



## JONES DAY COMMENTARY

# NEW FEDERAL RULE OF EVIDENCE 502 AND POSSIBLE LITIGATION DOCUMENT REVIEW COST SAVINGS

On September 19, 2008, President Bush signed Senate Bill No. 2450 into law as Public Law No. 110-322. This law creates a new rule of evidence—Federal Rule of Evidence 502, or FRE 502—limiting certain attorney-client privilege and work product waivers. The rule applies in “all proceedings commenced after” its enactment and, “insofar as is just and practicable, in all proceedings pending” on that date. Its two major purposes are to (1) harmonize the law governing certain disclosures of privileged and protected communications, and (2) reduce litigation costs incurred in reviewing documents for privilege before production. As detailed below, the new rule plainly makes federal privilege waiver law uniform in the situations it addresses but will achieve its cost-savings goal only for litigants that are willing to make potentially significant trade-offs.

## BACKGROUND

Before 1975, the law of evidence was left to the common law, which developed and was articulated by

judges over time but was not codified in statutes or rules. The Federal Rules of Evidence (“FRE”), which took effect in 1975, changed that. The FRE have multiple, detailed rules concerning almost every area of evidence law—judicial notice, presumptions, relevance, authentication, etc. For example, the FRE not only define hearsay and render it inadmissible, but they have 24 exceptions for available “declarants,” five more for unavailable ones, and a residual exception for good measure (and for creative lawyers).

Yet the FRE essentially ignore a major area of evidence law—privilege. It was not supposed to be that way. The FRE, as sent to Congress, had 13 specific privilege-related rules, including rules covering the attorney-client privilege rule (proposed FRE 503), voluntary waivers (proposed FRE 511), and compelled productions of privileged materials (proposed FRE 512). But Congress objected, so the new rules included only a single privilege-related rule—FRE 501. Under FRE 501, unless state law applies or the

Constitution or a federal statute says otherwise, federal privilege law “shall be governed by the principles of the common law.”

## WHAT NEW FRE 502 DOES

New FRE 502 does four primary things. First, it limits “subject matter” waivers. When there has been an intentional disclosure in a federal proceeding that waives the attorney-client privilege or work product protection, FRE 502(a) provides that the waiver extends to undisclosed privileged or protected communications on the “same subject matter” only if “they ought in fairness to be considered together.” The rule bars a waiver finding in both federal and state proceedings. This “no subject matter waiver unless fairness requires it” rule is the current rule in most (perhaps all) jurisdictions, but the new rule makes that clear.

Second, it prevents some unintentional productions of privileged and protected documents from resulting in a waiver. When there has been an inadvertent disclosure of privileged or protected materials in a federal proceeding, FRE 502(b) provides that there is no waiver if the privilege-holder took “reasonable steps” to both “prevent disclosure” in the first instance and “to rectify the error.” Like FRE 502(a), FRE 502(b)’s inadvertent disclosure rule bars a waiver finding in both federal and state proceedings. And again, the new rule codifies what already was the general rule, but removes any lingering uncertainty.

Third, when a disclosure is made in a state proceeding and is not subject to a state-court waiver order, FRE 502(c) provides that there is no waiver in a federal proceeding if either (1) there would have been no waiver under FRE 502 if the disclosure had been made in a federal proceeding, or (2) there is no waiver under the state law where the disclosure occurred. This provides that the federal or state rule that is most protective against waiver applies. It is new.

Finally, FRE 502(d) provides that federal court non-waiver orders relating to federal proceedings bind other federal and state courts, and FRE 502(e) provides that a non-waiver agreement between parties to a federal proceeding binds only the parties unless the agreement is incorporated into a

court order. FRE 502(d) is new, while FRE 502(e) is the general rule now.

## WHAT NEW FRE 502 DOES NOT DO

In the general area of privilege waiver that FRE 502 addresses, some uncertainties remain, notwithstanding the new rule. For example, FRE 502(a)’s “no subject matter waiver unless fairness requires it” rule will require courts to interpret and define both what is the “same subject matter” and when “fairness” requires a waiver. Similarly, FRE 502(b)’s “no waiver through inadvertent disclosure” rule neither identifies whose intent matters for purposes of determining whether the initial disclosure was “inadvertent,” nor details what “reasonable steps” before and after the production are required to avoid waiver. Courts, however, have grappled with these issues under the common law and presumably will continue to do so under FRE 502(a) and FRE 502(b).

There are also issues in the general area of privilege waiver that the new rule simply does not address. For example, corporations that have conducted internal investigations sometimes “voluntarily” disclose privileged and protected materials to government investigators and regulators as a sign of cooperation. These “voluntary” waivers became commonplace after the Justice Department’s so-called “Thompson Memo” arguably directed federal prosecutors to seek them. When plaintiffs pursuing other litigation against the corporation later seek the privileged and protected documents provided “voluntarily” to the government, corporate defendants have urged courts to find that there was only a “selective waiver” extending to the government, but no further. Courts generally have rejected “selective waiver” claims, but early versions of FRE 502 would have permitted them. FRE 502 does not speak to “selective waivers.”

Also, some may assert that there are constitutional problems with the provisions in FRE 502(a), FRE 502(b), and FRE 502(d) that make federal privilege rules (and federal courts’ orders applying them) binding on state courts. If courts ultimately find that Congress could not give federal courts this power, then some of the “certainty” provided by FRE 502 will prove illusory.

## HOW NEW FRE 502 WILL AFFECT LITIGATION

Having lived with the federal common law of privilege for 33 years, we now have doubled the number of federal privilege-related evidence rules with new FRE 502. Because FRE 502(a) and FRE 502(b) largely codify major chunks of what already is the common law of attorney-client privilege and work product waiver, they should bring more predictability to an area where, currently, it does not always exist. But they do little to change the law and should not significantly alter the manner in which courts resolve privilege and work product claims.

What may be significant in the new rule is FRE 502(d). It provides that “[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.” Effectively, FRE 502(d) will make a federal court non-waiver order a “trump” card in other federal courts, as well as in all state courts.

Thus, as long as they have the prior blessing of a federal court order—a “no-waiver order”—litigants may (a) produce privileged and protected documents in federal proceedings with no pre- or post-production privilege review, yet (b) retain otherwise applicable attorney-client privilege and work product claims and (c) assert them when the adversary attempts to use the documents. If that is what FRE 502(d) means and producing parties elect to proceed in this manner, this could be a huge cost savings since privilege reviews—particularly privilege reviews involving large quantities of electronically stored data—can be extremely time-consuming and expensive. But before producing parties rely on FRE 502(d) to eliminate the privilege review portion of their document production process, they should recognize that doing so has several potential pitfalls.

First, while the substance of some privileged or protected communications could hardly matter less, they very often involve information that the privilege-holder really wants to keep confidential, particularly as against the litigation adversary to whom the production is being made. The no-privilege-review approach, although it avoids the substantial expense of a privilege review, destroys this confidentiality.

Thus, while FRE 502(d) will preserve the privilege-holder’s privilege and work product claims, the adversary will know the substance of the still-privileged and protected communications. The proverbial cat will be out of the bag.

This could matter. “Knowing that communications will remain confidential ... encourages the client to communicate fully and frankly with counsel.” *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998). And “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Routine disclosures of privileged and protected communications to adversaries as FRE 502(d) contemplates could, as expectations of confidentiality disappear, discourage employees from confiding in the company’s attorneys and make attorneys reluctant to provide frank legal advice or engage in zealous advocacy. See *Hickman*, 329 U.S. at 511 (1947) (“Were [work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.”).

A second and related concern is that the right to raise privilege or work product claims that FRE 502(d) preserves may, as a practical matter, be of little use. A litigation adversary can “use” the document containing your privileged or protected communication in many ways that give you no opportunity to object. For example, the adversary may formulate questions, trial strategies, or challenges to privilege claims that are based on or informed by privileged or protected documents. In that event, objecting may be either impossible or pointless. Similarly, if the adversary has fact or expert witnesses review and rely on privileged or protected documents (of course, before the claims are asserted and sustained), it will be impossible to have them “unlearn” that information and difficult to excise the resulting knowledge from their testimony or opinions.

Third, the claims of privilege or protection that FRE 502(d) preserves may conflict with and ultimately yield to other interests. Suppose, for example, that a litigation adversary claims that information in privileged or protected documents “impeaches” the privilege-holder’s witness’s testimony. How trial courts will resolve the privilege claims in that context remains to be seen.

Fourth, FRE 502(d)'s "produce now, assert later" approach may create practical problems. The current paradigm is that privileged and protected documents are reviewed and, for the most part, removed from the production process and, therefore, are unavailable to litigation adversaries. In the new "produce now, assert later" world that FRE 502(d) creates, privileged and protected documents will, by assumption, be produced in substantial numbers. As a result, courts will be forced to resolve far more privilege and work product claims that will be asserted during depositions and at trial, where the privilege-holder presumably still would have to object to preserve the claims.

Busy courts may not like this new world and may respond in ways and with rules and rulings that privilege-holders will not appreciate. For example, courts may set deadlines for privilege-holders to assert claims of privilege or protection in produced documents, either before depositions begin or before trial, which may significantly reduce any cost savings. Similarly, unless the producing party reviews and identifies privileged and protected documents after production but before depositions or trial, which defeats the cost-savings goal, each of the privilege-holder's counsel will need to be expert at quickly spotting privileged and protected documents as the adversary uses them in any deposition or at trial and then objecting and defending the basis for those claims "on the fly." Counsel's inability to quickly raise and support the claims that FRE 502(d) preserved may mean that they are simply waived later through different conduct. And courts may ultimately decide that the new burdens that FRE 502(d) places on them are unwarranted and simply decline to enter FRE 502(d) "no-waiver" orders.

## AN OPPORTUNITY FOR ACHIEVING COST SAVINGS IN THE RIGHT SITUATION

The major litigation cost-savings vehicle in FRE 502 is the invitation in FRE 502(d) to produce documents with little or no pre-production privilege review and then assert otherwise applicable attorney-client privilege and work product protection claims later. On balance, if a litigant's privileged and protected documents are unimportant and voluminous, and the litigant is reviewing them before production only to avoid sweeping "subject matter" waiver claims that might reach more important communications, this is an invitation worth serious consideration. In that event, FRE 502 may provide real benefits in terms of cost-savings with little corresponding negative effects. But in the more typical situation where privileged and protected communications may matter or may even matter a great deal, FRE 502(d)'s "promise" to preserve privilege and work product claims for documents produced to litigation adversaries may mean little and come only at a heavy cost.

## LAWYER CONTACTS

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