

New Fed. R. Evid. 502 - How Well Will it Work?

By The Honorable Jerry Cavaneau

Computers have brought a whole new set of woes for litigators, their clients and the court system.

Documents are created more easily, and electronic storage of information is easy and cheap. Millions of e-mails are created every day by business and multiply like rabbits as they are replied to, forwarded and copied. Multiple drafts of various documents may remain, along with the final version. The resulting explosion of saved electronic information, coupled with a lack of care in organizing it, has made the discovery process an expensive nightmare. In fact, many companies have no storage policy; the information just remains – on servers, desktop computers, laptops, PDAs and cell phones. It is difficult to devise search protocols to find all relevant documents in response to a discovery demand. It is even more difficult, time-consuming and expensive to review relevant materials for attorney-client privilege and work product to prevent disclosure, which can result in waiver of the protection. Document-by-document review can be incredibly expensive and, in many cases, that expense exceeds the amount in controversy. Further, such review is an ineffective method and even with the best efforts, protected documents slip through and are inadvertently produced.

Federal courts have disagreed as to the effect of inadvertent disclosure of protected materials. Some hold that any disclosure waives protection, whether intentional or not; others find no waiver unless the disclosure is intentional. Still others (the majority) adopt a “middle” approach, examining a number of factors to determine when an inadvertent disclosure results in waiver. Courts have also disagreed on the scope of waiver. Some say waiver extends only to the disclosed document. Others extend waiver to all related information (subject matter waiver). New Federal Rule of Evidence 502¹ is an attempt to resolve these differences and to reduce the costs of privilege review. It accomplishes the goal of making the law more uniform. Rule 502 is a good first step and can be effective in reducing costs, giving counsel tools to reduce the need for expensive review in certain cases, but it does have limitations.

Scope of Waiver

Rule 502(a) resolves the question of scope of waiver. It provides:

(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.

Clearly then, an inadvertent disclosure can never result in subject matter waiver. The rationale as to intentional disclosures is the same as that underlying Fed. R. Evid. 106.² Intentional waivers broaden to subject matter waiver only if it would be unfair to limit waiver to the initially disclosed material.

Inadvertent Disclosure – Resolving the Differences

Rule 502(b) adopts the majority rule³ for deciding whether inadvertent disclosure of privileged or protected material results in a waiver. (It is noted that Arkansas, by rule, earlier codified the same approach.⁴) Courts have generally considered several factors, including:

- (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
- (2) The number of inadvertent disclosures;
- (3) The extent of the disclosure;
- (4) Any delay in discovering the disclosure and measures taken to rectify the disclosure; and
- (5) Which result would best serve the interests of justice.⁵

Rule 502(b) mentions only two factors, the reasonableness of measures taken to prevent disclosure and the reasonableness of the steps taken to rectify an inadvertent disclosure. The subsection states:

(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).⁶

However, the advisory committee notes make it clear that the rule is flexible enough to accommodate the additional factors previously considered by the courts in determining whether a disclosure operated as a waiver.⁷ Some recent post-rule decisions have considered additional factors,⁸ while others have discussed only the factors listed in the rule.⁹

Thus, cases decided prior to its inception remain informative.¹⁰ What will be considered reasonable steps to prevent disclosure will be decided on the particular facts of each case. The advisory committee notes indicate that an exhaustive pre-disclosure review of documents may not be necessary in a given case, stating:

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. The implementation of an efficient system of records management before litigation may also be relevant.

Further, the advisory committee notes make it clear that a post-production document review is not necessary, although a producing party must promptly follow up when there are obvious indications that protected material has been inadvertently disclosed.

It should also be noted that Rule 502(f) makes the rule applicable to diversity actions in federal court even though state law may provide the rule of decision. Therefore, the rule is to be uniformly applied in all federal litigation.

The Goal of Reducing Costs

Under Rule 502, counsel can agree on the steps to be taken to prevent disclosure and the steps to be taken to rectify an inadvertent disclosure. They can further agree that if the procedures are followed, no waiver will result from inadvertent disclosure.¹¹ If such an agreement is incorporated into a court order, that order has a controlling effect in subsequent federal or state proceedings and is enforceable against third parties. The rule is flexible enough to allow a wide range of agreements.¹² In the appropriate case, the parties might want to use a so-called “quick peek” agreement where there is no pre-production review and the parties agree no waiver will result as to any information disclosed. In other cases, it will be better to agree that careful use of software applications or linguistic tools to screen for such materials would be sufficient, that no waiver would occur for information that might inadvertently slip through, and that the materials would be returned. Still other situations may call for full pre-disclo-

sure review, but an agreement of non-waiver for any information that may slip through. All such agreements generally provide that the receiving party reserves the right to challenge the privilege or work-product objection. Counsel can be innovative in reaching such agreements and, if they are incorporated into an order, the parties have protection against use of the materials by third parties. Further, a court can order a limited and less expensive procedure even in the absence of an agreement by counsel.¹³ Thus, it is possible under the rule for counsel and the court to do away with or limit pre-disclosure review for privilege and work-product materials without the drastic consequence of waiver.

However, significant factors limit the effectiveness of the rule in preventing costs. First, the rule applies only to attorney-client privilege and work product protected materials. Cases involving other privileges, trade secrets, or other protected materials are not subject to its protection. Protective agreements may provide no protection other than between the parties. Second, there is at least an argument that subsection (d), in giving the rule controlling effect in state proceedings, is unconstitutional.¹⁴ This presents the possibility that a disclosure in a federal proceeding, even with a non-disclosure order, would not be effective against third parties in a state action. Third, and perhaps most significantly, in most cases, mere disclosure of protected information could be quite prejudicial to the disclosing party even if there was no waiver and even if the information could not be used directly. Opposing counsel would have seen the material. It would be impossible to erase that knowledge and perhaps impossible for counsel to avoid capitalizing on it, if only subconsciously. For example, if counsel has seen work product that includes important information about opposition strategy and thinking, it would be impossible (and perhaps a failure to adequately represent the client) if that information is not taken into account in structuring presentation of the case. Another



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example would be that the information could be used in formulating discovery requests. There are many more possibilities of severe prejudice arising from disclosure. These considerations will lead counsel, in many cases, to advise a painstaking and expensive pre-production review of relevant materials.

Conclusion

Rule 502 has made the law of waiver more uniform and has offered protection where federal courts have determined that no waiver has occurred, either as the result of the circumstances of the case or the operation of an agreement between the parties incorporated into an order. The long-term solution to excessive pre-production costs, however, will come from improved technology and record-keeping policies which will make it possible to categorize, segregate and electronically flag sensitive materials so that the producing party can reliably locate and withhold them and include them on a privilege log. Until that day comes, Rule 502 does provide some protection and some opportunities to creatively fashion agreements and orders that do reduce the costs of review.

Endnotes

1. The rule was enacted by Congress on September 19, 2008. It applies to all actions filed after that date and to all actions pending as of that date, so far as practicable. Its full text is:

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.

2. Rule 106 provides: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

3. The Eighth Circuit had commented favorably on that approach, saying that it is best suited to achieving a fair result. *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).

4. Arkansas is the first state to have adopted similar rules to deal with waiver. Ark. R. Evid. 502(e); Ark. R. Civ. P. 26(b)(5)(D). Under Fed. R. Evid. 502(c), if an Arkansas court has entered an order concerning waiver, federal courts will accept it. If a document has been disclosed in state court and there has been no ruling, the federal court will look to the law most protective of the privilege or work product.

5. See, e.g., *Fidelity & Deposit Co. of Maryland v. McCulloch*, 168 F.R.D. 516, 522 (E.D. Pa. 1996).

6. Fed. R. Civ. P. 26(b)(5)(B) provides:

Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

7. Fed. R. Evid. 502 advisory committee’s note.

8. *Heriot v. Byrne*, No. 08 C 2272, 2009 WL 742769 (N.D. Ill. Mar. 20, 2009); *Rhoads Indus. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008).

9. *B-Y Water Dist. v. City of Yankton*, No. CIV-07-4142, 2008 WL 5188837 (D. S.D. Dec. 10, 2008); *Laethem Equip. Co. v. Deere & Co.*, No. 2:05-CV-10113, 2008 WL 4997932 (E.D. Mich. Nov. 21, 2008).

10. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008); *Kalra v. HSBC Bank USA, N.A.*, No. CV-06-5890, 2008 WL 1902223 (E.D. N.Y. Apr. 28, 2008) (citing earlier cases using the balancing approach); *Atrionic Int’l, GMBH v. SAI Semispecialists of America*, 232 F.R.D. 160 (E.D. N.Y. 2005).

11. Fed. R. Evid. 502 advisory committee’s note.

12. *Id.*

13. *Id.*

14. *Henry S. Noyes, Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673 (2009). ■