

Recent Developments under the 2008 Amendment to Rule 502 of the Federal Rules of Evidence

by

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Overview

- In 2008, Federal Rule of Evidence 502 was amended in order to make it harder to inadvertently waive the attorney-client or work-product privilege:

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

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by 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-** 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 Federal Rule of Civil Procedure 26(b)(5)(B).

(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 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.

(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.

(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.

(g) **Definitions -** In this rule:

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

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Relevant Materials

- The text of the Senate bill which was passed in order to change Rule 502 (S. 2450) is available at <http://lawyersusaonline.com/wp-files/pdfs/S2450.pdf>.
- The text of the new Rule 502 itself is available at <http://www.law.cornell.edu/rules/fre/rules.htm#Rule502>.
- On May 15, 2006, the Judicial Conference of the United States' Committee on Rules of Practice and Procedure released a report of the Advisory Committee on Evidence Rules, dealing with the proposed revisions to Rule 502. The report was revised on June 30, 2006, and is available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf.
- On September 26, 2007, the Judicial Conference sent a letter to Congress regarding the proposed new Rule 502. The final enacted version of the Rule is identical to the version proposed by the Judicial Conference in this September 2007 letter. The letter is available at <http://lawyersusaonline.com/wp-files/pdfs/Letter%20and%20proposed%20rule%20changes.pdf>.
- The September 8, 2008 “Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence” is available at http://lawyersusaonline.com/wp-files/pdfs/Congressional_Record_re_S2450.pdf.

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Recent Decision by Judge Grimm of the District of Maryland on the New Rule

- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. May 29, 2008):

Plaintiff filed suit alleging intellectual property infringement and unfair competition, claiming the company lost contracts because the defendant inappropriately accessed images from its Web site

Victor Stanley made an e-discovery document request. As is mandated by the amended Federal Rules of Civil Procedure, the two parties sat down at a “meet and confer” conference to outline the specifics of the request and the production. Although they came to an agreement regarding the discovery’s methodology, the defendant abandoned it after the court extended the production deadline by four months. Instead, the defendant – without consulting the court or the plaintiff – ran a keyword search to identify privileged documents. They inadvertently produced 165 privileged documents.

Despite the defendants’ efforts to convince the court to compel the opposing party to return these documents, Judge Grimm ruled that because the defendants failed to take reasonable precautions to protect privilege, they voluntarily waived privilege.

Keith Ecker, Inside Counsel, *Keysearch Clarity: Victor Stanley provides guidance on the use of keysearch terms for privilege review*, Oct. 1, 2008, available at <http://www.insidecounsel.com/Issues/2008/October%202008/Pages/Keysearch-Clarity-.aspx>.

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Recent Decision by Judge Grimm of the District of Maryland on the New Rule (add'l materials)

- Latham & Watkins LLP, *The Importance of Victor Stanley, Inc. v. Creative Pipe, Inc.*, July 22, 2008, available at <http://www.lw.com/Resources.aspx?page=FirmPublicationDetail&practice=145&publication=2257>.
- Maryland Intellectual Property Law Blog, *Grimm's Guide to Asserting Attorney-Client Privilege*, Posted on June 12, 2008 by Brian Wm. Higgins, available at http://www.marylandiplaw.com/2008/06/articles/litigation-1/grimms-guide-to-asserting-attorneyclient-privilege/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MarylandIntellectualPropertyLawBlog+%28Maryland+Intellectual+Property+Law+Blog%29.
- Life Sciences Legal Update, *Can I Get Those Privileged Documents Back? E-Discovery Ruling in Victory Stanley, Inc. v. Creative Pipe, Inc.*, Posted on June 9, 2008 by Melissa A. Geist, available at http://www.lifescienceslegalupdate.com/2008/06/articles/electronic-discovery/can-i-get-those-privileged-documents-back-ediscovery-ruling-in-victory-stanley-inc-v-creative-pipe-inc/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+LifeSciencesLegalUpdate+%28Life+Sciences+Legal+Update%29.
- Mass Law Blog, *The Agony of Inadvertent Disclosure*, Posted on Sunday, June 8th, 2008 at 2:55 P.M., available at <http://www.masslawblog.com/?p=201>.

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Recent Decisions by Judge Facciola of the District of D.C. on the New Rule

- *Trs. of the Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 2010 U.S. Dist. LEXIS 12578 (D.D.C. Feb. 12, 2010):

“My initial memorandum opinion explained how Federal Rule of Evidence 502 modified the scope of any forfeiture that arises from the disclosure of privileged information. The new rule abolishes the dreaded subject-matter waiver, i.e., that any disclosure of privileged matter worked a forfeiture of any other privileged information that pertained to the same subject matter. Instead, if there has been a disclosure of privileged information, the disclosure of additional privileged information will be required if both documents "concern the same subject matter; *and* (3) they ought in fairness to be considered together." Fed. R. Evid. 502 (a)(2) & (3) (emphasis added).

Putting the principles of privilege and Rule 502 together leads to the conclusion that the disclosure of privilege information may lead to the additional and compelled disclosure of additional privileged information, if they concern the same subject matter and ought in fairness to be considered together. The disclosure of privileged information can lead to such a result; the disclosure of non-privileged information can never have that result. If it could, the privilege would evaporate at the precise moment that it was needed. In my *in camera* review of the privileged documents, I will consider whether they are in fact privileged and determine whether, if a document deals with the same subject matter as produced documents, fairness nevertheless requires its production in light of the production of *some other privileged information*. See Fed. R. Evid. 502(a)(3). Defendants' notion that I should also consider the disclosure of non-privileged information as a waiver by plaintiffs of privileged information that deals with the same subject matter is flat out wrong.”

- *Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45 (D.D.C. Dec. 8, 2009):

“Defendants do not provide the court with any indication of the methodology used to review documents for privilege, but only vaguely refer to several reviews of the documents to be produced. Further, defendants do not indicate how many total documents they produced, so the court cannot determine the magnitude of the error in producing this one document consisting of four pages. Indeed, one keeps searching for some statement somewhere in the defendants’ papers that speaks to what they did when they got the documents, how they segregated them so that the privileged documents were kept separate from the non-privileged, and how, despite the care they took, the privileged document was inadvertently produced. Instead, the court is told in the passive voice that ‘several reviews of the documents to be disclosed were undertaken, [and] this document was inadvertently produced.’ Hence, the efforts taken are not even described, and there is no indication of what specific efforts were taken to prevent disclosure, let alone any explanation of why these efforts were, all things considered, reasonable in the context of the demands made upon the defendants. . . . There can be no reasonable efforts, unless there are efforts in the first place. Hence, defendants do not meet the burden of proving that the privilege was not waived in regards to the memorandum.”

- *Covad Communs. Co. v. Revonet, Inc.*, 258 F.R.D. 5 (D.D.C. May 27, 2009):

“While I appreciate that it would be difficult for [producer] Revonet to go back through its papers to determine whether all of the documents contained therein have since been produced and that Revonet’s present counsel did not supervise or conduct the August, 2008 search for e-mails, I also appreciate that it is a burden of Revonet’s own making. [Requestor] Covad should not be penalized by Revonet’s failure to maintain its discovery materials in some sort of organized fashion or keep some record of its own actions in this lawsuit.”

- *D’Onofrio v. SFX Sports Group, Inc.*, 256 F.R.D. 277 (D.D.C. April 1, 2009):

- o Magistrate Judge Facciola specified that any depository containing the following electronically stored information (“ESI”) must be searched:

“(1) e-mails to or from plaintiff to include e-mails in which her name appears in the “cc” or “bcc” lines; (2) e-mail in which her name is mentioned; (3) electronically stored information created by her; (4) electronically stored information sent to her, again whether sent to her directly or as one of other recipients; (5) electronically

stored information in which her name appears, whether her full name or her first or last name or initials.”

- *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. March 7, 2008):

“[I]t is my understanding of the technology, based for the most part on my understanding of the FBI’s procedures in the criminal cases where I issue search warrants, that the mirror image is a perfect duplication of the hard drive and that it is physically impossible for the mirror image to contain anything the hard drive does not and for there to be anything on the mirror image that is not on the hard drive. Once again, I will turn to the examiner for his or her knowledge and require that in the declaration I am ordering the examiner to speak to whether there is any possibility whatsoever that the mirror images will not be perfect copies of the hard drives and whether there is any need to preserve the hard drives in their original condition once the mirror images are created”

“The parties have differed over whether the document they were negotiating will be in the form of an agreement or order. It will be in the form of an order that I will issue. [Defendant] indicates that the hard drives may contain attorney-client communications. As Magistrate Judge Grimm pointed out in what is now the seminal decision on the question, a judicially compelled disclosure of otherwise privileged information is not a waiver of any privilege that could be claimed. *See Hopson v. Mayor*, 232 F.R.D. 228, 232 (D. Md. 2005). Thus, an order can accomplish what an agreement between counsel cannot and I will issue an order.”

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Recent Articles, Etc. on the New Rule

- Evidence Prof Blog, “Waiving Away Uniformity: D.C. Opinion Reveals Why Rule 502 Will Not Harmonize Privilege Waiver Practices”, December 16, 2009, available at <http://lawprofessors.typepad.com/evidenceprof/2009/12/502--amobi-v-district-of-columbia-dept-of-corrections----fsupp2d-----2009-wl-4609593ddc2009.html>.
- Steve Puiszis, “Proper Framework for Analysis and Evidence Needed to Establish Inadvertent Waiver under F.R.E. 502(b) – or – “I may not always be right but I’m never wrong””, December 15, 2009, available at [http://forthedefense.org/post/Proper-framework-for-analysis-and-evidence-needed-to-establish-inadvertent-waiver-under-FRE-502\(b\)-e28093-or-e28093-e2809cI-may-not-always-be-right-but-Ie28099m-never-wronge2809d.aspx](http://forthedefense.org/post/Proper-framework-for-analysis-and-evidence-needed-to-establish-inadvertent-waiver-under-FRE-502(b)-e28093-or-e28093-e2809cI-may-not-always-be-right-but-Ie28099m-never-wronge2809d.aspx).
- Michael Stevens, “FRE: Case Highlights Inadvertent Disclosure Standards Under FRE 502(b)”, November 24, 2009, available at [http://www.kentuckylawblog.com/2009/11/fre-case-highlights-inadvertent-disclosure-standards-under-fre-502b-1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+KentuckyLaw+\(Kentucky+Law\)](http://www.kentuckylawblog.com/2009/11/fre-case-highlights-inadvertent-disclosure-standards-under-fre-502b-1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+KentuckyLaw+(Kentucky+Law)).
- K&L Gates E-Discovery Law Blog, “Court Articulates Analysis Under FRE 502, Finds No Waiver of Inadvertently Produced Email”, August 21, 2009, available at [http://www.ediscoverylaw.com/2009/08/articles/case-summaries/court-articulates-analysis-under-fre-502-finds-no-waiver-of-inadvertently-produced-email/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ediscoverylaw%2Fklgates+\(Electronic+Discovery+Law\)](http://www.ediscoverylaw.com/2009/08/articles/case-summaries/court-articulates-analysis-under-fre-502-finds-no-waiver-of-inadvertently-produced-email/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ediscoverylaw%2Fklgates+(Electronic+Discovery+Law)).
- James D. Palmatier, “Four Ways to Avoid Waiver Under FRE 502”, June 26, 2009, available at <http://www.discoveryresources.org/library/case-law-and-rules/four-ways-to-avoid-waiver-under-fre-502/>.

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Recent Articles, Etc. on the New Rule (cont'd)

- Francis G.X. Pileggi, “Rule 502 and eDiscovery in Delaware”, June 14, 2009, available at [http://www.delawarelitigation.com/2009/06/articles/commentary/rule-502-and-ediscovery-in-delaware/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+DelawareCorporateAndCommercialLitigation+\(Delaware+Corporate+and+Commercial+Litigation+Blog\)](http://www.delawarelitigation.com/2009/06/articles/commentary/rule-502-and-ediscovery-in-delaware/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+DelawareCorporateAndCommercialLitigation+(Delaware+Corporate+and+Commercial+Litigation+Blog)).
- Ralph Losey, “An Open Door Gives Away the Secret, But Rule 502 Attracts it Back,” e-Discovery Team, Posted on Mar. 31, 2009 at 9:51 P.M., available at <http://e-discoveryteam.com/2009/03/31/an-open-door-gives-away-the-secret-but-rule-502-attracts-it-back/>.
- Rick Wolf, “Protecting Privilege – New Rule 502 Mitigates the Risk of Inadvertent E-Discovery Disclosures”, February 27, 2009, available at <http://wolfs2cents.wordpress.com/2009/02/27/protecting-privilege-new-rule-502-mitigates-the-risk-of-inadvertent-e-discovery-disclosures/>.
- David C. Sarnacki, “New Rule 502: Inadvertent Disclosure of Attorney-Client Privilege and Work Product Materials”, January 10, 2009, available at <http://domesticdiversions.com/index.php/new-rule-502-inadvertent-disclosure-of-attorney-client-privilege-and-work-product-materials/>.
- Ronald J. Hedges, “U.S. Federal Rule of Evidence 502”, December 3, 2008, available at <http://wolfs2cents.wordpress.com/2008/12/03/us-federal-rule-of-evidence-502/>.
- Barry Barnett, “New Evidence Rule Raises Standard For, Limits Waiver”, November 11, 2008, available at [http://blawgletter.typepad.com/bbarnett/2008/11/new-evidence-rule-raises-standard-for-limits-waiver-of-privilege.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Blawgletter+\(Blawgletter%C2%AE\)](http://blawgletter.typepad.com/bbarnett/2008/11/new-evidence-rule-raises-standard-for-limits-waiver-of-privilege.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Blawgletter+(Blawgletter%C2%AE)).