CLIENT ALERT

Congress Passes New Federal Rule of Evidence to Address Privilege Issues

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Yesterday, the House of Representatives approved a bill that would amend the Federal Rules of Evidence to add new Rule 502, which addresses waiver of the attorney-client privilege and work product protection. The text of the new Rule is provided below. The House approved the same version of a bill unanimously approved by the Senate in February, and did so without amendment. The bill is now headed to the President's desk for signature and is expected to become law in December of this year. The new Rule would apply to proceedings commenced after the effective date and to proceedings pending on that date "insofar as is just and practicable," thus leaving the determination of retroactive application to the courts on a case-by-case basis.

New Rule 502 was approved by the Judicial Conference of the United States and submitted to Congress for its consideration last year. In 2006, House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) suggested that the Judicial Conference of the United States propose a rule for Congress to consider addressing waiver of attorney-client privilege and work-product protection. The Rules Enabling Act, 28 U.S.C. 2074(b), requires that rules of evidence, unlike rules of civil procedure, must be approved by Congress. Congressman Sensenbrenner's suggestion for a new evidentiary rule was prompted by a concern that the current law on privilege waiver and work-product contributes to increasing discovery costs, especially discovery involving electronically stored information (ESI). The Advisory Committee on Evidence Rules was responsible for drafting the new rule, which went through several iterations based upon input from a select group of judges, lawyers and academics as well as two days of public testimony and dozens of written submissions from various groups including the American Bar Association, defense and plaintiffs' lawyers, and in-house counsel. The Advisory Committee heard extensive testimony regarding rising costs associated with discovery of ESI and efforts required to protect privilege under existing law. For example, Verizon representatives testified during a public hearing that the company had spent $13.5 million on a single privilege review involving a U.S. Department of Justice antitrust investigation into a proposed merger. Concerns like these prompted the Advisory Committee to adopt language for new Rule 502, which the Standing Committee on Rules of Practice and Procedure and the Judicial Conference approved. Senators Arlen Specter (R-Pa.) and Patrick Leahy (D-Vt.) then introduced the new Rule as a bill before Congress.

Rule 502 is expected to reduce discovery costs associated with the review and production of ESI and hardcopy documents by permitting parties to employ cost-saving procedures without waiving privilege and also to protect against waiver that is the result of an inadvertent disclosure. Such cost-saving procedures include (1) the so-called "quick peek" procedure--which allows requesting parties to access the producing party's ESI in order to more concretely specify the scope of what is requested, and (2) non-waiver agreements, often called "claw-backs"--which allow the return of inadvertently disclosed privileged materials without claim of waiver. Rule 502 also ensures that the protections of federal court orders addressing waiver will be honored in other federal and state proceedings, even those involving other parties. Additionally, Rule 502 limits the scope of waiver, providing that privileged information not specifically disclosed or otherwise waived would be produced only if a court determines that it "ought in fairness" be considered together with the disclosed information.

Rule 502 also affords protections beyond just those aimed at reducing costs. Perhaps most significantly, it resolves the current divergence of authority among the federal circuit concerning the scope of waiver by effectively eliminating subject-matter waiver. Under the new Rule, privileged information not specifically disclosed or otherwise waived is required to be produced only if a court determines that it "ought in fairness" be considered together with the disclosed information. A committee note provides that this "fairness" determination should be limited to intentional disclosure of information in litigation in a selective, misleading and unfair manner. While this protection will not directly reduce the costs of privilege review, it provides substantial peace of mind to producing parties in knowing that an inadvertent error will not likely give rise to subject-matter waiver and the potential harm that ensues from such broad waiver.

The new protections are not without some obligation, however. The new Rule provides that, in the event of inadvertent disclosure, no waiver will be found only if the producing party had taken reasonable steps to prevent the disclosure and acted reasonably promptly in trying to retrieve the inadvertently disclosed information. One of the judges principally responsible for drafting Rule 502, Chief Magistrate Judge Paul Grimm of the District of Maryland, recently issued an opinion finding waiver for the inadvertent production of more than 100 privileged documents because the party had not shown that its methodology for searching and reviewing documents for production and privilege was "reasonable." *Victor Stanley Inc. v. Creative Pipe Inc.*, 2008 WL 2221841, at *1-*7 (D. Md. May 29, 2008). Judge Grimm also concluded that the producing party had not acted promptly to retrieve the inadvertently disclosed information because there had been a "one-week period between production by the Defendants and the time of the discovery by the Plaintiff of the disclosures -- a period during which the Defendants failed to discover the disclosure." Id. at *8.

It remains to be seen what, if any, cost-savings Rule 502 will reap, but at the very least litigants will be afforded greater protections against privilege waiver than under the current law should the President sign the new Rule into law.

The text of the new Rule 502 is below.

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 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.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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