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**Lead Story: Understanding New FRE 502 (Attorney-Client Privilege And Work-Product Doctrine)**

This issue’s Lead Story reviews the new privilege rule, FRE 502, including the materials that help explain its subsections. Links to many of the key documents and legislative history materials are included in the article.

A new rule, FRE 502, concerning the attorney-client privilege and work-product doctrine became effective on September 19, 2008, when the President signed S. 2450 into law. See Pub. L. No. 110-322, 122 Stat. 3537 (text reproduced at p. 1471). The final version of FRE 502 passed the House and Senate on voice vote, without any recorded opposition.

Other than the general privilege rule, FRE 501, this is the first rule addressing privilege issues enacted by the Congress since the FRE were enacted thirty-three years ago. When the Federal Rules of Evidence were first proposed in 1972, thirteen privilege rules were originally recommended, including for specific privileges such as “required reports, lawyer-client, psychotherapist-patient, husband-wife, communications to clerics, political votes, trade secrets, secrets of state and other official information, and identity of informer.” ACN FRE 501 (quoting H. Rep. No. 650, 93d Cong., 1st Sess. (1973)). In 1975, Congress rejected the proposal for specific privileges and, instead, adopted a general rule, FRE 501, which left the development of the privileges “by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” FRE 501.

FRE 502 breaks this tradition by including a specific, new rule entitled: “Attorney-Client Privilege and Work Product; Limitations on Waiver.” The application of the attorney-client privilege and work product doctrine has taken increasing importance over the past few decades, particularly with the greater use and reliance on electronic communications. The costs of protecting privileged materials have grown disproportionately, including for pre-production privilege review. The risks of inadvertent disclosure have also been too high. Among other issues, FRE 502 establishes a presumption against subject matter waiver, resolves the case conflict concerning inadvertent disclosure, provides for confidentiality orders and supports party agreements.

**I. Two Primary Objectives**

According to the legislative history, the new rule was intended to clarify and provide a consistent standard for application of the attorney-client privilege and work-product doctrine. Also, the rule addresses problems concerning the increasing costs of litigation connected with the privilege and work product doctrine. These two primary reasons for the new rule were identified during the legislative process:

“(1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

“(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.”

154 Cong. Rec. S1317 (Feb. 27, 2008) (quoting ACN; citation omitted). The Senate Report also noted concerns over increasing costs during the discovery phase:

“The costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number...
of documents litigants must review to protect privileged material. Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation cost increases.”

“[T]hough most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.”

Sen. Rep. No. 264, 110th Cong., 2d Sess. 1-2 (2008); see also 154 Cong. Rec. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson-Lee) (“This traditional principle can work unfair results in modern-day litigation when privileged information is disclosed by accident. Fast-moving litigation or expensive and vast litigation has both plaintiff and defendant shooting back and forth various documents, particularly in extensive discovery. In the course of the kind of voluminous discovery that often takes place, this can happen, where a privileged document is seen by the other party…. The document reviews can be grossly disproportionate in cost to the stakes of the underlying litigation and significantly impede the efficient processing of cases through the courts.”).

II.
Rule Genesis And Background

The process for adopting the new rule began in January 2006. Then-House Judiciary Committee Chairman James Sensenbrenner, Jr. asked the U.S. Judicial Conference to consider a rule concerning the attorney-client privilege, noting that the “absence of clarity on this subject … is causing significant disruption and cost to the litigation process.” Chairman Sensenbrenner suggested the new rule cover three specific areas:

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.”

Letter of House Judiciary Committee Chairman James Sensenbrenner, Jr. to Ralph Mecham, Director, Administrative Office of the U.S. Courts (dated Jan. 23, 2006) (bullets in original). The Administrative Office of the U.S. Courts replied that the matter was referred to the U.S. Judicial Conference, Advisory Committee on Evidence Rules, and that the committee had scheduled a mini-conference to review the shape of a rule to address the problem. See Letter of Ralph Mecham, Director, Administrative Office of the U.S. Courts to House Judiciary Committee Chairman James Sensenbrenner, Jr. (Feb. 13, 2006).

In April 2006, a Mini-Conference On Privilege Waiver was held at the Fordham University School of Law in New York City by the Advisory Committee on Evidence Rules on a proposed new evidentiary rule concerning the waiver of the attorney-client privilege and work-product doctrine. Subsequently, the Advisory Committee drafted a proposed new FRE 502 for public comment. After committees of the U.S. Judicial Conference reviewed the draft FRE 502, in August 2006 the Judicial Conference authorized publication of the rule for public comment.

Initially, the draft rule included language for a selective waiver provision, as requested in the letter from Chairman Sensenbrenner. The selective waiver provision guided how entities could cooperate with government agencies by disclosing privileged information to the government without waiving the privilege to third parties in subsequent litigation. After the public comment was received, committees of the U.S. Judicial Conference approved and recommended a new FRE 502. As noted below, the selective waiver provision was eventually dropped from the final proposal sent to Congress.

On September 27, 2007, the U.S. Judicial Conference proposal for new FRE 502 was transmitted to members of the Senate and House Judiciary Committees. See Letter of Lee H. Rosenthal, Chair, U.S. Judicial Conference
Committee on Rules of Practice and Procedure, to Senate Judiciary Committee Chairman Patrick J. Leahy, Senate Judiciary Committee Ranking Member Arlen Specter, House Judiciary Committee Chairman John Conyers, Jr., and House Judiciary Committee Ranking Member Lamar Smith.

Because the draft rule involved an evidentiary privilege, congressional action was required before the rule could be adopted. See 28 U.S.C. § 2074(b) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”); see also Sen. Rep. No. 264, 110th Cong., 2d Sess. 3 (2008) (“Under the Rules Enabling Act, … rules concerning evidentiary privileges must be affirmatively approved by an Act of Congress.”).


On the House side, some questions arose concerning the application of the proposed rule. After these questions were answered, on September 8, 2008, the U.S. House of Representatives passed S. 2450 on voice vote. See 154 Cong. Rec. H7817-H7820 (Sept. 8, 2008); id. at H7818 (“The Judicial Conference was able to answer all these questions satisfactorily, without need to revise the text of the rule as submitted to Congress.”). On September 19, 2008, President Bush signed the attorney-client privilege and work product doctrine legislation into law. See Pub. L. No. 110-322, 122 Stat. 3537 (Sept. 19, 2008).

### III. Legislative History: Explanatory Materials

The legislative history includes two explanatory documents approved by the U.S. Judicial Conference and Congress, which may be considered in understanding FRE 502. These explanatory materials became part of the legislative history as they were recognized by the Congress. See, e.g., H.R. Rep. No. 711, 103d Cong., 2d Sess. (1994) (“Conference intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1992, applies to Rule 412 as enacted by this section.”), reprinted in 1994 U.S. Code Cong. & Ad. News 1874. There are two explanatory materials: (1) an Advisory Committee Note (ACN) to FRE 502; and (2) a Statement of Congressional Intent, including answers to questions raised by members of the House.

#### A. Advisory Committee Note (ACN) Approved

The congressional debate made clear that the Senate and House adopted the legislation creating FRE 502 in light of the interpretation provided by the Advisory Committee Notes proposed by the U.S. Judicial Conference. See 154 Cong. Rec. S1317 (Feb. 27, 2008) (remarks of Sen. Leahy) (“I ask unanimous consent to have printed in the Record the Judicial Conference’s Committee Note to illuminate the purpose of the new Federal Rule of Evidence and how it should be applied.”); 154 Cong. Rec. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson-Lee) (“In order to more fully explain how the new rule is to be interpreted and applied, the Advisory Committee also prepared an explanatory note, as is customary, for publication alongside the text of the rule. The text of the explanatory note appears in the Record in the Senate debate.”).

#### B. Additional Statement Of Congressional Intent

As further explanation on the operation of FRE 502, during the House debate members cited a “Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence.” See 154 Cong. Rec. H7818 (Sept. 8, 2008) (remarks of Rep. Jackson-Lee) (“In order to further reduce any potential uncertainty regarding how the rule is to be interpreted and applied, the committee has asked and the Judicial Conference has agreed to augment the explanatory note. I would like to insert the agreed addendum to the explanatory note in the Record at this point.”) (referring to “Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence”). As part of the record of the final
adoption of FRE 502, the statement may be entitled to a degree of persuasiveness equal to that of the ACN to the new rule.

C. No Change On Determining Whether Information Is Protected

In addition to providing guidance on FRE 502, the explanatory documents clarify some limits to FRE 502. For example, FRE 502 does not modify the application of the attorney-client privilege and work product. As the ACN explains the scope of the rule, it:

“makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

“The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. See, e.g., Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); Ryers v. Burleson, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.”

ACN (quoted in 154 Cong. Rec. S1317 (Feb. 27, 2008)) see also 154 Cong. Rec. H7818 (Sept. 8, 2008) (“The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.”).

Under current case law, a party cannot use the privilege as both a sword and a shield. FRE 502 does not affect this balance. The rule does not enable a party to transform the privilege into a sword, while claiming its benefits as a shield. The “Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence” provided the following example on this point:

“One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.”

See, e.g., 154 Cong. Rec. H7818 (Sept. 8, 2008). Consequently, if a party claims to have relied on the advice of counsel, the attorney-client privilege may not apply. The rule does not address this issue which is already considered under current case law.

IV. Key Provisions Of New FRE 502

New FRE 502 has eight key provisions addressing separate aspects of the attorney-client privilege and work product doctrine. Each is considered in turn:

A. Scope Of Waiver: Presumption Against Subject Matter Waiver

FRE 502(a) addresses the scope of any waiver made in a federal proceeding or to a federal agency. As a general matter, any waiver of the privilege or work product is limited to the communication or information disclosed.

The rule creates a presumption against a subject matter waiver (such as the entire subject matter of the commu-
nication) unless “fairness” requires further disclosure. According to the ACN, FRE 502(a) “rejects the result in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.” ACN (quoted in 154 Cong. Rec. S1317 (Feb. 27, 2008)).

Under FRE 502(a), waiver of an undisclosed communication or information in a Federal or State proceeding results only upon the showing of three elements:

1. "the waiver is intentional;
2. the disclosed and undisclosed communications or information concern the same subject matter; and
3. they ought in fairness to be considered together."
FRE 502(a).

See also Sen. Rep. No. 264, 110th Cong., 2d Sess. 5 (2008) (Section-By-Section Summary) (“The section prevents such a waiver from extending to undisclosed information or information in a State or Federal proceeding unless: the waiver was intentional, the disclosed and undisclosed information concern the same subject matter, and in fairness, the undisclosed and disclosed information should be considered together.”).

The third prong of the rule ("ought in fairness to be considered together") is borrowed from FRE 106. As the ACN explain, “a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.” If a party disclosed information protected by the privilege or work product in “a selective, misleading and unfair manner,” the court may enforce a subject matter waiver. ACN (quoted in 154 Cong. Rec. S1317 (Feb. 27, 2008)).

Finally, FRE 502(a) extends disclosures made in federal proceedings or to federal agencies to subsequent state court decisions concerning the scope of the waiver of the initial disclosure. This promotes certainty and protection of the privilege and work product information. See ACN (quoted in 154 Cong. Rec. S1317 (Feb. 27, 2008)) (“To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.”).

B. Inadvertent Disclosure

FRE 502(b) resolves a conflict under case law concerning inadvertent disclosure of protected information. This subsection clarifies that inadvertent disclosure does not result in waiver when the holder of the privilege “took reasonable steps to prevent disclosure” and “promptly took reasonable steps to rectify the error.”

Under FRE 502(b), inadvertent disclosure in a federal proceeding or to a federal agency will not constitute waiver “in a Federal or State proceeding” where three elements are met:

1. “the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

See also Sen. Rep. No. 264, 110th Cong., 2d Sess. 5 (2008) (Section-By-Section Summary) (“This section prevents inadvertent disclosures made in Federal proceedings or to a Federal Officer or agency from operating as a waiver if: the disclosure was inadvertent, the holder of the privilege or protection took reasonable steps to prevent disclosure, and the holder took steps to quickly rectify the disclosure under Federal Rule of Civil Procedure 26(b)(5)(B).”).

FRE 502(b) addressed and resolved a conflict among the courts in determining whether inadvertent production of protected information waived either the attorney-client privilege or work product material. According to the legislative history materials, three positions had been applied in the case law. See FRE 502 ACN (noting conflict and citing Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005) (surveying three positions in the case law) (ACN (quoted in 154 Cong. Rec. S1317 (Feb. 27, 2008)). The Hopson case, noted by the drafters of the rule, highlighted the three positions as follows:

“Specifically, three distinct positions have been taken by the courts: the ‘strict accountability’ approach followed by the Federal Circuit and the First Circuit (which almost always finds waiver, even if production was inadvertent,
because ‘once confidentiality is lost, it can never be restored’; the lenient/‘to err is human’ approach, followed by the Eighth Circuit and a handful of district courts (which views waiver as requiring intentional and knowing relinquishment of the privilege, and finds waiver in circumstances of inadvertent disclosure only if caused by gross negligence); and the third approach, adopting a “balancing” test that requires the court to make a case-by-case determination of whether the conduct is excusable so that it does not entail a necessary waiver.”

Hopson, 232 F.R.D. at 235-36 (footnotes and citations omitted). The drafters of the rule selected the majority view, explaining:

“The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.”

ACN (quoted in 154 CONG. REC. S1317-S1318 (Feb. 27, 2008)).

The drafters of the rule also approved of some cases which applied a multi-factor test in deciding whether an inadvertent disclosure results in waiver of protected information. See ACN (quoted in 154 CONG. REC. S1317-S1318 (Feb. 27, 2008)). For example, some of the factors identified by the drafters may include:

- “The reasonableness of precautions taken;
- The time taken to rectify the error;
- The scope of discovery;
- The extent of disclosure and the overriding issue of fairness”;

ACN (quoted in 154 CONG. REC. S1318 (Feb. 27, 2008)) (text modified). Factors concerning “the reasonableness of a producing party’s efforts” may include:

- “The number of documents to be reviewed”;
- “The time constraints for production”;
- “The implementation of an efficient system of records management before litigation”; and
- “Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure.”

Under FRE 502(b), the party disclosing the protected materials is not required “to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.” ACN (quoted in 154 CONG. REC. S1317-S1318 (Feb. 27, 2008)). However, the disclosing party must “follow up on any obvious indications that a protected communication or information has been produced inadvertently.” ACN (quoted in 154 CONG. REC. S1317-S1318 (Feb. 27, 2008)).

C. Initial State Disclosure Considered In Later Federal Proceeding

Which protections apply when disclosure was first made in a state proceeding and is later considered in a federal proceeding? Does the disclosure in the initial state proceeding waive the privilege and work product in the later federal proceeding? FRE 502(c) answers these questions by applying the federal or state law that furnishes the greatest protection to the privilege and work product. In this manner, the rule promotes certainty as
parties may have relied on rules of protection under state or federal law.

Under FRE 502(c), the initial disclosure in a state proceeding, which “is not the subject of a State-court order concerning waiver,” does not result in waiver in the federal proceeding when the disclosure:

1. “would not be a waiver under this rule if it had been made in a Federal proceeding; or
2. is not a waiver under the law of the State where the disclosure occurred.”

See also Sen. Rep. No. 264, 110th Cong., 2d Sess. 5 (2008) (Section-By-Section Summary) (“This section prevents disclosures made in a State proceeding, which are not the subject of a State-court order concerning waiver, from constituting a waiver in Federal court if: the disclosure would not have been a waiver under this rule if made in Federal court or the disclosure would not be a waiver under the law of the State where the disclosure occurred.”).

Consequently, under this provision, if a communication falls within the scope of the privilege and is not waived, a court cannot disregard the privilege by reassessing and rebalancing the policies, interests, or dangers concerning the application of the privilege in the particular instance. In contrast, some jurisdictions – admittedly not many – view the privilege as qualified. For instance, in the Second Circuit, Connecticut and New York, (and also New Jersey) recognize a qualified attorney-client privilege that the court must balance the interests of the parties in disclosure. See, e.g., Sackman v. Liggett Group, Inc., 920 F. Supp. 357, 365 (E.D. N.Y. 1996) (under New York law the attorney-client privilege is not absolute so that disclosure of the confidential communication to the attorney was waived because, in part, the “compelling public policy interest” in protecting public health); Leonen v. Johns-Manville, 135 F.R.D. 94, 100 (D.N.J. 1990) (A party seeking to show that a waiver occurred of the attorney-client privilege needs to show as required by New Jersey law, the relevance and materiality of the communications, a legitimate need to obtain the communications, and show that the substance of the communications is not available through other means.).

The enforcement of a state court confidentiality order in a federal proceeding is not considered under FRE 502(c). Separate statutes and rules govern this issue. See, e.g., 28 U.S.C. § 1738 (state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken”).

D. Confidentiality Orders

FRE 502(d) allows for the filing of confidentiality orders which provide that disclosure in the pending federal case does not result in “a waiver in any other Federal or State proceeding.” Under this rule, a federal court may enter a confidentiality order providing “that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.” See also Sen. Rep. No. 264 110th Cong., 2d Sess. 5 (2008) (Section-By-Section Summary) (“This section allows Federal courts to order that privileged or otherwise protected information is not waived by disclosure connected with the present litigation, and provides that such disclosure is not a waiver in any other Federal or State proceeding.”); 154 Cong. Rec. H7819 (Sept. 8, 2008) (“Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence”) (“This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party’s right to assert the privilege to preclude use in litigation of information disclosed in such discovery.”); see generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D.Md. 2005) (cited in the ACN for surveying the case law on confidentiality orders).

FRE 502(d) promotes certainty and reduces litigation costs by protecting the disclosure of the protected material outside the pending case. The rule supports the use of efficiency measures such as “quick peek” or “claw-back” arrangements by parties to disclose protected information to focus on key litigation issues and conserve costs in pre-production privilege review. See ACN (quoted in 154 Cong. Rec. S1317-S1318 (Feb. 27, 2008)) (citing Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting use of “so-called ‘claw-back’
agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents.

The confidentiality order becomes enforceable upon the filing of the order, and without regard to whether the parties reach agreement on the matter. See ACN (“Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court’s order.”) (ACN quoted in 154 Cong. Rec. S1317-S1318 (Feb. 27, 2008)). The court will retain flexibility in imposing appropriate conditions in the order. See 154 Cong. Rec. H7819 (Sept. 8, 2008) (“Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence”) (“Moreover, whether the order is entered on motion of one or more parties, or on the court’s own motion, the court retains its authority to include the conditions it deems appropriate in the circumstances.”).

When disclosure of the same information occurs in separate proceedings, such as state court, FRE 502(c) applies and provides the rules offering the greatest amount of protection. As the drafters of the rule noted, FRE 502(d) “does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal.” ACN (quoted in 154 Cong. Rec. S1317-S1318 (Feb. 27, 2008)).

E. Party Agreements

FRE 502(e) permits party agreements to limit the effect of any disclosure. The agreement is only binding on the parties. Third parties are unaffected unless the agreement is included in a court order. See also 154 Cong. Rec. H7820 (Sept. 8, 2008) (statement of Rep. Jackson-Lee) (“This subdivision [(e)] simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a Federal proceeding, it is not binding on others unless it is incorporated into a court order.”); Sen. Rep. No. 264, 110th Cong., 2d Sess. 5 (2008) (Section-By-Section Summary) (“This section limits agreements made between parties on the effects of disclosure in a Federal proceeding to be binding only on the parties to the agreement unless the agreement is incorporated into a court order.”).

F. Controlling Effect

FRE 502(f) address the circumstances of disclosure of protected information in a federal proceeding that may be considered in subsequent proceedings, such as state court. Under this subsection, the rule “applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings” and “even if State law provides the rule of decision.” As the drafters of FRE 502 explained the operation of this provision:

“The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

“The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

“The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.”

ACN (cited in 154 Cong. Rec. S1318 (Feb. 27, 2008)).

G. Definitions

FRE 502(g) provides the definitions for “attorney-client privilege” and “work-product protection.” Under this provision:
“(1) ‘attorney-client privilege’ means the protection that applicable law provides for confidential attorney-client communications; and

“(2) ‘work-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”

The definition for work-product protection specifies that it covers tangible and intangible materials. See 154 Cong. Rec. S1318 (Feb. 27, 2008) (“The definition of work product ‘materials’ is intended to include both tangible and intangible information.”) (citing In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) (“work product protection extends to both tangible and intangible work product”).

H. Effective Date

According to Section 1(c) of the Act, the new rule applies “in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.” See Pub. L. No. 110-322, § 1(c). The rule became effective on September 19, 2008 when it was signed into law.

I. Summary

FRE 502 was enacted relatively quickly. After being proposed by the U.S. Judicial Conference in September 2007, there was no recorded opposition in Congress, and the measure was passed by voice vote in both chambers by September 2008.

The new rule resolves some current conflicts in the cases and provides greater certainty on some significant areas. The rule adopts the majority position concerning inadvertent disclosure. The rule establishes a presumption against subject matter waiver. Predictability and uniformity are promoted by ensuring that decisions concerning the privilege in federal court will be uniformly applied in subsequent state court litigation. Additionally, the court may enforce a confidentiality agreement on the parties, where necessary. Parties are encouraged to adopt so-called “quick peek” or “claw-back” agreements permitting disclosure of privileged communications to focus on key litigation issues and reduce pre-production privilege review costs. There are likely to be reductions by lowering the costs of pre-production review and minimizing risks associated with inadvertent disclosure and by establishing a presumption against subject matter waiver.

The need for review of voluminous materials, particularly involving electronic evidence, will certainly continue. Time will tell how much the new rule aids in reducing the costs in the litigation.

V. Areas Not Covered By FRE 502

There are two significant areas involving attorney-client privilege and work product matters were not included in the new rule. These two areas are likely to receive more attention in the coming years.

A. Selective Waiver Provision Dropped

As already noted, the selective waiver provision, originally requested by Chairman Sensenbrenner in his letter to the U.S. Judicial Conference, was not included in the rule. See Letter of House Judiciary Committee Chairman James Sensenbrenner, Jr. to Ralph Mechem, Director, Administrative Office of the U.S. Courts (dated Jan. 23, 2006). The selective waiver issue usually arises in corporate investigations. Many corporations may voluntarily desire to provide materials obtained during an internal corporate investigation to the government which may be covered by the attorney-client privilege and work product doctrine. However, the corporation may elect not to provide these materials based on concerns that a third party will later claim the material has been waived for all purposes after being voluntarily disclosed to the government. Some corporations have entered into selective waiver agreements with the government, memorializing that the disclosure of the protected information to the government does not waive the privilege to any third parties. However, these agreements may be challenged later in court by third parties. In an environment of uncertainty, the scope of the protection by the privilege becomes equally doubtful. The circuits remain divided on whether a selective waiver rule should apply, with most circuits rejecting the selective waiver doctrine.
The Advisory Committee on Evidence Rules considered the following selective waiver language:

“(c) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.”

The Draft Advisory Committee Note explained the purpose of the provision:

“Subdivision (c): Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of ‘selective waiver,’ holding that waiver of privileged or protected information to a government 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). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co., 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. See, e.g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977). The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances further the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the ‘public interest in easing government investigations’ justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

“The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.”

See Draft Advisory Committee Note for Proposed FRE 501, at 8-10 (attached to Report of the Advisory Committee on Evidence Rules (May 15, 2006)).

After considering the issue, the Advisory Committee on Evidence Rules unanimously voted to eliminate the selective waiver provision proposed for FRE 502. See Minutes of Advisory Committee on Evidence Rules Meeting, at 15 (April 12-13, 2007). The U.S. Judicial Conference also omitted the selective waiver language from the legislative proposal sent to Congress. See Letter of the U.S. Judicial Conference to Congress.
The Advisory Committee on Evidence Rules explained the positions for and against a selective waiver rule:

“During the public comment period, the selective waiver provision was without question the most controversial part of proposed Rule 502. It was adamantly opposed by bar groups and private lawyers; it was enthusiastically favored by government offices and agencies. The basic arguments expressed in favor of selective waiver were 1) it is a necessary tool for corporations to be able to cooperate with government investigations when they would not otherwise do so for fear that the information disclosed to the government could be used by private parties; and 2) it will decrease the costs of government investigations. The basic arguments expressed against selective waiver were 1) it would add more pressure on corporations to waive the privilege— pressure that would only feed into the alleged ‘culture of waiver’ already established by federal agencies; and 2) it would deprive private parties of relevant information that may be necessary for private recovery. (Other arguments for and against selective waiver are described in the summary of public comment attached to proposed Rule 502, as submitted to the Standing Committee as an action item).

“At the Spring meeting Committee members discussed whether the selective waiver provision should be retained in proposed Rule 502. The discussion (and the public comment) indicated that selective waiver raised empirical questions that the Committee was not in a position to determine — most specifically whether selective waiver protection is necessary to encourage corporations to cooperate with government investigations, or instead whether corporations are sufficiently incentivized to cooperate so that selective waiver would be an unjustified protection. Committee members also noted that much of the debate on selective waiver was in essence political. For example, most of those opposed to selective waiver argued that it would only aggravate the ‘culture of waiver’ that currently exists when public agencies seek privileged information from corporations. And most of those in favor denied the existence of a ‘culture of waiver’. But the Committee determined that 1) whether a culture of waiver was a good or bad thing was essentially a political question, and 2) whether such a culture existed was an empirical question. Neither question could be determined by the Committee during the rulemaking process.

“Some members opposed to selective waiver emphasized that the doctrine has been rejected by almost all federal courts, and therefore any rule adopting selective waiver should bear a heavy burden of justification — one that had not been met during the public comment. Finally, members noted that if a selective waiver provision were included in Rule 502, it would probably have to require state courts to adhere to selective waiver protection for disclosures made to federal regulators. Otherwise the provision could not be relied upon for sufficient protection from the consequences of disclosure. But binding state courts to selective waiver would raise significant problems of federalism, because most states do not recognize selective waiver.”

See Minutes of Advisory Committee on Evidence Rules Meeting, at 15 (April 12-13, 2007). The Committee agreed to provide a separate report on the selective waiver issue.

The “Statement Of Congressional Intent Regarding Rule 502 Of The Federal Rules Of Evidence” further noted that under FRE 502(d), a court may not adopt a selective waiver order. As the statement noted, FRE 502(d) “does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information.” 154 CONG. REC. H7818-19 (Sept. 8, 2008).

While the selective waiver was considered and rejected in the U.S. Judicial Conference, the issue frequently arises in corporate investigations. It certainly is the subject of greater controversy than the remaining provisions of FRE 502. Given the importance of this issue, perhaps it will eventually be considered on another appropriate occasion.

B. Attorney-Client Privilege Protection Act

Separate legislation was considered in the 110th Congress involving the Attorney-Client Privilege Protection Act. The legislation would generally bar federal attorneys in criminal and civil enforcement actions from requesting or using communications protected by the Attorney-Client privilege or materials covered by the work product doctrine.

Senator Arlen Specter introduced similar legislation in the Senate. Last summer, it seemed that momentum was gaining in the Senate to consider the Attorney-Client Privilege Protection Act. More than thirty former prosecutors had written to Congress in support of the legislation. However, on August 28, 2008, Deputy Attorney General Mark Filip announced revisions to Department of Justice guidelines regarding Principles of Federal Prosecution of Business Organizations. See U.S. Attorney’s Manual §§ 9-28.000 to 9-28.130. Under these guidelines, a corporation may voluntarily share information protected by the attorney-client privilege or work product doctrine, but prosecutors may not ask for such waivers. Prosecutors may not consider whether a corporation is advancing fees or providing counsel to its employees within the scope of the investigation. Given the legislative interest in this issue, it remains to be seen whether further legislative efforts will be pursued in the new Congress and with a new Administration.

There is also a relation between the selective waiver provision and the Attorney-Client Privilege Protection Act. The Attorney-Client Privilege Protection Act would generally bar federal attorneys in criminal and civil enforcement actions from requesting or using communications protected by the attorney-client privilege or materials covered by the work product doctrine. The Act would allow business organizations to voluntarily waive the attorney-client privilege or attorney work product doctrine. For example, proposed Section 3014(d) provides:

“(d) VOLUNTARY DISCLOSURES.— (1) IN GENERAL.—Nothing in this section may be construed to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to waive the protections of the attorney-client privilege or attorney work product doctrine.”

However, without the benefit of a selective waiver provision, it is questionable how many corporations may elect to voluntarily disclose protected information to the government. The objective of the provision, to encourage voluntary disclosure of protected information by corporations, may not be meaningful without a selective waiver provision. If the debate advances on the Attorney-Client Privilege Protection Act, the selective waiver issue may be considered again.

Recent Postings On New FRE 502
In The Federal Evidence Blog

The consideration and enactment of FRE 502 has recently been reviewed on the Federal Evidence Blog, including:

- FRE 502 Adopts “Middle Ground” On Inadvertent Disclosure Issue (Nov. 3, 2008)
- Advisory Committee Note And Congressional Addendum For New FRE 502 Attorney-Client Privilege Rule (Oct. 2, 2008)
- Selective Waiver Absent From New FRE 502 (Sept. 23, 2008)
- President Signs New Attorney-Client Privilege Rule (FRE 502) (Sept. 22, 2008)
- Congress Passes Attorney-Client Privilege Rule (FRE 502) (Sept. 10, 2008)
- New Support For Attorney-Client Privilege Legislation (June 24, 2008)
- Is Attorney-Client Privilege Legislative Reform Imminent? (June 24, 2008)
Prior Review: The attorney-client privilege selective waiver issue and proposed FRE 502 were previously considered in:

- **Lead Story:** “Recent Attorney-Client Privilege Measures Pending in Congress,” 5 FED. EVID. REV. 919 (July 2008)

- **Lead Story:** “Are Further Changes On The Horizon Concerning The Corporate Attorney-Client Privilege And Work Product Protection?: The New McNulty Memorandum, Recent Congressional Action, And Proposed FRE 502 Suggest A Ripe Environment For Even Further Standards To Be Promulgated,” 4 FED. EVID. REV. 25 (Jan. 2007)

- **Lead Story:** “Is The Time Ripe For Adoption Of A Rule Of Selective Waiver Of The Attorney-Client Privilege and Work Product Protection?,” 3 FED. EVID. REV. 1040 (Aug. 2006)

- **Open Issue:** “Tenth Circuit Confronts Open Issue Whether A Selective Waiver Of The Attorney-Client Privilege and Work-Product Doctrine Should Be Recognized And Declines To Do So,” 3 FED. EVID. REV. 885 (July 2006)

Prior Review: The attorney-client privilege has also been considered in:

- **Practice Tip:** “Implicit Waiver Of The Attorney-Client Privilege,” 4 FED. EVID. REV. 1103 (Aug. 2007)

- **Open Issue:** “Third Circuit Considers Whether To Recognize The ‘Fiduciary Exception’ To The Attorney-Client Privilege, Which Is Applied In Several Other Circuits,” 4 FED. EVID. REV. 641 (May 2007)

- **Practice Tip:** “The Attorney-Client Communications Privilege: Common Exceptions And Grounds For Unavailability,” 4 FED. EVID. REV. 630 (May 2007)

- **Open Issue:** “Ninth Circuit Resolves Open Questions On Application Of Crime-Fraud Exception To Attorney-Client Privilege,” 4 FED. EVID. REV. 461 (April 2007)

- **Lead Story:** “Is The Time Ripe For Adoption Of A Rule Of Selective Waiver Of The Attorney-Client Privilege and Work Product Protection?,” 3 FED. EVID. REV. 1040 (Aug. 2006)

- **Open Issue:** “Tenth Circuit Confronts Open Issue Whether A Selective Waiver Of The Attorney-Client Privilege and Work-Product Doctrine Should Be Recognized And Declines To Do So,” 3 FED. EVID. REV. 885 (July 2006)


- **Circuit Split:** “FRE 501: Attorney-Client Privilege Availability Of The Governmental Attorney-Client Privilege,” 2 FED. EVID. REV. 175 (March 2005)

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**Resource Page on Federal Rule of Evidence 502**

**Available at FederalEvidence.com**

In one place, the Resource Page provides background and key links including:

- FRE 502 Overview
- Primary Legislative Materials
- Additional Background Materials
- Cases (tracking)
- Federal Evidence Blog Postings
- FRE 502 Text
Proposed Amendments To The Federal Rules Of Evidence (September 2008)

Text of New FRE 502
(Enacted Sept. 19, 2008)

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made In A Federal Proceeding Or To A Federal Office Or Agency; Scope Of A Waiver. — When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. — When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made In A State Proceeding. — When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or
(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling Effect Of A Court Order. — 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.

(e) Controlling Effect Of A Party Agreement. — An 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.

(f) Controlling Effect Of This Rule. — Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions. — In this rule:

(1) ‘attorney-client privilege’ means the protection that applicable law provides for confidential attorney-client communications; and
(2) ‘work-product protection’ means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Note: Pursuant to Section 1(c) of Pub. L. No. 110-332, new FRE 502 “shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.” Pub. L. No. 110-322 was enacted on September 19, 2008.
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