

On September 19, 2008, the President signed into law a bill adding new Evidence Rule 502 to the Federal Rules of Evidence.

## **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

The following applies to disclosure of information or a communication falling within the scope of:

- the attorney-client privilege or
- work-product protection

**(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.** A waiver of the attorney-client privilege or work product protection also extends to undisclosed information or communications in a federal or state proceeding in the following situations:

- A disclosure is made in a federal proceeding or to a federal office or agency.
- There is a waiver of the attorney-client privilege or work-product protection.
- The following additional conditions are met:
  - (1) Intentional: the waiver is intentional;
  - and (2) Same subject matter: both the disclosed and undisclosed information concern the same subject matter;
  - and (3) Fairness: fairness dictates that they be considered together.

**(b) Inadvertent disclosure.** A disclosure made in a federal proceeding (or to a federal office or agency) does not operate as a waiver if:

- (1) the disclosure is inadvertent;
- and (2) the holder of the privilege or protection took reasonable steps to prevent disclosure;
- and (3) the holder promptly took reasonable steps to correct the error, including (if applicable) following FRCP Rule 26(b)(5)(B) (Sending Notice after Inadvertent Disclosure).

**(c) Disclosure made in a state proceeding.** A disclosure made in a state proceeding does not operate as a waiver in a federal proceeding if the disclosure

- is not the subject of a state-court order concerning waiver
- and the disclosure either:
  - (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.**

1. A federal court may order that a privilege is not waived by virtue of a disclosure in the litigation then pending before the court.
2. If the court so orders, then the disclosure is also not a waiver in any other federal or state proceeding.

**(e) Controlling effect of a party agreement.**

1. Parties to a federal proceeding may agree on the effect of a disclosure.

2. Such an agreement is only binding on the parties to the agreement (unless the agreement is incorporated into a Court order).

**(f) Controlling effect of this rule.**

1. This rule applies to the following types of proceedings:
  - a. state proceedings
  - b. federal court-annexed arbitration proceedings
  - c. federal court-mandated arbitration proceedings
2. This rule applies notwithstanding Rules 101 and 1101 (dealing with the applicability of the Federal Rules of Evidence).
3. This rule applies even if state law provides the rule of decision (and notwithstanding Rule 501 (Privileges)).

**(g) Definitions.** — In this rule:

- (1) **“attorney-client privilege”** means the protection for confidential attorney-client communications that applicable law provides.
- (2) **“work-product protection”** means the protection (provided by applicable law) for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

### **Explanatory Notes on Evidence Rule 502**

- One of the major purposes of the Rule is to resolve disputes in the courts about the effect of certain disclosures protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

### **Note on Amendments to the Federal Rules of Evidence**

Other amendments to the federal rules of practice, procedure, and evidence are usually drafted by the Judicial Conference and take effect automatically unless Congress acts affirmatively to modify, defer, or reject it.

In this case, however, because the amendment constitutes a “rule creating, abolishing, or modifying an evidentiary privilege” it “shall have no force or effect unless approved by Act of Congress.” See [28 U.S.C. § 2074\(b\)](#).