

<http://e-discoveryissues.blogspot.com/2008/09/president-signs-s-2450-new-evidence.html>

## EDD: Issues, Law, and Solutions

Knowledge truly is power. However, knowledge when it comes to e-discovery means knowing where the information is. A year after new Federal Rules of Civil Procedure took effect, electronic discovery remains a complicated and often costly issue. This blog will take an objective look at ediscovery best practices; ediscovery in law and the peripheral issues surrounding the new technologies being developed to support the litigation lifecycle

Wednesday, September 24, 2008

### President Signs S. 2450 (New Evidence Rule 502) Into Law: September 19, 2008

On September 19, 2008, the President signed S. 2450 into law, a bill adding new Evidence Rule 502 to the Federal Rules of Evidence (Pub. L. No. 110-322, 122 Stat. 3537). The House had approved S. 2450 on September 8, 2008. The Senate had approved S. 2450 on February 27, 2008. See Sen. Rept. No. 110-264.

The legislation protects against the inadvertent waiver of the attorney-client privilege or the work product protection. The new rule will apply in all proceedings commenced after the date of enactment and, insofar as is just and practicable, in all proceedings pending on such date of enactment.

Evidence Rule 502 is not a "home free" rule. Reasonable steps must be taken to prevent inadvertent disclosure and to rectify any such disclosure. More specifically, according to [Congresswoman Sheila Jackson-Lee](#), in her statement in the Congressional Record,

"The new rule protects the confidentiality of privileged information against waiver in several ways. It protects information inadvertently disclosed in discovery, as long as the party has taken reasonable efforts to avoid disclosing privileged information and, upon learning of disclosure, promptly takes reasonable steps to rectify it.

It protects against a waiver extending to other, undisclosed documents except where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party, so that fairness requires that other information regarding the same subject matter be available.

And it authorizes courts to enter orders enforceable in all jurisdictions permitting parties to make initial discovery exchanges efficiently without waiving the right to appropriately assert privilege later for documents culled for actual use as evidence.

This is sort of a back-up protection. This is your guarantee. This is an assistance to the idea of protecting privilege. This is extremely important, in that vast majority of documents exchanged in discovery, in some cases running to millions of pages, ultimately prove to be of [no interest](#)."

Just as important as what the new Rule is about is what the new Rule is not about. As Jackson-Lee noted,

"Importantly, the rule does not alter the law regarding when the attorney-client privilege or work product protection applies in the first instance. [Instead,] [i]t is narrowly targeted to address the question of when the specified kinds of litigation-related disclosures do or do not operate as a waiver of the privilege that would [otherwise apply](#)."

Also, as noted by the [Federal Evidence Review](#), the new Rule does not contain a selective waiver provision, which was requested by the Judicial Conference, but which was apparently too controversial to find its way into the completed Rule.

S. 2450 is identical to Evidence Rule 502, as approved by the Judicial Conference of the United States in September 2007. Congress, with the consent of the Judicial Conference, added additional language to the explanatory note accompanying Rule 502. The "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence" is posted at [http://www.uscourts.gov/Congressional\\_Record\\_re\\_S2450.pdf](http://www.uscourts.gov/Congressional_Record_re_S2450.pdf).

Unlike other amendments to the federal rules of practice, procedure, and evidence that take effect automatically unless Congress acts affirmatively to modify, defer, or reject it, "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." See [28 U.S.C. § 2074\(b\)](#).

Posted by Kriss Wilson at [8:46 AM](#)  