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David A. Schlueter

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Amendments to the Federal Rules of Procedure and Evidence

BY DAVID A. SCHLUETER

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees, who draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States they are forwarded to the U.S. Supreme Court, which reviews the rules, makes any appropriate changes, and in turn forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. However, if the proposed rule governs an evidentiary privilege, it must be approved by an act of Congress. (28 U.S.C. § 2074(b).)

Federal Rule of Evidence 502

In a very unusual step, Congress enacted Federal Rule of Evidence 502, dealing with the attorney-client and work product privileges. Under the Rules Enabling Act, discussed above, Congress reserved for itself the authority to draft and enact any rule of evidence dealing with privileges. (See 28 U.S.C. § 2074(b).) In the case of Rule 502 the chair of the House Judiciary Committee recommended to the Judicial Conference in 2006 that it consider proposing a rule of evidence dealing with waiver of the attorney-client and work product privileges. The proposal was driven primarily by the concern over rising litigation costs associated with discovery, especially electronic discovery. Experience had demonstrated that especially in complex litigation cases lawyers spend considerable time and effort to preserve privileged



DAVID A. SCHLUETER is the Hardy Professor of Law and director of advocacy programs at St. Mary's University Law School in San Antonio, Texas. He served as the reporter for the Advisory Committee on the Federal Rules of Criminal Procedure from 1988 to 2005. He is an associate editor to Criminal Justice magazine.

documents; if a privileged document is mistakenly produced there is a risk that a court would find subject matter waiver, not only in the case at bar, but in other cases as well. The issue was forwarded to the Advisory Committee on the Federal Rules of Evidence, which in turn drafted a proposed rule and committee note and published it for public comment. The committee received testimony from more than 20 witnesses and written comments from over 70 individuals. The proposed rule and note were approved by the Standing Committee and Judicial Conference and were forwarded to Congress. The new rule became effective on September 19, 2008.

The text of the new rule is as follows:

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 Fed. R. Civ. P. 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.

Critical Points

While space limitations prevent a more detailed analysis of the new rule here, several critical points should be noted. First, while the rule does not provide comprehensive coverage on all of the potential issues of that attorney-client and work product privileges, it does provide a template applicable in all federal courts for determining whether a waiver has occurred—in particular in those cases where the disclosure was inadvertent. Prior to the adoption of Rule 502, the case law on the subject of waiver vis a vis inadvertent disclosures was far from certain or consistent.

Second, the rule focuses primarily on the subject of waiver where the disclosures are made to a federal court, office, or agency. Rule 502(c) provides that if such a disclosure is made in a federal forum, the state courts are bound by Rule 502 in any subsequent state proceeding. But if the disclosure was made first in a state proceeding, the question of admissibility in a subsequent federal proceeding is determined by the law that is the most favorable for finding no waiver. The rule does not address the question of admissibility of the information in another state proceeding.

Finally, probably the most critical portion of the rule is in subdivision (d). That provision states that if a federal court enters an order stating that the disclosure of information is not a waiver, the order is binding against all parties and persons in any other federal or state proceeding. ■

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