

New Illinois Supreme Court Rules Address Inadvertent Disclosure of Privilege

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The Supreme Court of Illinois has adopted an amendment to Supreme Court Rule 201 and added Rule 502 to the Illinois Rules of Evidence. Both of these new rules concern the inadvertent disclosure of privileged materials in litigation or other state proceedings and took effect on January 1, 2013.

Supreme Court Rule 201, entitled "General Discovery Provisions," has been amended to add a subsection (p), which addresses assertions of privilege or work product after disclosure in discovery. Supreme Court Rule 201(p) states:

If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.

Illinois Rule of Evidence 502, entitled "Attorney Client Privilege and Work Product: Limitations on Waiver," incorporates the language and structure of Federal Rule of Evidence 502. Illinois joins Arizona, Indiana, Iowa and Washington in adopting paragraph (d) of the federal rule, which purports to protect any disclosure made pursuant to court order from operating as a waiver in any subsequent proceeding. For a review of Federal Rule 502, [click here](#) to see our previous alert.

The federal and Illinois state versions of Rule 502 diverge with respect to the other types of legal proceedings to which each expressly applies. The federal version expressly applies in federal court-annexed and federal court-mandated arbitration proceedings, but not federal agency proceedings. The Illinois version expressly applies to Illinois agency proceedings, but not to arbitration proceedings.

Illinois' new rules are helpful in clarifying the procedure for handling inadvertent disclosures and their effect in Illinois proceedings. However, to the extent that Illinois Rule 502 purports to be binding in other state or federal proceedings, practitioners should be wary. Until tested, the extrajurisdictional effect of orders under Illinois Rule of Evidence 502, and other similar state rules, remains unclear, especially in federal proceedings.

The full text of Illinois Supreme Court Rule 201 can be found [here](#).

The full text of Illinois Rule of Evidence 502 can be found [here](#).