

## **Litigation & Trial Practice ADVISORY**

September 26, 2008

### **Evidence Rule 502 Is Law**

After the Senate and House passed identical versions of S. 2450, adding new Evidence Rule 502 to the Federal Rules of Evidence, the bill went to President Bush for signature. On Friday, September 19, 2008 the President signed the legislation. As written, the new rule is intended to apply to all proceedings commenced after the date of enactment and, if just and practicable, in all proceedings already pending on the enactment date.

### **The Purpose of Rule 502**

The important purpose of the legislation is protection against inadvertent waiver of work product protection and the attorney-client privilege. Not just waiver of the privilege for a single document, but subject matter waiver by which all information concerning the same subject also loses the privilege, has been a significant concern particularly since the Federal Rules of Civil Procedure were amended introducing concepts like claw back agreements or orders and quick peek productions.

### **The Problem**

Claw back provisions or orders, helpful in the particular case in which they are entered, allow the producing party to request return of inadvertently produced documents and disallow waiver of the privilege. Yet, although helpful in the individual case, litigants were left with insecurity as to whether, in state court proceedings or subsequent federal proceedings, the privilege would still be deemed waived, as state and federal laws conflict on the issue of waiver.

### **The Solution**

The Advisory Committee's Explanatory Note notes that the Committee determined "that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production."

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## The Legislation

The resulting legislation provides in part:

- (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.

The complete rule is available online at: [http://www.uscourts.gov/rules/Hill\\_Letter\\_re\\_EV\\_502.pdf#page=16](http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf#page=16).

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