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September 23, 2008

Safe Harbor Redux: President Bush Signs Federal Rule Of Evidence 502 Into Law

In what I would regard as the most lawyer (and client) friendly federal rule change since the "safe harbor" provision was added to Federal Rule of Civil Procedure 11, President Bush recently signed into law Federal Rule of Evidence 502, which is entitled, "Attorney-Client Privilege and Work Product: Limitations on Waiver." The Rule makes it so that disclosures, whether intentional or inadvertent, which previously led to partial or complete waiver of the attorney-client privilege and work produce protection (at least in certain courts), no longer do so.

According to the new Rule,

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."

So, what was the reason for this new Rule? Well,

"[t]he Judicial Conference concluded that the current law on waivers of privilege and work product is largely responsible for the rising costs of discovery, especially discovery of electronic information. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. The fear of waiver also leads to **extravagant claims of privilege."**

So, how will the new Rule result in cost savings and predictability for parties? Well, as the **Federal Evidence Review** has nicely summarized,

There are seven key provisions under the new rule:

1. Subsection (a): Limits waiver of the privilege normally to the communication or materials disclosed, and not to the entire subject matter of the communication. The scope of any waiver is therefore confined to the information disclosed unless “fairness” requires further disclosure.
2. Subsection (b): 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.”
3. Subsection (c): Addresses the circumstances when disclosure was first made in a state proceeding and is later considered in a federal proceeding. The provision applies the federal or state law that furnishes the greatest protection to the privilege and work product.
4. Subsection (d): Recognizes that a confidentiality order may provide “that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.”
5. Subsection (e): Allows parties to enter into an agreement to limit the effect of any disclosure. The agreement is only binding on the parties unless the agreement is included in a court order.

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6. Subsection (f): Notes that 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."
7. Subsection (g): Includes definitions for "attorney-client privilege" and "work-product protection."

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 ostensibly too controversial to find its way into the completed Rule. I direct readers to ***In re Qwest Communications International, Inc. v. Securities Litigation***, 450 F.3d 1179 (10th Cir. 2006), for an interesting discussion about the circuit split surrounding the issue of selective disclosures.

(Hat tip to Joe Hodnicki of the **Law Librarian Blog**)

-CM

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