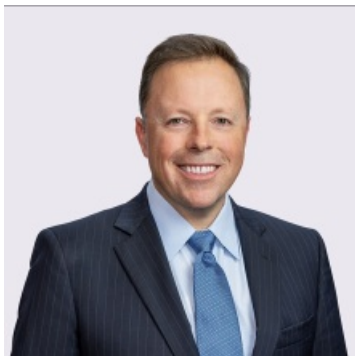


New Jersey Addresses Rising Use of E-Discovery with ‘Safe Harbor’ for Inadvertent Disclosures

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Under an amendment to New Jersey Rule of Evidence (N.J.R.E.) 530 (Waiver of Privilege by Contract or Previous Disclosure), a “safe harbor” is available effective July 1, 2020, to clients and attorneys who inadvertently disclose information protected by the attorney-client privilege or work-product doctrine.

The amendment was adopted by the New Jersey Supreme Court on September 16, 2019, in response to the heightened risk of inadvertent disclosures caused by the rising use of electronic discovery in litigation.

New Provision

N.J.R.E. 530 adds new paragraph (c) to address a variety of circumstances concerning disclosure of privileged or work-product communications and closely aligns with the federal evidence standard (Federal Rule of Evidence 502). Similar to Federal Rule of Evidence 502, N.J.R.E. 530(c) provides a safe harbor to those who inadvertently disclose work-product or privileged information.

The new subpart contains the following provisions:

1. Disclosures made in a state proceeding or to a state office or agency (N.J.R.E. 530(c)(1));
2. Inadvertent disclosures (N.J.R.E. 530(c)(2));
3. Disclosures made in another forum (N.J.R.E. 530(c)(3));
4. The controlling effect of a court order (N.J.R.E. 530(c)(4)); and
5. The controlling effect of a party agreement (N.J.R.E. 530(c)(5)).

Previously, state evidence rules did not provide such protection against inadvertent disclosures and New Jersey courts had not adopted a unified approach or standard governing the waiver of privilege.

Now, under amended N.J.R.E. 530, an inadvertent disclosure will not operate as a waiver in a state proceeding if a disclosing party can demonstrate the following under N.J.R.E. 530(c) (2):

- (a) The disclosure was inadvertent;
- (b) The holder of the privilege took reasonable steps to prevent disclosure; and
- (c) The holder promptly took reasonable steps to correct the error.

Caveats; Private Agreement; Court Order

The protection afforded by the new safe harbor is limited. In particular, N.J.R.E. 530(c)’s burdensome and imprecise standards (such as having to show inadvertence, reasonableness, and promptness) can leave the producing party’s efforts open to challenge and result in ancillary litigation regarding these privilege issues.

New N.J.R.E. 530(c)(5) permits a private agreement between the parties to protect against inadvertent and other types of disclosures. While such agreements can provide greater protections and relieve a party of having to show reasonable steps were taken to avoid the disclosure, they are binding only on the parties to the agreement. They would not be enforceable against third parties who may seek to gain access to privileged documents that were inadvertently disclosed.

New N.J.R.E. 530(c)(4) permits parties to eliminate this uncertainty by having a court enter an order directing that the disclosure of privileged or work-product information, whether inadvertent or otherwise, will not constitute a waiver of privilege. If a court orders that the privilege or protection is not waived by disclosure connected with the litigation pending before it, then the disclosure also will not constitute a waiver in any other state or federal proceeding. This last option provides parties and attorneys with the greatest amount of protection against inadvertent disclosures.

Implications

Amended N.J.R.E. 530 is welcome news for litigation attorneys as it expands the protections against waiver caused by inadvertent disclosure of privileged information and provides a more uniform rule that closely aligns with the Federal Rules of Evidence. As inadvertent disclosures often arise in cases involving voluminous amounts of electronic discovery, this new rule will significantly change how e-discovery is conducted in state cases.

Please contact a Jackson Lewis attorney with any questions about the amended rule or e-discovery.

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