

FRE 502 - Attorney-Client Privilege and Work Product; Limitations on Waiver

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On Friday, September 19, 2008, President Bush signed into law S. 2550, the new Federal Rule of Evidence 502. This legislation, which takes effect immediately, protects against the inadvertent waiver of the attorney-client privilege or the work product protection. FRE 502 should be read in conjunction with FRCP 26(b)(5)(b)¹, as well as with, Magistrate Paul Grimm's opinions in *Hopson v. The Mayor & City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005) and *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008).

Reason for the New Rule –

The Problem with FRCP 26(b)(5)(b)

When the Federal Rules of Civil Procedure were amended in December of 2006, many lawyers were relieved to see the addition of FRCP 26(b)(5)(b). This provision recognized that the sheer volume of electronic discovery would lead to inadvertent disclosures and was an attempt to provide a procedure to alleviate the stresses and costs associated with guarding against an inadvertent disclosure. The rule provided for a clawback² arrangement if documents protected by attorney-client privilege or work product were inadvertently disclosed to opposing counsel.

However, legal scholars were quick to point out two problems with the new rule. First, the usefulness of the clawback agreement as delineated in FRCP 26(b)(5)(b) was limited unless third parties were bound by it. For instance, if privileged materials are inadvertently produced to the lead plaintiff in a securities class action, does a clawback agreement in that proceeding protect the privilege from the plaintiff in a related derivative action? This was the type of scenario in *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844 (8th Cir. 1989). In this case, the corporation was being prosecuted criminally and sued in a class action. The corporation provided privileged materials in the civil matter subject to a non-waiver agreement. However, when the prosecutor sought those same

materials, the defendant asserted work-product immunity and pointed to the non-waiver agreement. Notwithstanding that agreement, the court held privilege was waived because confidentiality was destroyed when the materials were given to the class. Indeed, Magistrate Judge Grimm put it very succinctly that “[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule [26(b)(5)(B)].” *Hopson*, 232 F.R.D. at 234.

The second problem with FRCP 26(b)(5)(b), was that while clawback agreement may be an attractive way to address an inadvertent disclosure, such arrangements, even when enshrined in the amended Federal Rules of Civil Procedure, could not actually modify the substantive law on privilege. Parties were still “stuck” the existing substantive law of their jurisdiction – (1) the strict approach (any voluntary disclosure of privileged material constitutes a waiver, (2) the “to err is human” approach (simple attorney negligence does not waive privilege, and (3) the balancing test approach (look to a variety of factors, such as the reasonableness of the precautions taken to avoid inadvertent disclosure).

Thereafter, the Advisory Committee on Federal Rules heeded these concerns and proposed a new Federal Rule of Evidence 502, which would address the issues.

Purpose of the New Rule FRE 502

The purpose of FRE 502 is fourfold.

- (1) Reduce the costs and burdens associated with the massive volumes of e-discovery.
- (2) Provide clear guidance on the waiver of attorney-client privilege and work product protection.
- (3) Avoid the broad waiver of privilege and work product protection by the disclosure.
- (4) Protect parties which enter into non-waiver agreements.

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The new rule FRE 502, will standardize the federal procedure on privilege waiver following an inadvertent disclosure of information protected by the attorney-client privilege or work product protection. The rule is limited to these two types of privileges, and does not address any other privileges. Under new Rule 502 the inadvertent disclosure of attorney-client or work product information in a federal proceeding would not operate as a waiver of either privilege, provided that the:

- (1) disclosure was inadvertent,
- (2) holder of the privilege took reasonable steps to prevent the disclosure, and
- (3) holder promptly took reasonable steps to rectify the error.

This rule would apply to the waiver of attorney-client and work product protections in federal proceedings and also to alleged waiver of these privileges in state court proceedings based on inadvertent federal disclosures. The rule further applies to state proceedings even if a particular state's law provides separate rules of decision on the issue of waiver under these circumstances.

¹FRCP 26(b)(5)(b) reads as follows: 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.

²A clawback agreement is an arrangement whereby the parties agree that production of privileged or protected material, without intent to waive the privilege or protection, will not constitute a waiver.

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