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Federal Rules Update: Amendments to the Federal Rules of Procedure and Evidence

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24 CRIM. JUST. 61 (2009).

In a very unusual step, Congress enacted Federal Rule of Evidence 502. This rule deals with the attorney-client and work product privileges. The proposal for this rule was driven primarily by the concern over rising litigation costs associated with discovery, especially electronic discovery. Experience had demonstrated that in complex litigation cases lawyers spend considerable time and effort to preserve privileged documents. If a privileged document is mistakenly produced, there is a risk that a court would find subject matter waiver, not only in the case at bar, but in other cases as well.

The new rule became effective on September 19, 2008, and several critical points about it are notable. First, while the rule does not provide comprehensive coverage on all of the potential issues of that attorney-client and work product privileges, it does provide a template applicable in all federal courts for determining whether a waiver has occurred. Second, the rule focuses primarily on the subject of waiver where the disclosures are made to a federal court, office or agency. Finally, and most critically, it provides that if a federal court enters an order stating that the disclosure of information is not a waiver, the order is binding against all parties and persons in any other federal or state proceeding.

Keywords: Rules Enabling Act, Federal Rules of Procedure and Evidence, United States Judicial Conference, Standing Committee on the Rules, United States Supreme Court, Federal Rule of Evidence 502, attorney-client privilege, work-product protection, limitations on waiver, scope of a waiver, inadvertent disclosure.