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Rule 502: Waiver For The E-Document Age

Law360, New York (November 05, 2008) -- President Bush recently signed into law a new rule of evidence — Rule 502 — that every litigator and in-house counsel should welcome.

The rule has the potential to:

—Significantly reduce the costs of privilege reviews during discovery;

—Limit subject-matter and inadvertent waivers resulting from disclosure of communications and information protected by the attorney-client privilege or work-product doctrine; and

—Allow parties to write their own rules regarding waivers that could bind both the parties themselves and also, given court approval, third parties.

Rule 502 is intended to bring the law on waivers into the modern era and help reduce the escalating costs of litigation related to document review.

Recognizing that the explosion of e-mail and other electronic media has dramatically increased the expense of discovery and that just one inadvertently produced document might waive privilege for all records concerning the same subject matter, the drafters of Rule 502 attempted to provide uniform standards and limited governing the waiver of privileged and protected material. [2]

As anyone familiar with modern document review can attest and, as the Senate Judiciary Committee's report on the rule observes, the vast majority of records produced during discovery have minimal value, but lawyers must conduct extensive privilege reviews to guard against inadvertent waiver and may feel compelled to assert questionable privilege claims. [3]

While these reviews may at one time have entailed little additional cost, they have become exceedingly burdensome, time-consuming and expensive in this era of voluminous e-mail and electronic records. [4]

To remedy these problems, Rule 502 contains provisions limiting the consequences of intentional and inadvertent disclosures; making federal court orders on waiver enforceable in all other federal and state proceedings; and — most creatively — allowing parties to enter into agreements governing the effect of disclosures regardless of the waiver rules.

Rule 502 Restricts Subject-Matter Waivers And Limits The Consequences Of Inadvertent Disclosures

Under subsection (a) of the rule, a disclosure of information protected by the attorney-client privilege or work-product doctrine must have been intentional for a subject-matter waiver to result.

This means that inadvertent disclosures in federal proceedings "can never result in" subject-matter waivers. [5]

The Advisory Committee on Evidence Rules, which drafted Rule 502, specifically intended to reject case law holding that an inadvertent disclosure "automatically" results in a subject-matter waiver. [6]

This decision makes enormous good sense and is essential if the rule is to achieve its purposes of reducing privilege review costs and discouraging dubious privilege claims; otherwise, lawyers, fearing the consequences of a single inadvertently produced document, will continue to devote too many resources to document review and continue to assert every objection that passes the red-face test (and some that do not).

Furthermore, subsection (a) states explicitly that even an intentional disclosure will not cause a subject-matter waiver unless the disclosed and undisclosed information concern the same subject matter and "ought in fairness to be considered together."

Though these terms are not defined, the Senate Judiciary Committee report on the bill makes it clear that the "ought in fairness" standard is not intended to trigger a subject-matter waiver unless the disclosing party "intentionally used the privileged information in a misleading fashion." [7] Thus, subject-matter waivers should be rare under the rule.

Subsection (b) seeks to harmonize conflicts regarding the consequences of inadvertent disclosure of privileged or protected materials.

Most courts have found a waiver only if the disclosing party acted carelessly and failed to promptly request a return of inadvertently disclosed information. Some courts have

held that only an intentional disclosure of protected information constitutes a waiver and still others have held that any inadvertent disclosure results in a waiver regardless of the level of care. [8]

Subsection (b) articulates a uniform standard concerning the consequences of inadvertent waiver.

Under the rule, a disclosure does not result in a waiver if the disclosure was inadvertent, reasonable steps were taken to prevent disclosure and the holder of the privileged or protected document "promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

While the rule does not define "reasonable steps," the advisory committee note states that the rule is "flexible enough" to account for a variety of factors, such as the number of documents, time limitations for producing the documents and the scope of discovery. [9]

The use of "advanced analytical software applications and linguistic tools" to screen for privilege and work product could, depending on the circumstances, constitute "reasonable steps." [10]

Note that, even when the disclosure of privileged or protected documents effects a waiver under the rule, the waiver is limited to the disclosed documents themselves. While subsection (b) does not precisely set forth the consequences of an inadvertent disclosure, nothing in the text or structure of the rule suggests that an inadvertent disclosure can result in a subject-matter waiver.

On the contrary, subsection (a) is the only provision concerning subject-matter waivers and it restricts subject-matter waivers to intentional waivers in very limited circumstances. Indeed, the purpose of the intent requirement was to make it clear that "an inadvertent disclosure can never constitute a subject-matter waiver." [11]

Subsection (C) Restricts The Effect Of Disclosures In State Proceedings

The two subsections discussed above govern the effect of disclosing privileged or protected material in federal proceedings. Subsection (c) addresses the effect, in federal proceedings, of disclosures made at the state level.

Under this subsection, to determine the effect in federal proceedings of a disclosure at the state level, both state and federal law must be considered. If the disclosure would not effect a waiver if made in a federal proceeding or under state law, then the disclosure will not result in a waiver under Rule 502.

There is one exception: if the disclosure is already the subject of a state court order, Rule 502 does not apply. [12]

In that case, according to the advisory committee note, the effect of the state court order in federal proceedings is controlled by "[federal] statutory law and principles of federalism and comity." [13]

Neither this subsection nor any other provision in the rule purports to regulate the effect of state disclosures in other state proceedings.

Rule 502 Allows The Parties To Create Their Own Privilege Rules That Bind Themselves And Third Parties In All Other Federal And State Proceedings

Perhaps the most beneficial aspect of Rule 502 is its establishment of a two-step process by which parties may reach binding agreements on waiver issues that are enforceable in other proceedings.

First, subsection (e) allows the parties to write their own waiver rules and make them binding on third parties. The subsection states: "[a]n agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement unless it is incorporated into a court order."

While it has always been the case that parties can enter into nonwaiver and confidentiality agreements between themselves, [14] subsection (e) resolves issues about the enforceability of such agreements against others by stating, albeit in the negative, that the agreements will bind nonparties if they are incorporated into a court order. [15]

Second, subsection (d) makes federal court orders on waiver issues applicable in other federal and state proceedings.

It provides: a "federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding." The purpose of this provision is to "protect the rule's ability to limit discovery costs by ensuring that parties in any given case will know they can rely on the new waiver rules in subsequent proceedings." [16]

Considered together, subsections (d) and (e) make it clear that the parties can enter into waiver agreements that are binding on third parties in all other federal and state proceedings.

The potential cost-savings and efficiency gains of subsection (e) are huge. To save time and expense, parties can, for instance, agree to produce documents after only a limited

privilege review, while also agreeing that no produced document will lose its privileged or protected status. They also can agree upon such issues as time limits (or the lack thereof) for requesting the return of documents.

So long as the agreement is embodied in a court order, it will be enforceable against all comers.

Whether a limited privilege review makes sense for a client will depend, of course, on the sensitivity of the documents and the client's resources. In some cases protecting as many documents as possible from disclosure may be critical, but in other cases there may be large volumes of marginal records that are arguably privileged but not worth an exhaustive review.

Even if the parties are unable to reach agreement on alternative rules concerning waiver, a federal court has the power under subsection (d) to impose its own waiver rules for case management or other purposes.

As discussed above, subsection (d) authorizes a federal court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding." The advisory committee note expressly states that a party agreement "should not be a condition of enforceability of a federal court's order." [17]

What Rule 502 Does Not Do

It is important to understand what Rule 502 does not do. First, the rule does not purport to alter existing law concerning whether information is protected by the attorney-client privilege or work-product protection in the first place. [18]

Second, the rule addresses "only certain waivers by disclosure." [19] It does not govern waivers by other means, such as those resulting from an "advice of counsel" defense or allegations of legal malpractice. [20]

Third, the rule governs only waivers of information protected by the attorney-client privilege or the work product doctrine. It does not purport to address waivers of other privileges, such as the Fifth Amendment privilege against self-incrimination. [21]

Finally, Rule 502 does not include provisions concerning selective waivers to law enforcement or regulatory agencies. When it was first proposed, Rule 502 contained a provisional selective waiver section authorizing parties to selectively produce privileged and protected documents to the government without effecting a waiver. [22]

The advisory committee, however, never affirmatively approved the provision, and the controversial provision was dropped from the rule in response to criticism that it promoted a "culture of waiver" by regulators and prosecutors [23] and because it implicated policy matters that were primarily outside the expertise of the committee and unrelated to the goals of reducing the costs and burdens of discovery. [24]

Despite the absence of specific selective waiver provisions, nothing in the rule precludes a private party and a federal agency from entering into their own agreement concerning disclosures to government agencies.

So long as the agreement is incorporated into a court order under subsection (e) and the disclosure is "connected" to "litigation pending before the court" under subsection (d), the agreement would be binding in all federal and state proceedings. Grand jury investigations, for example, are considered "litigation" for work-product purposes [25] and supervised by a grand jury judge who could issue the required order. We have, in fact, had success in obtaining such orders even before the passage of Rule 502.

Rule 502 Is Effectively Immediately

Rule 502 was effective immediately upon President Bush's signing it as the rule applies to "all proceedings commenced after the date of enactment ... and, insofar as is just and practicable, in all proceeding on such date of enactment." [26]

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[2] S. Rep. No. 110-264, at 2-3 (2008) ("Senate Report").

[3] Id. at 2.

[4] Id.

[5] Advisory Committee Note at 7 ("Advisory Committee Note") (emphasis added) (attached to Report of the Advisory Committee on Evidence Rules (May 15, 2007)) ("Advisory Committee Report").

[6] Id. at 7.

[7] Senate Report at 3 (emphasis added)

[8] Id. at 8.

[9] Id.

[10] Id. 9-10.

[11] Advisory Committee Report at 4.

[12] Advisory Committee Note at 11.

[13] Id.

[14] See, e.g., Rainer v. Union Carbide Corp., 402 F.3d 608, 625 (6th Cir. 2005) (affirming district court order requiring plaintiffs to return protected work product that defendants inadvertently produced in discovery because "The agreed protective order signed by all the parties was clear in stating that a producing party waived no rights in the event a privileged document was accidentally produced.") See generally Advisory Committee Note at 12 (discussing confidentiality orders and case law).

[15] Advisory Committee Note at 13.

[16] Senate Report at 3.

[17] Id. at 12.

[18] Senate Report at 3; Advisory Committee Note at 6.

[19] Advisory Committee Note at 6.

[20] Id. at 6-7.

[21] Id. at 14.

[22] See Proposed Rule 502 (attached to Report of the Advisory Committee on Evidence Rules, at 5‑6 May 15, 2006 (revised June 30, 2006)); Advisory Committee Report at 4 (noting that the Committee never voted "affirmatively" on the selective waiver provision).

[23] See Sept. 26, 2007, letter from Lee Rosenthal (Chair of Judicial Conference Committee on Rules) to Senators Patrick Leahy and Arlen Specter, at 6; Ashish Prasad & Vazantha Meyers, The Practical Implications of Proposed Rule 502, 8 Sedona Conf. J. 133, 139-40 (2007). Legislation to curb waiver demands by the government is currently pending in Congress. See S. 3217, 110th Cong. (2008).

[24] Senate Report at 4. The Advisory Committee did approve a report to Congress summarizing the arguments for and against selective waiver; explaining its reasoning for taking no position; and also providing draft language for a statute should Congress decide to adopt a selective waiver provision. Advisory Committee Report at 4.

[25] See, e,g., Restatement (Third) of Law Governing Lawyers § 87 cmt h (2000) ("'Litigation' includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing."). It is conceivable that parties could enter into binding waiver agreements with federal agencies under the Rule simply by incorporating them into a court order even without "pending litigation," Arguably, sub section (e) requires nothing more than a court order to make waiver agreements binding on third parties.

[26] S. 2450, 110th Cong. § 1(c) (2008).