

FRE 502

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It comes as no surprise to litigation attorneys that the discovery process, particularly pre-production review, takes up a large amount of monetary and staff resources. One reason for these high costs is the fear of inadvertently disclosing material that would otherwise fall under attorney-client privilege or the work product doctrine. To help combat the high (and increasing) costs of discovery and the danger of inadvertent disclosure, the Federal Rules of Evidence (FRE) were amended in September 2008 to include new Rule 502, titled "Attorney-Client Privilege and Work Product; Limitations of Waiver."[1]

Starting with FRE 502(a), the Rule provides that when a 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.[2]

As stated in an explanatory note by Congress, this rule limits subject matter waiver "to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."[3] It is worth noting that FRE 502(a) will change the previous rule in some jurisdictions, including that in *In re Sealed Case*,[4] which held that an inadvertent disclosure automatically constituted a subject-matter waiver of the attorney-client privilege.

FRE 502(b) continues the theme of preventing inadvertent disclosures from operating as a waiver, stating that a disclosure made in a federal proceeding or to a federal office or agency does not operate as a waiver in federal or state proceedings 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).[5]

Although some courts have held that any inadvertent disclosure of privileged material constitutes a waiver, Rule 502(b) "is in accord with the majority view" by stating that inadvertent disclosure of protected communications *does not* constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error.[6]

FRE 502 (c) addresses the breadth of waiver of the disclosure of a communication made during a state proceeding that falls under the attorney-client privilege or work product doctrine and is later offered in a federal proceeding. That section states, in part, that for disclosures made in a state proceeding that are 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."[7] As pointed out by Congress, "the proper solution for a federal court is to apply the law that is most protective of privilege and work product,"[8] reasoning that "applying a more restrictive federal law of waiver could impair the state objective of preserving privilege," and that applying a state law that favored waiver more than did the federal law was "likely to undermine the federal objective of limiting the costs of production."[9]

FRE 502(d) and (e) emphasize the importance of confidentiality orders and party agreements. FRE 502(d) provides that, when a court order states that a privilege or protection is not waived by disclosure, the terms of the court order are enforceable in *any other* federal or state proceeding.[10] The Congressional intent of this provision is to provide parties "with a predictable protection from a court order – predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention."[11] Subsection (e) clarifies that a party agreement can be entered into; however, the agreement can bind only the parties to the agreement, unless it is incorporated into a court order.

In the end, only time will tell if FRE 502 will reduce both the financial stress of document review and the fear of disclosing privileged material.

Notes

1. Fed. R. Evid. 502. *See also* Pub. L. No. 110-322, 122 Stat. 3537 (2008).
2. Fed. R. Evid. 502(a) (emphasis added).
3. 145 Cong. Rec. S1317 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).
4. 877 F.2d 976 (D.C. Cir. 1989).
5. Fed. R. Evid. 502(b).
6. 145 Cong. Rec. S1317 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).
7. Fed. R. Evid. 502(c). (emphasis added).
8. 145 Cong. Rec. S1318 (daily ed.

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that no alternative would serve the governmental interest with a less discriminatory effect).
17. *See* Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565, 573 (2d Cir. 2003).
18. *Id.*
19. *See* Mountan Side Mobile Estates P'ship, 56 F.3d at 1253.
20. 466 F.3d 1276, 1286 (11th Cir. 2006).
21. *Id.* at 1286-87.
22. As previously noted, the trial court declined the opportunity to indulge this argument, which was raised in the City's motion to dismiss, motion for summary judgment, and halftime motion for a directed verdict.
23. Dews v. Town of Sunnyvale, Tex., 109 F. Supp.2d 526 (N.D. Tex. 2000).
24. *Id.*
25. *Id.*
26. Hallmark Developers, Inc. v. Fulton County, 466 F.3d 1276, 1288 (11th Cir. 2006).
27. *See* Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989) ("every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."); *see also*, Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996) ("the exercise of discretion, whether to require a minimum of 650 square feet for an apartment of four people, as opposed to a minimum of 500 square feet or 800 square feet, is a legislative, not a judicial function").
28. *See* Metro. Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977) (Seventh Circuit expressly rejects the argument that, once a racially discriminatory effect is shown, a violation of the FHA has necessarily been established); *see also*, Oti Kaga, Inc. v. South Dakota Hous. Dev. Auth., 342 F.3d 871, 883 (8th Cir. 2003); *compare* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).
29. 272 U.S. 365 (1926); *see also*, Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (Supreme Court recognized a city's police power to protect its citizens from "the premature and unnecessary conversion of open-space land to urban uses" and the "ill effects of urbanization").
30. City of Kyle, Tex., Ordinance No. 438 (2003).
31. *See* Elliott v. City of Athens, Ga., 960 F.2d 975, 982 (11th Cir. 1992).
32. The City also challenged the plaintiffs' experts with *Daubert* motions. ML

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endnote, "In making this finding, the Zoning Administrator shall consider the building's past and current vacancy rate, existing and previous uses, and real estate market information." *Id.* at 30.
12. Los Angeles, Ca., Adaptive Reuse Incentive Areas Specific Plan, Ordinance No. 175,038, § 6 (2003).
13. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005), available at http://www.nashville.gov/mc/ordinances/term_2003_2007/bl2004_492.htm, or go to www.nashville.gov and search "BL2004-492."
14. Metropolitan Government of Nashville and Davidson Country, Tenn., Code, ch. 17.36, Overlay Districts (2008). The Code is available using the Online Library at www.municode.com.
15. Metropolitan Government of Nashville and Davidson County, Tenn., Ordinance No. BL2004-492 (Feb. 02, 2005).
16. *Id.* at § 2.
17. *Id.* at § 11.
18. *See* ftp://ftp.nashville.gov/web/mpc/Adaptive_Reuse_Ordinance.pdf. ML

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Feb. 27, 2008) (Explanatory Note on Evidence Rule 502).
9. *Id.*
10. For emphasis, this means that the terms of the court order would be enforceable in a subsequent proceeding against non-parties.
11. 145 Cong. Rec. S1318 (daily ed. Feb. 27, 2008) (Explanatory Note on Evidence Rule 502). ML

Supreme Court

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a traditional Title VII lawsuit, while the plaintiffs were stepping into what were usually the employer's shoes and defending the validity and use of the tests. In the end, the court found that the desire to comply with Title VII was a legitimate non-discriminatory reason, and that the City had leeway to decline to certify the tests, even when the ultimate validity of the tests, had they been used, remained uncertain.

On appeal, a three-judge panel of the Second Circuit summarily affirmed, essentially endorsing the district court's decision. The plaintiffs moved for rehearing *en banc*, which the Second Circuit denied by a 7-6 vote, with several dissenting opinions. Among their concerns, the dissenters questioned whether the district court used the correct framework, which gave a large degree of deference to the City, or whether something more akin to strict scrutiny was the appropriate standard for the City's admittedly race-conscious conduct. And assuming that compliance with Title VII could provide the basis for a compelling governmental interest, the dissenters also questioned whether the City could legally abandon its test for race-conscious reasons without a more detailed analysis of the validity of the test. What, the dissenters asked, prevented municipalities from adopting stealth quota systems based upon the mere presence of adverse impact?

A Grant of *Cert.* and a Plea for Clarity

In January, the plaintiffs' petition for certiorari was granted. Final briefs are due on March 18, and the case may be argued and decided this Term. As demonstrated by *Ricci*, hiring and promotional testing, especially in police and fire departments, continues to produce results that are legally perplexing and politically challenging. Cities continue to face the threat of litigation from either white or minority applicants (and sometimes both) each time they make a decision to test and to use (or not use) test results. Whatever the final outcome, municipalities must hope that the Supreme Court gives guidance as