New Federal Rule of Evidence 502 Seeks to Strengthen Attorney-Client Privilege and Work Product Protections

Introduction

The new Federal Rule of Evidence 502, effective September 19, 2008, seeks to resolve the longstanding dispute throughout the court system regarding the consequences of the intentional and inadvertent disclosure of materials protected by the attorney-client privilege or work product doctrine. In particular, the drafters of Rule 502 were responding to the burdensome discovery costs placed on litigants in guarding attorney-client privileges and work product, especially in an era where the volume of electronically stored information continues to grow exponentially. Discovery costs were exacerbated by the uncertainty faced by litigants as to how disclosures of protected information were treated from case to case and from court to court. Thus, Rule 502 both strengthens and harmonizes the rules regarding intentional and inadvertent disclosure of privileged and work product information.

The Particulars of Rule 502

Intentional Disclosure

Paragraph (a) of Rule 502 limits the scope of a waiver of privilege or work product when those materials are intentionally disclosed in a federal proceeding. Under the traditional view of subject matter waiver, the intentional disclosure of one privileged communication or document could result in the waiver of privilege as to all documents regarding the same subject matter and could constitute a waiver of this information in the litigation at issue as well as subsequent federal or state proceedings. Rule 502 limits the scope of waiver to the actual communications or documents disclosed unless three prongs are met: (1) the waiver was intentional; (2) the disclosed and undisclosed information concern the same subject matter; and (3) the disclosed and undisclosed information ought, in fairness, to be considered together. As the Advisory Committee Notes explain, Rule 502 protections against subject matter waiver are not absolute. The rule retains some flexibility to allow courts to find broad subject matter waiver in exceptional circumstances, where fairness requires further disclosure. Specifically, the Advisory Committee
contemplated a broad subject matter waiver if the disclosing party intentionally uses protected information in a selective and misleading manner to the disadvantage of an adversary.

Inadvertent Disclosure

Paragraph (b) addresses waiver of privilege in the context of inadvertent disclosures, i.e., where a party has unintentionally disclosed privileged or work product materials. Rule 502 states that the inadvertent disclosure of privileged or work product materials in a federal proceeding will not operate as a waiver in a subsequent federal or state proceeding so long as the privilege holder took reasonable precautions to prevent disclosure and promptly took reasonable steps to rectify any disclosure once discovered. Prior to Rule 502, under common law, different federal and state courts took a variety of approaches to address waiver for inadvertent disclosure, which created great uncertainty for litigants as to the consequences of any given document production or privilege review strategy. For example, some courts applied a “never waived” rule, where the attorney-client privilege could never be waived by inadvertent disclosure, whereas other courts applied a “strict” approach where any disclosure waived privilege. The majority rule, however, was the “middle test” where the court examined a totality of factors to determine the reasonableness of the inadvertent disclosure. In adopting Paragraph (b) of Rule 502, Congress has adopted the “middle test” approach for the federal courts and attempted to harmonize the analysis across federal and state lines.

Disclosure in State Proceedings

Paragraph (c) governs how federal courts treat disclosures previously made in state court. It requires a federal court to apply the more protective of either Federal Rule 502 or the substantive state law on waiver.

Court-Approved Agreements on Disclosure

Paragraph (d) establishes that federal court orders regarding waiver of privilege and work product shall be enforced in subsequent federal and state proceedings. Prior to the enactment of Rule 502, these agreements, at least in theory, could save the parties a significant amount of time and money by limiting the privilege review that must be conducted prior to a document production—the parties would simply agree that disclosure, no matter the circumstances, will not waive any privilege. But these agreements were rarely used as there was no guarantee they would be respected by non-parties or in subsequent proceedings. Rule 502 increases the utility of these types of agreements by making them binding not just between the parties, but also in subsequent federal and state court proceedings. As Paragraph (e) makes clear, an agreement between the parties will not bind any other federal or state court unless it is incorporated into a court order.
Potential Problems

While Rule 502 is a significant step forward in reinforcing attorney-client privilege and work product protections, a number of potential problems remain.

First, it is unclear whether any given state court will respect the protections afforded in Rule 502. The text of paragraphs (a), (b) and (d) of Rule 502 all expressly state that they apply to subsequent federal and state court proceedings. The Explanatory Note to Rule 502, as well as the Advisory Committee’s explanatory letter to Congress, also declare that Rule 502 binds state courts. However, because the Federal Rules of Evidence are not controlling in state court, the possibility remains that a state court would decline to give effect to Rule 502. At the very least, a challenger to the privilege holder in a subsequent state proceeding may have fodder for a constitutional challenge to the Rule based on federalism and comity grounds.

Second, while Rule 502 protects disclosures initially made in state proceedings in subsequent federal proceedings, it does not necessarily protect those disclosures in proceedings in other states. The drafters considered such “state-to-state” protection but excluded it from the Rule because of concerns, similar to those expressed above, that it might offend principles of federalism and comity. Thus, a litigant must be aware that any disclosure of privileged or work product materials may constitute a waiver of privilege for that information in a subsequent proceeding in another jurisdiction.

Third, the protections for privilege and work product in Rule 502 are far from a talisman for individuals or corporations seeking to cooperate with a government investigation. In today’s climate, a corporation under investigation by a government agency is often asked to demonstrate its cooperation by voluntarily waiving the attorney client privilege and work product doctrine protections. Plaintiffs who later file civil litigation against the corporation often claim that the privilege has been waived and that the once-protected documents must be produced to them. Corporations faced with this dilemma have urged courts to apply the “selective waiver” rule, which would allow the party to divulge privileged information to a government agency without waiving the privilege as to any other party. This “selective waiver” rule has not been accepted in many jurisdictions, and most courts have held that the waiver of privilege to a government agency waives privilege for all purposes to all parties. Unfortunately, the drafters omitted from Rule 502 a “selective waiver” provision specifically protecting disclosures made in the course of a regulatory, investigative or enforcement action. Therefore, corporations continue to face uncertainty as to how disclosures made to a government body in the course of an investigation will be treated in subsequent litigation. Thus, companies should work closely with counsel when determining whether to “voluntarily” disclose privileged information to a governmental agency.

Fourth, paragraph (b) of Rule 502 is itself somewhat nebulous and will remain a developing area of case law. In particular, to be protected by the inadvertent disclosure rule, a litigant must have taken “reasonable steps to prevent disclosure.” A determination of what constitutes “reasonable steps,” especially in an era of rapidly changing technology, is likely to be a fact-intensive inquiry based on the particular circumstances in each case. To date, only a handful of courts throughout the country have had the occasion to address this issue, especially in the context of
New Federal Rule of Evidence 502 Seeks to Strengthen Attorney-Client Privilege and Work Product Protections

electronic document productions. Thus, what constitutes “reasonable steps” will undoubtedly remain an elusive standard that will require careful counsel in advance of any production.

This advisory was prepared by Dawn Curry and Matthew Ritchie, members of the firm’s Litigation Department. For more information, please contact Dawn, Matt or your Nutter attorney at 617-439-2000.

This update is for information purposes only and should not be construed as legal advice on any specific facts or circumstances. Under the rules of the Supreme Judicial Court of Massachusetts, this material may be considered as advertising.