

Calendar No. 580

110TH CONGRESS
2D SESSION

S. 2450

[Report No. 110–264]

To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.

IN THE SENATE OF THE UNITED STATES

DECEMBER 11, 2007

Mr. LEAHY (for himself, Mr. SPECTER, and Mr. GRAHAM) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

FEBRUARY 25, 2008

Reported by Mr. LEAHY, without amendment

A BILL

To amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. ATTORNEY-CLIENT PRIVILEGE AND WORK**
 2 **PRODUCT; LIMITATIONS ON WAIVER.**

3 (a) IN GENERAL.—Article V of the Federal Rules of
 4 Evidence is amended by adding at the end the following:

5 **“Rule 502. Attorney-Client Privilege and Work Prod-**
 6 **uct; Limitations on Waiver**

7 “The following provisions apply, in the circumstances
 8 set out, to disclosure of a communication or information
 9 covered by the attorney-client privilege or work-product
 10 protection.

11 “(a) DISCLOSURE MADE IN A FEDERAL PRO-
 12 CEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE
 13 OF A WAIVER.—When the disclosure is made in a Federal
 14 proceeding or to a Federal office or agency and waives
 15 the attorney-client privilege or work-product protection,
 16 the waiver extends to an undisclosed communication or in-
 17 formation in a Federal or State proceeding only if:

18 “(1) the waiver is intentional;

19 “(2) the disclosed and undisclosed communica-
 20 tions or information concern the same subject mat-
 21 ter; and

22 “(3) they ought in fairness to be considered to-
 23 gether.

24 “(b) INADVERTENT DISCLOSURE.—When made in a
 25 Federal proceeding or to a Federal office or agency, the

1 disclosure does not operate as a waiver in a Federal or
 2 State proceeding if:

3 “(1) the disclosure is inadvertent;

4 “(2) the holder of the privilege or protection
 5 took reasonable steps to prevent disclosure; and

6 “(3) the holder promptly took reasonable steps
 7 to rectify the error, including (if applicable) fol-
 8 lowing Federal Rule of Civil Procedure 26(b)(5)(B).

9 “(c) DISCLOSURE MADE IN A STATE PROCEEDING.—

10 When the disclosure is made in a State proceeding and
 11 is not the subject of a State-court order concerning waiver,
 12 the disclosure does not operate as a waiver in a Federal
 13 proceeding if the disclosure:

14 “(1) would not be a waiver under this rule if it
 15 had been made in a Federal proceeding; or

16 “(2) is not a waiver under the law of the State
 17 where the disclosure occurred.

18 “(d) CONTROLLING EFFECT OF A COURT ORDER.—

19 A Federal court may order that the privilege or protection
 20 is not waived by disclosure connected with the litigation
 21 pending before the court—in which event the disclosure
 22 is also not a waiver in any other Federal or State pro-
 23 ceeding.

24 “(e) CONTROLLING EFFECT OF A PARTY AGREE-
 25 MENT.—An agreement on the effect of disclosure in a

1 Federal proceeding is binding only on the parties to the
 2 agreement, unless it is incorporated into a court order.

3 “(f) CONTROLLING EFFECT OF THIS RULE.—Not-
 4 withstanding Rules 101 and 1101, this rule applies to
 5 State proceedings and to Federal court-annexed and Fed-
 6 eral court-mandated arbitration proceedings, in the cir-
 7 cumstances set out in the rule. And notwithstanding Rule
 8 501, this rule applies even if State law provides the rule
 9 of decision.

10 “(g) DEFINITIONS.—In this rule:

11 “(1) ‘attorney-client privilege’ means the pro-
 12 tection that applicable law provides for confidential
 13 attorney-client communications; and

14 “(2) ‘work-product protection’ means the pro-
 15 tection that applicable law provides for tangible ma-
 16 terial (or its intangible equivalent) prepared in an-
 17 ticipation of litigation or for trial.”.

18 (b) TECHNICAL AND CONFORMING CHANGES.—The
 19 table of contents for the Federal Rules of Evidence is
 20 amended by inserting after the item relating to rule 501
 21 the following:

“502. Attorney-client privilege and work-product doctrine; limitations on waiv-
 er.”.

22 (c) EFFECTIVE DATE.—The amendments made by
 23 this Act shall apply in all proceedings commenced after
 24 the date of enactment of this Act and, insofar as is just

- 1 and practicable, in all proceedings pending on such date
- 2 of enactment.

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