

# Client Bulletin

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## **Federal Rule of Evidence 502: A New, Uniform Set of Rules Relating to the Waiver of Attorney-Client Privilege and the Work Product Doctrine**

Since the amendment of the Federal Rules of Civil Procedure relating to electronic discovery (or “e-discovery”) on December 1, 2006, parties to federal litigation have been required to identify, collect and review, in addition to traditional paper documents, a potentially staggering volume of electronically stored information (“ESI”) and then produce the relevant, non-privileged information in the early stages of litigation. In order to accomplish this, parties must make a determination whether, among other things, any relevant information should be withheld from production because it is protected by the attorney-client privilege or the work product doctrine. The volume of relevant information and the forms in which it can be stored make this privilege review more difficult, time-consuming and expensive, but also less likely to identify all privileged information. Because of the costs associated with such review, as well as the risk that the inadvertent disclosure of privileged information could result in a waiver of all other privileged information that relates to the same subject matter (“subject matter waiver”), parties have sometimes entered into non-waiver agreements permitting the parties to “take back” inadvertently produced privileged information.

Non-waiver agreements often take the form of “claw-back” agreements, which allow the parties to forego privilege review based upon an agreement to return inadvertently produced privileged documents, or “quick peek” agreements. In a quick peek agreement, the party responding to discovery may, prior to formal production, allow the opposing party to inspect all information and advise the responding party what it should produce. The responding party then conducts a privilege review and makes its formal production.

Historically, there have been significant risks associated with non-waiver agreements, as it has been far from clear that a court would enforce non-waiver agreements and, even if courts did so as to the parties to the agreements, the agreements might not be enforceable as to non-parties to the litigation. *See Hopson v. The Mayor & City Council of Baltimore*, 232 F.R.D. 228, 235-36, 244 (D. Md. 2005) (noting that there is no uniform position taken by courts relating to whether inadvertent disclosure results in a waiver of the attorney-client privilege or work product doctrine).

On September 19, 2008, Congress amended the Federal Rules of Evidence to create Rule 502 for two principal purposes: (1) to resolve disputes in courts about whether the inadvertent disclosure of communications or information protected by the attorney-client privilege or the work product doctrine results in subject matter waiver; and (2) to address the prohibitive costs associated with protecting against the waiver of the attorney-client privilege or the work product doctrine as a result of the concern that any disclosure could operate as a subject matter waiver of all protected communications or information. *See Explanatory Note on Evidence Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules.*

Consistent with these purposes, Rule 502 does not alter federal or state law about whether the underlying communication is privileged, but rather provides a uniform set of rules to govern the potential waiver of privilege as a result of the disclosure of information or communications protected by the attorney-client privilege or the work product doctrine. The Rule applies in all litigation commenced after September 19, 2008 and, to the extent “just and practicable,” in all pending litigation as of that date.

Some of the more significant provisions of Rule 502 are that:

- A disclosure made in a federal proceeding (or to a federal office or agency) is not a waiver in a federal or state proceeding if the disclosure was inadvertent; the holder of the privilege or protection took reasonable steps to prevent disclosure; and the holder promptly took reasonable steps to rectify the error.
- A disclosure made in a federal proceeding (or to a federal office or agency) that results in a privilege waiver does not also result in subject matter waiver unless the waiver was intentional; the disclosed and undisclosed communications or information related to the same subject matter; and they ought in fairness to be considered together.
- A disclosure made in a state proceeding generally will not result in a waiver in a federal proceeding if the disclosure would not have been a waiver under this rule had it been made in a federal proceeding; or it was not a waiver under the state law where the disclosure occurred.
- A federal court may order that there is no waiver of privilege by a disclosure connected with the litigation before the court. This order is enforceable against non-parties in any federal or state proceeding.
- An agreement on the effect of disclosure with respect to waiver in a federal proceeding is not binding on non-parties unless it is incorporated into a court order.

Although Rule 502 has yet to be interpreted by the courts, it provides parties to litigation with guidance about how to reduce the time and costs associated with pre-production privilege review while reducing the risks of waiver of privilege (including subject matter waiver) associated with a non-waiver agreement. It should not be overlooked, however, that although Rule 502 provides the means to avoid waiver due to inadvertent disclosure of privileged information, it does not address the practical implications of disclosure of privileged information to one's adversary. For example, even if a privileged

document were to be returned after inadvertent disclosure or a "quick peek," any sensitive information from the document very likely will have been revealed to opposing counsel, which could significantly alter the dynamic of the litigation (*e.g.*, change the theory of the case, provide counsel with new issues to pursue and witnesses to depose, *etc.*). In light of this, a party should carefully consider the potential costs and benefits of a thorough privilege review even in light of the implications of Rule 502.



If you have any questions about Rule 502 or would like any further information about its implications, please contact:

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