

New Evidence Rule 502: How Much Help Will It Be?

Thursday, Jun 12, 2008

Congress is considering a new Rule of Evidence intended to protect litigants who inadvertently produce a privileged document. The rule stems from the realization that in today's world of electronic discovery, the care and handling of privileged information has become a numbers game.

As the size of document productions continues to increase, so does the risk that a privileged document will slip through. This is a particular concern in mass tort litigation, where a product manufacturer frequently finds itself having to produce millions of documents.

Often, the manufacturer must produce these documents in a number of proceedings, across a variety of jurisdictions, each with its own privilege law.

For example, in major pharmaceutical litigation there may be an MDL proceeding, parallel state court actions, securities and ERISA cases, and government investigations.

The inadvertent production of a privileged document may occur in one of these proceedings or in all of these proceedings at once, with widely different consequences.

Courts are split on whether an inadvertent disclosure may constitute a waiver of the attorney-client privilege or the work product protection.

A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the information and failed to request its return in a timely manner. And a few courts hold that any mistaken

disclosure constitutes a waiver. Advisory Committee Note at 7 (citing *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005)).

Government investigations present special problems when it comes to protecting the attorney-client privilege and work product protection. In our experience, the government frequently asks the manufacturer to waive voluntarily, and the manufacturer must weigh its desire to be cooperative against the prospect that such a waiver will extend beyond the investigation.

Indeed, many courts find that a waiver to a governmental agency constitutes a waiver for all purposes and to all parties. See, e.g., *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991).

Fed. R. Civ. P. 26

In 2006, the Advisory Committee for the Federal Rules of Civil Procedure recognized that the risk of a privilege waiver, and the work necessary to avoid it, was adding to the costs of discovery. The Committee amended Rule 26 to provide a procedure for parties to assert a claim of attorney-client privilege or work product protection after information is produced.

Once notified of the privilege or work product claim, the opposing party must “promptly return, sequester, or destroy the specified information” pending a determination of the merits of the claim. *Fed. R. Civ. P. 26(b)(5)(B)*.

The amendment of Rule 26 was a good first step towards addressing the problem of inadvertent disclosure, but

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it did not go far enough. Although the Committee recognized that litigants were being forced to take extraordinary measures to avoid the risk of a waiver, Rule 26 remains silent on that critical issue. It does not address the existence or scope of any waiver resulting from an inadvertent production.

Proposed Federal Rule Of Evidence 502

Help may now be on the way. The proposed new addition to the Federal Rules of Evidence would give teeth to Rule 26 and fill in the missing pieces. The new rule, which would become Federal Rule of Evidence 502, has already been approved by the Senate and is currently in the House.

In its present form, Rule 502 would resolve the split in the courts by making clear that an inadvertent disclosure does not constitute a waiver provided that “the holder of the privilege or protection took reasonable steps to prevent disclosure,” and “took reasonable steps to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).” Proposed Fed. R. Evid. 502(b).

In the event of a waiver, proposed Rule 502 would also help to limit its scope. In most circumstances, the waiver would be limited to the information actually disclosed. It would not extend to undisclosed information unless the waiver was intentional, the undisclosed information concerned the same subject matter, and the undisclosed information “ought in fairness” be considered with the disclosed information. Proposed Fed. R. Evid. 502(a).

What The New Rule Does And Doesn't Do

The Rule Helps, But No One Wants To Produce A Privileged Document

In drafting Rule 502, the Evidence Rules Committee recognized that the current law of privilege waiver is contributing to the rising costs of discovery. Nowhere is this felt more keenly than in mass tort litigation.

To avoid an inadvertent disclosure, manufacturers design complicated processes to review their documents, often featuring automated search engines, multiple layers of attorney review and quality control checks.

The big worry is that an inadvertent production may result in a broad subject matter waiver. Rule 502 would go a long way to relieving this worry, as an inadvertent disclosure would rarely result in a waiver and even more rarely one that would extend to other documents or cases.

But will that be enough to change the way that manufacturers review potentially privileged materials or reduce, in any significant way, the associated costs and attorney time?

The answer will depend on the importance of the case, the litigation budget and the manufacturer's tolerance for risk. But it is difficult to see Rule 502 having a dramatic effect. After all, no one wants to produce a privileged document in a bet-the-company case, regardless of whether they can retrieve it and avoid a waiver.

The obvious problem is that once privileged information is disclosed, a skilled adversary will find ways to use it. For example, knowledge of the information may enable the adversary to craft additional discovery requests, to seek additional depositions or to formulate new lines of questioning.

Unscrupulous lawyers may even seek to take advantage of an inadvertently produced document before it can be retrieved; notwithstanding confidentiality agreements and protective orders, such documents have been leaked to the press or published on the Internet.

The Costs Of Recovering An Inadvertently Produced Document

The Evidence Rules Committee also recognized the expenses associated with retrieving inadvertently produced documents. Even if many of these documents “are of no concern to the producing party,” they may be vigorously fought over due to the fear that the production might otherwise result in a subject matter waiver.

By eliminating subject matter waivers in all but rare circumstances, Rule 502 is intended to reduce collateral privilege litigation. Indeed, the rule may encourage manufacturers to decide that it is not worth trying to retrieve, or risk drawing attention to, an otherwise marginal document.

The State Court Loophole

As a Federal Rule of Evidence, Rule 502 would apply to disclosures made in federal proceedings and to disclosures that are made to a federal office or agency. In addition, once a federal court determines that a disclosure is not a waiver, that determination would also govern in parallel state court litigation.

The proposed rule expressly provides that if a federal court orders that a disclosure made in connection with proceedings before it is not a waiver, “the disclosure is also not a waiver in any other Federal or State proceeding.” Proposed Fed. R. Evid. 502(d).

The loophole arises when privileged information is first disclosed in a state court proceeding. In that circumstance, the state court would continue to consider the waiver issue under state law. In the mass tort context this is a real concern, as discovery may commence in state court litigation before a federal MDL can be established.

Practitioners urged the Rules Committee to close this loophole, see, e.g., Statement of Charles W. Cohen Regarding Proposed Federal Rule of Evidence 502, but concerns regarding state comity prevented it from happening. See Letter from Committee on Rules of Practice and Procedure to Representatives John Conyers Jr. and Lamar Smith, at 4 (Sept. 26, 2007).

Government Waiver

The proposed rule does not address the effect of a waiver made to the federal government as part of an investigation or enforcement proceeding.

The Advisory Committee initially included a “selective waiver” provision that would have allowed a manufacturer to disclose information to a government agency without waiving the privilege or work product protection with respect to other persons or entities.

But this provision was abandoned in the face of opposition from the business community, which was concerned that such a provision would “perversely increase the number of waiver demands made of companies (since prosecutors and enforcement officials c[ould] suggest to companies that their waived disclosures w[ould] be protected against future third party discovery requests).” See, e.g., Letter to Chair of Standing Committee on Rules of Practice and Procedure on behalf of the Association of Corporate Counsel, at 2 (Jan. 9, 2006).

Conclusion

Rule 502 is well intentioned and should ultimately help to curtail some of the expenses associated with the inadvertent production of privileged documents. In some cases, it may give parties enough confidence to forgo multiple layers of privilege review. But in mass tort litigation this is unlikely to happen.

Given the high stakes and the large volume of documents that need to be produced, it is likely that manufacturers will continue to expend significant resources to guard against inadvertent disclosures.

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