9] The purpose of enacting Rule 502 is to bring uniformity and predictability to discovery in federal proceedings/investigations, but in doing so, Congress was wary of impinging upon states' policies governing privilege. Federal-state comity meant that a rule affecting state courts' treatment of disclosures made in state court could not emanate from the federal government.

For assistance in this area, please contact one of the service professionals listed below, or any member of your Mintz Levin client service team.

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