Your deputy comes in with a Cheshire cat grin holding the litigation budgets for 2009. "It seems," she sniffs, "that the staff is not aware of the new Federal Rule of Evidence, 502, which won't result in a waiver if we inadvertently turn over privileged materials! If we don't waive privileges, then we can go ahead and produce all of our electronic documents that are identified in word-based searches, and not to worry —there won't be a waiver of any privileges. This should eliminate the need for that expensive document review that is killing us in litigation." You respond "hold on, Alice... maybe things are not what they seem."

Inadvertent Disclosures and New FRE 502: Will It Relieve the Burdens and Costs Of Discovery?

BY JOHN K. VILLA

Indeed, they aren't. There is no question that Rule 502 will reduce the anxiety that has accompanied 21st century document productions, but will it remove all risk? No. It provides a framework for reducing risk, and avoiding dreaded "subject matter waivers," but there are still potential problems afoot.

Strict discovery deadlines and an ever-increasing amount of electronically stored information have made the inadvertent disclosure of privileged or protected client information a huge risk in large-scale litigation. Faced with varying rules as to whether, and to what extent, an inadvertent disclosure constitutes a waiver of the attorney-client privilege and work-product protection, parties have incurred massive expense to prevent such disclosures. In order to address and reduce these costs, Congress has recently enacted a new federal rule of evidence, Rule 502, which governs inadvertent disclosures and the issue of waiver in federal proceedings.[1] While the new rule answers some important questions, it leaves many issues open.

Before looking at new Rule 502 and its potential impact, let's briefly review how the courts have stood on the waiver issue before enactment of this new standard.

There have historically been two "bright-line" positions—the traditional view that an inadvertent disclosure necessarily results in a privilege waiver because it breaches client confidentiality,[2] or the opposite view that a waiver does not occur unless the disclosure was intended by the client.[3] Most courts, however, have fashioned more flexible, middle-of-the-road approaches that an inadvertent disclosure does not result in a waiver if the precautions undertaken to maintain confidentiality were reasonable under the circumstances.[4] In determining what constitutes "reasonable" precautions, these courts have focused on several factors, including: (1) the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) the promptness of any measures taken to rectify the disclosures; and (5) the interests of justice.[5] Thus, whether a waiver has occurred under this approach requires a case-by-case determination. In other words, reasonableness is in the eye of the beholder.

Although many if not most courts now apply this resolution, they differ markedly on the waiver's reach once it has resulted from an inadvertent disclosure. Many courts have limited the scope of the waiver to the document inadvertently disclosed.[6] A waiver in other jurisdictions, however, has not only affected the document inadvertently disclosed, but has also extended to all other documents pertaining to the same subject matter in both the pending litigation and any subsequent litigation.[7] Similarly, the courts have not been consistent in their decisions regarding the efficacy of non-waiver agreements entered into between the parties to maintain the confidentiality of information produced during discovery.[8]

Against this background in the case law, Congress enacted Rule 502 (effective December 1, 2008) which provides, in pertinent part, as follows:

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(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).[9]

(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 protections are 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.[10]

(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.

> There have historically been two "bright-line" positions—the traditional view that an inadvertent disclosure necessarily results in a privilege waiver because it breaches client confidentiality,[2] or the opposite view that a waiver does not occur unless the disclosure was intended by the client.[3]

Portions of subsection (a), of course, are intended to address an issue that has bedeviled many companies who attempt to cooperate with law enforcement and still protect themselves from private litigants. (See the July/August, 2002, Ethics & Privilege column, "Will Sharing with a Regulatory Agency the Report of an Internal Corporate Investigation Waive its Protections against Disclosure to other Potential Adversaries?"). That will be the subject of future columns. Our analysis today covers the sections dealing with inadvertent disclosure in civil litigation that are the focus of subsection (b). Congress, acting on the recommendation of the federal judiciary's rulemaking body,[11] has essentially taken the middle ground approach in determining whether a waiver has resulted from an inadvertent disclosure. Unfortunately, neither the rule nor any of its supporting documentation provides any guidance with respect to the ticklish question of assessing the reasonableness of the steps taken to prevent disclosure.[12] Thus, while the rule provides for a uniform standard for resolving the issue of waiver in the context of inadvertent disclosures, application of the standard will necessarily vary depending upon how the court weighs the various factors that may be considered in determining the reasonableness of the precautions undertaken to prevent disclosure.

Where a waiver is found to have resulted from an inadvertent, or even a voluntary, disclosure in a federal proceeding or to a federal office or agency, subsection (a) of Rule 502 generally limits the scope of the waiver to the material actually disclosed. As explained by the Advisory Committee on Rules of the Judicial Conference,

> [A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. . . . Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver.[13]

Unlike the position of several courts, Rule 502 significantly reduces the

adverse consequences of a finding of inadvertent waiver. This may be little solace, however, if you have turned over the crown jewels of privilege.

There are a number of very important changes, however, that solve knotty problems in the jurisprudence. With respect to non-waiver or confidentiality agreements, for example, subsection (e) of Rule 502 gives effect to recent amendments to the Federal Rules of Civil Procedure that permit the use of these agreements[14] by providing for their binding effect—even against non-parties—as long as the agreements are incorporated into a court order. In the absence of an agreement, subsection (d) authorizes the entry of a confidentiality order that is effective not only in the pending litigation, but in any other federal or state proceeding. According to the notes of the Advisory Committee, subsection (d) resolves a dispute in the case law as to the enforceability of confidentiality orders in other proceedings, and is intended to provide "predictable protection from a court order—predictability that is needed to allow [a] party to plan in advance to limit the prohibitive costs of privilege and work product review and retention."[15]

Finally, Rule 502 addresses the implications of state law on privilege protection.

First, the rule provides protection for disclosures that initially were made in state court proceedings but were not subject to a state court order on waiver. Pursuant to subsection (c), a prior disclosure in a state proceeding will not constitute a waiver in a subsequent federal proceeding if it (1) would not constitute a waiver under Rule 502 if made in a federal proceeding, or (2) would not constitute a waiver under the law of the state where the disclosure occurred. This provision is intended to enable a court "to apply the law that is most protective of privilege and work product."[16] As explained by the Advisory Committee, "[i]f 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."[17]

Second, subsection (f) makes the rule applicable to a state court proceeding where the disclosures were initially made in a federal proceeding. Otherwise, the Advisory Committee states, "the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined."[18]

> The litmus test remains "reasonableness" in the review of documents for privileges prior to production.

Third, pursuant to subsection (f), the rule applies to state law causes of action brought in federal court, notwithstanding the provision of Rule 501 providing for application of state privilege law in a federal proceeding where state law provides the rule of decision.[19] As explained by the Advisory Committee, "[t]he costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law."[20]

What can we glean from the new rule?

- It remains important to negotiate non-waiver agreements and obtain court approval of them in the form of court orders as they remain essential to providing protection beyond the case itself.
- Many of the protections provided by the new rule will not reach intentional disclosures thus the positions parties take in litigation—such as placing the lawyers' advice at issue—will probably still become a waiver.
- The litmus test remains "reasonableness" in the review of documents for privileges prior to production. That test remains unpredictable although it is possible that the parties could try to define its meaning within the context of a case and an agreement to eliminate or at least reduce the risk.

In short, Alice, there is still the chance that the red queen will scream, "Off with her head!"

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1 Rule 502 was proposed by the Advisory Committee on Evidence Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and was incorporated into S. 2450 that was introduced by Senators Leahy and Specter on December 11, 2007. The bill passed both Houses of Congress on September 8, 2008, and was signed into law on September 19, 2008. See *www.uscourts.gov/rules/index2.html#s2450* (What's New—President Signs S. 2450 (New Evidence Rule 502) Into Law).

2 *See In re Sealed Case*, 877 f.2d 976, 980 (D.C. Cir. 1989); *Kaminski v. First Union Corp.*, 2001 WL 793250 at *2 (E.D. Pa. 2001).

3 *See Berg Electronics, Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995); *Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. 1573, 1576 (S.D. Fla. 1993).

4 *See Alldread v. City of Grenada*, 988 F.2d 1425,1434 (5th Cir. 1993); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D. N.Y. 1993).

5 *See Alldread v. City of Grenada*, 988 F.2d at 1434; *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D. N.C. 1987); *see also Restatement (Third) of the Law Governing Lawyers* § 79, cmt. h (2000).

6 *See Parkway Gallery Furniture*,116 F.R.D. at 52.

7 *See F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 79-80 (D. Md. 1998).

8 *Compare Chubb Integrated Systems Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 67-68 (D. D.C. 1984) (not effective to preclude finding of waiver in subsequent litigation), with *Smith v. Armour Pharmaceutical Co.*, 838 F. Supp. at 1576 (effective to preclude finding of waiver). While recent amendments to the Federal Rules of Civil Procedure support the use of these agreements, see Fed. R. Civ. P., Rule 26(f)(3), they did not validate these agreements as a means for preserving claims of privilege, since such a substantive change in the federal law of privilege would require congressional approval, see 28 U.S.C.A. § 2074, which, as discussed *infra*, has now been obtained.

9 Pursuant to Rule 26(b)(5)(B), a party who inadvertently discloses privileged information during discovery may notify the opposing party of her claim of privilege. Upon notification, the rule requires the opposing party to "promptly return, sequester, or destroy the specified information and any copies it has," and to refrain from using or disclosing the information until resolution of the privilege claim. Fed. R. Civ. P., Rule 26(b)(5)(B).

10 Fed. R. Evid., Rule 502.

11 *See* n. 1, *supra*.

12 According to the notes of the judiciary's Advisory Committee on Evidence Rules that accompanied the proposed rule submitted to Congress, other factors that may be considered in determining the reasonableness of the precautions, in addition to those set forth in the case law, see n. 5, supra, and accompanying text, include the use of advanced analytical software applications and linguistic tools to screen for privileged and protected material, and the pre-litigation implementation of an efficient records management system. See Judicial Conference Advisory Committee on Evidence Rules, Explanatory Note on Evidence Rule 502, at 8 (revised November 29, 2007), available at *www.uscourts.gov/rules/hill_letter_re_EV_502.pdf*. The Advisory Committee further states that while the rule does not require post-production reviews to determine whether a mistaken disclosure has occurred, it does require that the producing party "follow up on any obvious indications that a protected communication or information has been produced inadvertently." *Id.*

13 *Id.* at 6.

14 *See* n. 8, *supra*.

15 Judicial Conference Advisory Committee on Evidence Rules, Explanatory Note on Evidence Rule 502, at 10.

16 *Id.* at 9.

17 *Id.*

18 *Id.* at 11.

19 *See* Fed. R. Evid., Rule 501.

20 Judicial Conference Advisory Committee on Evidence Rules, Explanatory Note on Evidence Rule 502, at 12.