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What Rule 502 Does: The Six Most Important Points You Need to Remember about Federal Evidence Rule 502 (and like state rules).

Federal Evidence Rules of Evidence, Rule 502 contains more than the six main points set forth below. Read the entire Rule. Other parts of the rule may be significant in your instance. But here are the six most important points for you to know. Know these six points cold.

#1. Federal Evidence Rule 502 provides that when a party discloses protected information in a "in a Federal proceeding or to a Federal office or agency," *the disclosure does not operate as a waiver of privilege or waiver of protection in a Federal or State proceeding if all three of the following happened:*

- (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 rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

The problem litigators would anticipate is future (after the fact of disclosure) wrangling about whether what the holder did were “reasonable steps.” Therefore the Rule includes points # 2 and # 3 below.

2. The parties to litigation can enter into a clawback agreement which will specify the “reasonable steps to rectify the error”, and thus assure themselves of protection — as between themselves. But — their agreement is binding only among themselves, and for that litigation only, *unless it is incorporated into a court order*. Neither the involved court nor third parties need to abide by the parties’ agreement, even if their private clawback agreement incorporates the very words of Rule 502. Moreover, in another federal court or a state court (in any proceeding), the court can ignore the private clawback agreement — *unless it is incorporated into a court order* — and declare a waiver has occurred by inadvertent production.

3. The Federal court can enter an order approving the parties agreement, or making it’s own clawback order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court. *If there is a court order, that order will bar any determination by another federal court or by any state court (in any proceeding) that a waiver has occurred.*

☞ **TIP.** From now on: every time you have an agreement with counsel on the effect of inadvertent disclosure on privilege — get your agreement incorporated into a court order.

4. Rule 502’s coverage is limited to attorney-client privilege and work product protections. The questions of waiver by disclosure of other evidentiary privileges remains a question of federal common law or state law.

5. Voluntary disclosure to a federal investigative agency still results in a waiver of the information actually disclosed, but now disclosure of one item does not automatically (although it might) constitute a subject matter waiver as all documents and items in the protected subject matter.

6. The new Federal Rule 502 applies in all federal court proceedings and to state proceedings, even if state substantive law provides the rule of decision for a state cause of action tried in federal court. Rule 502 is intended to apply in all federal court proceedings which involve state proceedings, including court-annexed and court-ordered arbitrations. Rule 502 goes even further: the rule is intended to prohibit material protected in federal court being used in state court.

Procedural Law versus Substantive Law of Privilege, and State Law versus Federal Law.

Federal Evidence Rule 501 provides that questions of privilege are determined by state law (with some few exceptions determined by federal common law).

As the official notes to the Federal Rule 501 rule point out, a mere procedural rule cannot control whether a privilege is protected or waived if the procedural rule provisions are followed by the parties. Substantive law of privilege controls over procedural law of privilege. Ordinarily, procedural rules do not trump substantive law.

However, we now have the new Federal Evidence Rule 502. Rule 502 is enacted as federal substantive legislation. The Rules Enabling Act (28 U.S.C. § 2074) which requires the approval of Congress for the creation or modification of an evidentiary privilege, was followed. Federal Evidence Rule 502 is substantive law.

Federal Rule 502 provides that ("notwithstanding Rule 501") the Federal Rule applies in federal court even if state law provides the rule of decision for a state cause of action tried in federal court; applies to state proceedings involving prior federal proceedings on the subject of waiver; applies and to federal court-annexed and federal court-mandated state arbitration proceedings. Put another way: if a disclosure is made in federal litigation, the federal rule trumps state law in cases in federal court;, and if a state court is trying a case, a prior federal order on a waiver governs the subsequent state court determinations on the scope of the waiver by disclosure.

The federal Rule 502 does not address the enforceability of a state court confidentiality order in a federal proceeding. However, that question is covered both by statutory law and also by principles of federalism and comity. See, 28 U.S.C. §1738 (state judicial proceedings "have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State"). See also, *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and ... federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

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