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**A BILL TO AMEND THE FEDERAL RULES OF EVIDENCE
TO ADDRESS THE WAIVER OF THE ATTORNEY-CLIENT
PRIVILEGE AND THE WORK PRODUCT DOCTRINE**

FEBRUARY 25, 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany S. 2450]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2450), to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and the work product doctrine, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. BACKGROUND AND PURPOSE OF THE BILL

A. BACKGROUND

An efficient and cost-effective discovery process is important to preserving the integrity of our legal system. The costs of discovery have increased dramatically in recent years as the proliferation of email and other forms of electronic record-keeping have multiplied the number of documents litigants must review to protect privileged material. Outdated law affecting inadvertent disclosure cou-

pled with the stark increase in discovery materials has led to dramatic litigation cost increases.

Currently, the inadvertent production of even a single privileged document puts the producing party at significant risk. If a privileged document is disclosed, a court may find that the waiver applies not only to that specific document and case but to all other documents and cases concerning the same subject matter. Furthermore, the privilege can be waived even if the party took reasonable steps to avoid disclosing it.

The increased use of email and other electronic media in today's business environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege.

In his floor statement introducing legislation to correct this problem, Senator Leahy observed:

Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials. With the routine use of email and other electronic media in today's business environment, discovery can encompass millions of documents in a given case, vastly expanding the risks of inadvertent disclosure. The rule proposed by the Standing Committee is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens associated with the conduct of diligent electronic discovery.

In his statement supporting the proposed legislation, co-sponsor Senator Specter remarked:

Current law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery—especially electronic discovery. Right now, it is far too easy to inadvertently lose—or “waive” the privilege. A single inadvertently disclosed document can result in waiving the privilege not only as to what was produced, but as to all documents on the same subject matter. In some courts, a waiver may be found even if the producing party took reasonable steps to avoid disclosure. Such waivers will not just affect the case in which the accidental disclosure is made, but will also impact other cases filed subsequently in State or Federal courts.

In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

B. PURPOSE OF THE BILL

The bill addresses these problems by providing a predictable and consistent standard to govern the waiver of privileged information. It improves the efficiency of the discovery process while preserving accountability. Furthermore, it does not alter federal or state law on whether information is protected by the attorney-client privilege or work product doctrine in the first instance, but merely modifies the consequences of inadvertent disclosure once a privilege is found to exist.

The bill provides a new Federal Rule of Evidence 502 to limit the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege. It provides that if there is a waiver of privilege, it applies only to the specific information disclosed and not the broader subject matter unless the holder has intentionally used the privileged information in a misleading fashion. An inadvertent disclosure of privileged information does not constitute a waiver as long as the holder took reasonable steps to prevent disclosure and acted promptly to retrieve the mistakenly disclosed information.

The bill provides a new rule to ensure that parties will take advantage of its protections by remaining enforceable in subsequent proceedings. If a federal court enters an order finding that an inadvertent disclosure of privileged information does not constitute a waiver, that order will be enforceable against persons in federal or state proceedings. This protects the rule's ability to limit discovery costs by ensuring that parties in any given case will know they can rely on the new waiver rules in subsequent proceedings.

Importantly, the bill respects federal-state comity. The bill will ensure that if there is a disclosure of privileged information at the federal level then courts must honor Rule 502 in any subsequent state proceedings. If there is a disclosure in a state proceeding, then admissibility in any subsequent federal proceeding will be determined by the law that is most protective against waiver. However, it does not apply to any disclosure made in a state proceeding that is later introduced in a subsequent state proceeding.

Litigants recognize the need to adopt a new waiver doctrine to adapt to the effects of changing technology in the business environment. The bill has attracted widespread support from major legal organizations representing stakeholders on all sides of modern litigation. Among those groups voicing support for the measure are the American Bar Association, American College of Trial Lawyers, U.S. Chamber of Commerce, former Chairs of the Section of Litigation of the American Bar Association, Lawyers for Civil Justice, and several private law firms.

C. STATUTORY REQUIREMENTS

Any rule creating, establishing, or modifying an evidentiary privilege requires legislation. Under the Rules Enabling Act, federal rules of procedure proposed by the Judicial Conference usually take effect after a prescribed period unless Congress acts to disapprove them. Pursuant to 28 U.S.C. § 2074(b), however, rules concerning evidentiary privileges must be affirmatively approved by an Act of Congress.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. DRAFTING OF THE BILL

The Judicial Conference Committee on Rules of Practice and Procedure has long been concerned about the rising costs of litigation associated with the current law on waiver of privileged information. In 2006, then-House Judiciary Committee Chairman Sensenbrenner suggested that the Judicial Conference propose a rule that would deal with privilege waiver in a way that would solve the problems of rising discovery costs. The Judicial Conference referred the task of drafting a proposed rule to the Advisory Committee on Evidence Rules.

The Advisory Committee invited eminent judges, lawyers, and academics to testify before the Committee about the need for the new evidence rule and how to craft it successfully. For over a year, the Advisory Committee coordinated the drafting of the proposed new rule with the Conference of Chief Justices, revising it by limiting the rule's scope to address the Conference's federalism concerns. The Advisory Committee also met with Pennsylvania Chief Justice Ralph Cappy, who chaired the Conference's group addressing the new rule to satisfy the Conference's last remaining concern about the proposed rule. As a result of this collaboration, the Advisory Committee revised the Committee Note to acknowledge the reciprocity of court orders by state and federal courts.

At the suggestion of Chairman Sensenbrenner, the Advisory Committee also considered a new rule that would allow persons to cooperate with government agencies and disclose privileged information without waiving the right to assert privilege as to other parties in subsequent litigation. However, after careful review of the competing interests involved in these "selective waivers," the advisory committee determined that it would not recommend this provision. Unlike inadvertent waivers, which raise the costs and burdens of the discovery phase of litigation, an area of great concern to the rules committees, the selective waiver provision addresses policy matters, principally the effectiveness of government investigations, which are largely outside the competence and jurisdiction of the rules committees.

In April 2006, the Advisory Committee held a conference at Fordham Law School with a select group of practitioners and academics to review the draft rule. After making appropriate changes in response to the feedback at the conference, the Advisory Committee published the revised rule for public comment in August 2006. The Committee received more than 70 public comments and heard testimony from 20 live witnesses at two public hearings.

In April 2007, the Advisory Committee released a revised proposed Rule 502, taking into consideration the public comment and witness testimony. The Committee on Rules of Practice and Procedure and the Judicial Conference approved the revised rule.

B. INTRODUCTION OF THE BILL AND COMMITTEE CONSIDERATION

On December 11, 2007, Chairman Leahy introduced S. 2450, incorporating the language proposed by the Judicial Conference's Advisory Committee. He was joined initially by Senator Specter and later by Senator Graham on December 17, 2007. The bill was referred to the Senate Committee on the Judiciary.

The bill was listed on the Executive Business Meeting Agenda on January 24, 2008. On January 31, 2008, the Judiciary Committee considered the legislation approved it by unanimous consent. The Committee reported the bill to the full Senate without amendment.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

SECTION 1: ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT LIMITATIONS ON WAIVER

(a) This section amends Article V of the Federal Rules of Evidence by adding the following provisions as Rule 502:

(a) This section limits the effect of disclosures made in a Federal proceeding or to a Federal officer or agency that waive the attorney-client privilege or the work-product doctrine. The section prevents such a waiver from extending to undisclosed information or information in a State or Federal proceeding unless: the waiver was intentional, the disclosed and undisclosed information concern the same subject matter, and in fairness, the undisclosed and disclosed information should be considered together.

(b) This section prevents inadvertent disclosures made in Federal proceedings or to a Federal Officer or agency from operating as a waiver if: the disclosure was inadvertent, the holder of the privilege or protection took reasonable steps to prevent disclosure, and the holder took steps to quickly rectify the disclosure under Federal Rule of Civil Procedure 26(b)(5)(B).

(c) This section prevents disclosures made in a State proceeding, which are not the subject of a State-court order concerning waiver, from constituting a waiver in Federal court if: the disclosure would not have been a waiver under this rule if made in Federal court or the disclosure would not be a waiver under the law of the State where the disclosure occurred.

(d) This section allows Federal courts to order that privileged or otherwise protected information is not waived by disclosure connected with the present litigation, and provides that such disclosure is not a waiver in any other Federal or State proceeding.

(e) This section limits agreements made between parties on the effects of disclosure in a Federal proceeding to be binding only on the parties to the agreement unless the agreement is incorporated into a court order.

(f) This section defines the applicability of this rule, notwithstanding Rules 101 and 1101, to State proceedings and to Federal-court annexed and Federal-court mandated arbitration proceedings, in the circumstances set out in this rule. Notwithstanding Rule 501, this rule applies even if State law provides the rules of decision.

(g) This section defines “attorney-client privilege” as “the protection that applicable law provides for confidential attorney-client communications”; and defines “work-product protection” as “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”

(b) This section adds Rule 502 to the table of contents for the Federal Rules of Evidence.

(c) This section makes this rule applicable to all proceedings commenced after the enactment of this rule and to all proceedings pending on the date of enactment, if it would be just and practicable.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee on the Judiciary sets forth, with respect to the bill, S. 2450, the following estimate prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 22, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2450, a bill to amend the Federal Rules of Evidence to address the waiver of the attorney-client privilege and work product doctrine.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

ROBERT A. SUNSHINE
(For Peter R. Orszag, Director).

Enclosure.

S. 2450—A bill to amend the Federal Rules of Evidence to address the waiver of attorney-client privilege and the work product doctrine

S. 2450 would amend the Federal Rules of Evidence relating to the disclosure of information gained by a waiver of the attorney-client privilege and work product protection. The bill would apply to all proceedings commenced after the date of enactment, and when practicable, to proceedings pending on such date. CBO estimates that implementing S. 2450 would have no significant effect on the federal budget. Enacting the legislation would not affect direct spending or revenues.

S. 2450 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The staff contact for this estimate is Leigh Angres. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2450.

VI. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2450, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

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

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

“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.”.

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

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

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

