

## **New Attorney-Client Privilege Protections Signed Into Law**

On September 19, 2008, President Bush signed into law a new Federal Evidence Rule that promises increased protection for the attorney-client privilege. New Federal Evidence Rule 502 also has the potential for cutting some electronic discovery costs, especially the cost of conducting privilege reviews before producing corporate documents. The Association of Corporate Counsel has lauded the new rule.

The new federal rule applies to the inadvertent disclosure of information protected by the attorney-client privilege and by the work-product doctrine in federal-court litigation and federal agency investigations.

Rule 502 promises to benefit businesses that have cases in federal court, or that are targeted for investigation by federal offices or agencies. By limiting the situations in which inadvertent production of a privileged document will result in a waiver, and by giving federal courts power to enter a non-waiver order, Rule 502 makes it possible to reduce or bypass the expensive process of carrying out a privilege review when thousands or hundreds of thousands of documents are involved—particularly in electronic discovery. In interviews, the head of the Judicial Conference Advisory Committee responsible for drafting the new rule has said that the reduction of this cost burden was one of its key goals.

Under new Rule 502, a disclosure of privileged information will not waive the attorney-client privilege or work-product protection if the disclosure is inadvertent; the holder of the privilege or protection has taken reasonable steps to prevent disclosure; and the holder takes “reasonable steps to rectify the error.” The committee notes explain that “reasonable steps to rectify” the error means that the holder of the privilege must attempt to retrieve the inadvertently disclosed information.

In addition, the new rule addresses the issue of “subject-matter waiver.” It provides that even where the privilege has been waived, the waiver applies only to the information disclosed, and not other information pertaining to the same subject matter, unless the disclosure was intentional and there is undisclosed information on the same subject that “ought in fairness to be considered together.” The committee notes explain that the determination of “fairness” applies only in situations where a party uses privileged information in a misleading or unfair way.

The new rule also provides that in federal litigation, the court may issue an order that attorney-client privilege or work-product protection is not waived by disclosure connected with the pending case. If a party obtains a non-waiver order in federal court, it is also enforceable in state court. Further, if the parties to a federal proceeding enter into an agreement to limit the effect of waiver



by disclosure and incorporate the agreement into a court order, they may broaden the scope of the protection to also apply to non-parties.

New Rule 502 applies in all “proceedings commenced after the date of enactment,” *and* “insofar as is just and practicable, in all proceedings pending on such date...”

The new rule does not change the law of attorney-client privilege or the work-product doctrine. But it will likely increase predictability and promote cost savings for companies grappling with the demands of document production in federal matters.

#### **FOR MORE INFORMATION**

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