



Oops, It Happened Again: Inadvertent Disclosure under New Federal Rule of Evidence 502

By Wayne Morse, Jr.

New Federal Rule of Evidence 502 is worthwhile reading for courtroom lawyers because it changes the law regarding waiver of attorney-client privilege. Rule 502 has several subsections.

(a) defines the limited circumstances under which a party's intentional waiver of the attorney-client or work-product protections as to one document waives the protections afforded other documents and information concerning the same subject-matter;

(b) creates a "reasonableness" standard for identifying those instances when a party's inadvertent disclosure of a document waives the protections attached to that document;

(d) and (e) strongly counsel that litigators use court-approved confidentiality agreements to further avoid uncertainty regarding a waiver and its consequences and to ensure that whatever disclosures they make cannot be used by non-parties as evidence of waiver; and in an important federalism development

(f) provides that a federal court's determination of a party's non-waiver is binding upon a state proceeding.

Intentional Disclosure

In short, Rule 502 provides that a waiver of privilege exists with respect to a document if the party acted intentionally. *Fed. R. Evid.* 502(a). Most important, the inquiry into intent under Rule 502(a) concerns a party's intent to waive the privilege, not its intention to produce a particular document. If a party intentionally waives the privilege attaching to a document, the Rule does not create a broader waiver of all other documents and information on the same subject, unless the non-disclosed, privileged documents "ought in fairness to be considered" with the material that was turned over. This codification is a change in the presumption of waiver. Previously, lawyers and judges considered an intentional waiver as to a document a waiver as to all documents of that subject-matter. The result was often harsh, so judges tended to narrowly construe the subject-matter of the disclosed document.

The language of Rule 502(a) and the advisory committee notes unambiguously provide that Rule 502's presumption is against subject-matter waivers for even an intentional waiver. The notes offer that subject-matter waivers should occur only in "unusual situations," when fairness requires that the non-disclosed material be considered with the material already

turned over. Rule 502 falls short of providing sufficient certainty and guidance on when "fairness" will require a subject-matter waiver. The advisory committee notes do not add much guidance, as they state only that "... a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation." Until more case law interpretation develops, it will be difficult for a party or its counsel to assess what documents a court might conclude "ought in fairness" to be considered waived with other documents.

Suppose a party intends to waive the attorney-client privilege that would otherwise protect a corporate internal investigation report. It is clear that, pursuant to Rule 502(a), production of the report would waive the protections afforded that report. What about the many other privileged documents that were created as part of preparing the final report? If management reviewed and commented on a draft, would management's comments remain privileged? Would management's comments be waived because "fairness" would dictate that the party receiving the report see whether any changes were proposed and who proposed them? Is a party making a "selective" and "misleading" disclosure if it provides only a final report when man-

agement was heavily involved in editing the drafts, such that it would be “unfair” to allow production of only the final version?

Whether the general rule of subject-matter waiver applies in cases of inadvertent disclosure is less settled. Some courts have applied a broad scope of waiver, even if the disclosure was not intentional. The District of Columbia Circuit found potential subject-matter waiver where disclosure of a single document was “human error.”¹ The court noted that a waiver “extends to all communications related to the same subject-matter.”

Other courts have held that “[i]n a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.”² In a separate decision, a court determined that “the general rule that a disclosure waives not only the specific communication but also the subject-matter of it in other communications is not appropriate in the case of inadvertent disclosure unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure.”³

Inadvertent Disclosure

If the disclosure is inadvertent, a waiver of privilege exists as to a document only if a party failed to take “reasonable steps to

prevent disclosure” or took “such steps to prevent disclosure” or took such steps, but failed “promptly” to take “reasonable steps to rectify the error” once the party learned an inadvertent error was made. *Fed. R. Evid.* 502(b). Subsection (b) allows a party who inadvertently disclosed a document to continue to apply the privilege to that document and “claw back” the document provided it acted reasonably in preventing disclosure and in rectifying the problem after it discovered that an inadvertent disclosure took place. Under subsection (b), a broad subject-matter waiver never occurs from an inadvertent disclosure.

The inadvertent disclosure provisions are at the heart of the cost-saving goals of Rule 502. The Rule codifies the majority judicial rule that an inadvertent disclosure only is a potential waiver as to the disclosed document, not as to the entire subject-matter referred to in that document. Accordingly, the potential damage to a disclosing party is minimized.

The claw-back provision adds helpful guidelines for determining waiver. According to the Rule’s notes, courts are to consider many factors: (a) the reasonableness of precautions taken; (b) the time taken to rectify the error; (c) the scope of discovery; (d) the number of documents reviewed and the time constraints for production; (e) the extent of disclosure; and (f) “the overriding issue of fairness.” The notes also suggest that a party can help in demonstrating that its steps were reasonable by employing “advanced analytical software applications and linguistic tools” in screening for privilege.

Rule 502 was drafted to reduce the costs of privilege reviews in discovery in complex cases. Its development is also an acknowledgement. Reviewing documents for privileged communications is expensive, as is motion practice over inadvertently disclosed documents. The Rule seeks to address the challenges for withholding attorney-client communications where voluminous electronic documents are involved. For Rule 502 to reduce costs, courts will have to be consistent and predictable and liberally find that disclosures were inadvertent.

District courts have shown some commonality in their approaches to inadvertently disclosed documents. Analyses have been fact-intensive, and most have weighed heavily the “fairness” factor enumerated in Rule 502’s notes.⁴ Courts also tend to focus on how soon the party

sought return of the document and the volume of discovery produced.

The first decision to address new Rule 502 and inadvertent disclosures was *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008). *Rhoads* involved a dispute over whether Rhoads’s inadvertent disclosure of more than 800 privileged documents constituted waiver. Rhoads faced motions to deem certain of privilege claims waived, contending that the Rhoads was careless, delayed in seeking return of the documents and failed to produce complete and accurate privilege logs. Notably, the court pointed to the Advisory Committee Note to Rule 502, which summarizes the multi-factor test utilized by a majority of courts.

Facts the court found favoring Rhoads included: the purchase of a special software program for purposes of the litigation; the trial searches conducted prior to purchase of the software; the hired technical consultant was experienced with the Rhoads computer system; search terms utilized; time spent reviewing documents; the number of inadvertent disclosures in comparison to the number of documents produced; Rhoads’s immediate response to defendants’ e-mail that some potentially privileged documents had been produced; a tight discovery schedule; the invocation of *Federal Rule of Civil Procedure* 26(b)(5)(B) to have the inadvertently produced documents sequestered; the willingness to produce a cleansed hard drive; and Rhoads’s general compliance with the three conditions of Rule 502(b).

The court in *Rhoads* pointed to the following facts in favor of the defendants on the issue of inadvertent disclosure: the limited search terms utilized; Rhoads’s associate attorney having no prior experience doing a privilege review; the document search limited to e-mail address lines as opposed to the e-mail body; the documents produced which should have been captured even under Rhoads’s search terms; the reliance solely on a key word search for purposes of conducting privilege review; the Rhoads’s testing of its search; the number of inadvertently produced documents; the time taken by Rhoads to review; Rhoads’s failure to provide adequate resources for the review; the defendants brought the privilege error to Rhoads’s attention; the time taken to produce a privilege log; Rhoads’s failure to offer suggestions to rectify the inadvertent

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production until after many depositions were taken; and the lack of rigor in Rhoads's privilege review.

In its legal analysis of inadvertent disclosure, the court took the position that the first hurdle is to determine whether the producing party has "at least minimally complied with the three factors stated in Rule 502(b), *i.e.* that the waiver was inadvertent, the party took reasonable steps to prevent disclosure, and attempted to rectify the error." If the initial three factors are "minimally complied with" and a dispute remains regarding "reasonableness," the court proceeds with the traditional five-factor test used in earlier decisions.

The court found Rhoads had taken steps to prevent disclosure and to rectify its error; however, Rhoads's efforts, to some extent, were unreasonable. The court applied the five-factor test, found in favor of defendants as to the first four factors, but in favor of Rhoads as to the fifth factor, interest of justice. Denial of the privileged documents to defendants was not prejudicial because defendants had no reasonable expectation to privileged communications. Rhoads was required to produce certain privileged documents due to its failure to timely log all of its inadvertently produced privileged documents. The court did not analyze this issue under Rule 502, relying instead on *Federal Rule of Civil Procedure* 26(b)(5).

Not surprising is that courts have consistently made a threshold determination of whether the documents are indeed attorney-client communications. The party claiming the privilege has the burden of proving the document contains a communication between an attorney and a client, constituting legal advice, which was intended to be and was kept as confidential. The courts' consideration of this threshold issue appears to be informed by a concern that a party is not seeking to be opportunistic and to use Rule 502(b)'s generous "fairness" factor improperly to obtain return of a document that is not privileged. In the most recent reported decision, *Clarke v. J. P. Morgan Chase & Co.*, 2009 WL 970940 (S.D. N.Y. Apr. 10, 2009), the court held that an inadvertently disclosed e-mail was not privileged. The e-mail, authored by an attorney, was sent by the company's management team, not the attorney, and it did not state that it was prepared by the attorney. The court determined that the remaining documents sought back by J. P. Morgan Chase were

not protected by Rule 502(b), among other reasons, because of the delay in reclaiming the documents, and "the volume of Plaintiff's discovery was not so large that the email would have been difficult for Defendant to identify."

Uncertainties remain even under Rule 502. Therefore, lawyers should craft agreements regulating the effect of an intentional waiver or inadvertent disclosure and seek an order incorporating those agreements. Such provisions should be included in consent protective orders which are routine in civil litigation. By agreement, parties may avoid any ambiguity in Rule 502 regarding inadvertent disclosure and substitute a well-defined standard. Parties may agree that no production could create a subject-matter waiver, or that an inadvertently produced privileged document may be clawed back under any circumstances. Under Rule 502, litigants must still proceed with caution in discovery, be diligent in reclaiming privileged documents and seek judicially approved agreements at the incipient stages of the proceeding. However, thoughtful, well-informed practice under Rule 502 should help control costly electronic discovery and privilege reviews meant to protect against inadvertent disclosure.

This article originally appeared in the American Bar Association's *Pretrial Practice & Discovery*, volume 17, number 4, summer 2009. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association. ▲▼▲

Endnotes

1. *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989).
2. *Parkway Gallery v. Kittinger/Pennsylvania H. Group*, 116 F.R.D. 46, 52 (M.D.N.C. 1987).
3. *Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D.Va. 1991).
4. *See, e.g., B-Y Water District v. City of Yankton*, 2008 WL 5188837 (D.S.D. 2008); *Reckley v. City of Springfield, Ohio*, 2008 WL 5234356 (S.D.Ohio 2008).



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A Female Perspective

Jeanne Marie Leslie, director of the ASB Lawyer Assistance Program, was the guest editor for the fall 2009 edition of *Highlights* newsletter, published by the American Bar Association Commission on Lawyer Assistance Programs. Leslie assembled a number of articles focusing on the barriers women confront in addressing and accessing addiction treatment. She even wrote a very frank first-person account, "A Feminine Perspective," about her own struggle with alcohol and drugs. As she wrote, "I know beyond a shadow of a doubt that recovery is possible. As a professional I carry this message of recovery to lawyers, judges and law students suffering from alcohol addictions and other mental health disorders. I am truly privileged and humbled to do this work and I am grateful every day to be alive."

If you need help or know someone who does, please contact the Alabama Lawyer Assistance Program at (334) 224-6920. ▲▼▲