

CLIENT ALERT

Proposed Rules of Evidence Amendment

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The Advisory Committee on the Federal Rules of Evidence has proposed a change that would promote cooperation with federal regulatory, investigative and enforcement authorities and at the same time remove the fear that such cooperation would permit discovery by third parties of attorney-client privileged and work product protected materials that are shared with these federal authorities. The proposed rule declares that these disclosures do not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

The proposed rule, Rule 502, also states the disclosure of privileged and protected communications and information does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and made in connection with federal litigation or administrative proceedings and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

Additionally, the proposed rule would limit the scope of a waiver by disclosure of attorney-client privileged or work product protected communications or information. No longer would subject matter waiver be required. Instead, only undisclosed communications or information that ought in fairness to be considered with the disclosed communication or information would be subject to waiver.

The proposed rule requires Congressional enactment. It deserves support for it resolves circuit splits with respect to selective waiver and inadvertent disclosure. However, whether the proposed rule will achieve another of its goals – reducing the costs involved in reviewing and protecting material that is privileged or work product – reducing the costs involved in reviewing and protecting material that is privileged or work product – remains to be seen. Plainly, though, the proposal is a step in the right direction.

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

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