LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An incisivemedia publication

Volume 17, Number 1 • September 2009

Rule 502

A Way to Limit Privilege Waiver in Government Investigations?

By Joseph F. Savage, Jr., Jennifer L. Chunias and Marcy D. Smirnoff

Companies under government investigation commonly grapple with the risk of inadvertent disclosure of privileged information, typically during document productions, as well as the consequences of deliberately disclosing privileged information to the government — either to gain credit for cooperation or to meet a self-reporting requirement.

Prior to the adoption of Federal Rule of Evidence 502, common law governed privilege waivers and was fraught with inconsistencies. Some courts found waiver only for intentional disclosure. Others held that any disclosure, even inadvertent, constituted waiver. Most courts found waiver for a careless inadvertent disclosure that the disclosing party failed to remedy promptly. This uncertainty and inconsistency was compounded by the unpredictability of the scope of any waiver, raising the specter of full subject matter waiver in later proceedings.

Congress asked the Judicial Conference to initiate rule-making on privileges in order to:

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

Letter from Honorable F. James Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, to Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Courts (Jan. 23, 2006), *available at* http://www.uscourts.gov/rules/evidence502.html.

Despite this specific request, the Judicial Conference sent a proposed Rule 502 to Congress that deliberately did not provide for "selective waiver" for those disclosing to the government. Rule 502 does, however, provide a limited mechanism for selective waiver on a case-by-case basis, and also codifies a standard regarding the consequences of disclosure that, as a practical matter, may greatly limit the risk of full subject matter waiver.

Inadvertent Disclosure

Rule 502 implements the Congressional request that inadvertent disclosure should not result in waiver for those acting in good faith. The Rule encourages litigating parties to agree to limit waiver for inadvertent disclosures. Absent such an agreement, Rule 502(b) specifically provides protection, including for those under government investigation, when: "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)."

This uniform rule replaces the patchwork approach under the common law and provides defense counsel a dependable basis upon which to resolve inadvertent disclosure issues with regulators. Section (e) of the rule, discussed below, provides a mechanism for parties to litigation to agree that inadvertent disclosure is not a waiver as between themselves. Consistent with that philosophy, and perhaps to expedite a document production, there may be situations in which regulators would agree that any inadvertent disclosure would not constitute a waiver even to the government, and even though they are not presently parties to litigation.

Potential for Selective Waiver

The Rule does not provide the blanket protection many sought in the form of a selective-waiver provision. Indeed, one district court has already used the history of Rule 502 to resist selective waiver in seemingly any circumstance. Credit Suisse Securities (USA) LLC, a defendant in a civil litigation, argued that sharing privileged information under confidentiality agreements with the U.S. Attorney and SEC did not result in a waiver to other third parties. The court, however, concluded broadly that "selective waiver is not in the long-term best interests of the government, the adversarial system, or litigants" and found that the privilege was waived as to specific items previously produced. *In re IPO Securities Litigation*, 249 F.R.D. 457 (S.D.N.Y. 2008). While the result is consistent with the overwhelming majority of courts reaching the issue prior to Rule 502, the analysis implies a more categorical skepticism of selective waiver and does so by referencing Rule 502. The case-by-case approach to selective waiver may, as a practical matter, be dead.

Joseph F. Savage, Jr. (jsavage@goodwinprocter.com), a member of this newsletter's Board of Editors, is a partner in the Boston office of Goodwin Procter LLP and a former federal prosecutor. **Jennifer L. Chunias** is also a partner in the Boston office. **Marcy D. Smirnoff** is a litigation associate.

Nevertheless, Rule 502 does provide an opportunity for selective waiver because it not only encourages non-waiver agreements among parties, but also allows the court to make them binding on outsiders. Rule 502(d) empowers Federal courts to "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." Meanwhile, Rule 502(e) provides: "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." When the last clause is read together with Rule 502(d), the two provisions open the door to so-ordered non-waiver agreements binding on the whole world.

While Rule 502 is limited to agreements among parties "in a Federal proceeding," what about a non-waiver agreement between a company and the government during an investigation, when the company is not a party to any proceeding? The Rule certainly adds force to whatever contractual or other remedies would be available if the government were to attempt to violate an agreement on the scope of a waiver. Moreover, Rule 502 allows the subject of an investigation to obtain a confidentiality order if there is also pending litigation.

Although most investigations are not accompanied by other pending litigation with the government, there may be cases where a pending parallel SEC proceeding or a qui tam suit, even if still sealed, can provide the setting for a so-ordered non-waiver agreement binding on outsiders. It may be feasible to delay the disclosure until the ultimate settlement and then structure the settlement so that a proceeding is initiated and the order is entered. If there is a plea agreement, it might include jointly seeking a confidentiality order — *nunc pro tunc* if the disclosure has already occurred. Declaratory judgment actions or contempt proceedings might also provide mechanisms for issuing an order. The area has not yet been fully explored, and the procedures are unsettled (for instance, the Rule provides for no standard for when a court may refuse to enter an order implementing the parties' agreement). But the Rule provides many opportunities for the creative.

Scope of Waiver Under Rule 502

There is also some good news under the Rule for those who have made a disclosure to federal law enforcement. Rule 502(a) provides:

> 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.

The Committee's notes to Rule 502(a) emphasize that subject matter waiver will rarely be found — only in "unusual situations in which fairness requires a further disclosure" in order for the intentionally disclosed privileged material not to be misleading or to prevent a party from obtaining a tactical advantage over an adversary.

Two courts have recently declined to find a subject matter waiver after considering Rule 502. In *United States v. Treacy*, No. S2 08 CR 366 (JSR), 2009 WL 812033 (S.D.N.Y. Mar. 24, 2009), the Board of Directors of Monster Worldwide, Inc. had furnished the government with privileged witness interview information in connection with a stock option investigation. The indicted former chief operating officer sought disclosure of certain additional privileged internal investigation interview memoranda relating to the same subject matter, claiming that prior disclosure constituted a subject matter waiver. While the defendant had access to the material previously shared with the government, the court refused to extend the waiver to additional material. Relying on Rule 502 and its commentary, Judge Jed S. Rakoff concluded that since Monster was not a party to the criminal case, its prior decision to disclose certain information was not made to seek any advantage against an adversary generally or the former employee in particular. Similarly, in *Adams v. U.S.*, Civ. No. 03-0049-E-BLW, 2009 WL 1117392 (D. Idaho Apr. 23, 2009), the court relied on Rule 502 to conclude that the disclosure of two pieces of privileged information related to damages did not require the further disclosure of underlying damages calculations because the initial limited waiver was not made to obtain a tactical advantage.

Conclusion

For those hoping that privileged material given to the government would now be routinely protected from disclosure to third parties, Rule 502 is a disappointment. The new Rule does, however, explicitly extend the protection of privileges in certain circumstances and provides a mechanism for those waiving the privilege to limit the damaging consequences of that decision.