

110TH CONGRESS
1ST SESSION

S. 2450

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 and Mr. SPECTER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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,*

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

5 (a) IN GENERAL.—Article V of the Federal Rules of
6 Evidence is amended by adding at the end the following:
7 **“Rule 502. Attorney-Client Privilege and Work Prod-**
8 **uct; Limitations on Waiver**

9 “The following provisions apply, in the circumstances
10 set out, to disclosure of a communication or information

1 covered by the attorney-client privilege or work-product
2 protection.

3 “(a) DISCLOSURE MADE IN A FEDERAL PRO-
4 CEEDING OR TO A FEDERAL OFFICE OR AGENCY; SCOPE
5 OF A WAIVER.—When the disclosure is made in a Federal
6 proceeding or to a Federal office or agency and waives
7 the attorney-client privilege or work-product protection,
8 the waiver extends to an undisclosed communication or in-
9 formation in a Federal or State proceeding only if:

10 “(1) the waiver is intentional;

11 “(2) the disclosed and undisclosed communica-
12 tions or information concern the same subject mat-
13 ter; and

14 “(3) they ought in fairness to be considered to-
15 gether.

16 “(b) INADVERTENT DISCLOSURE.—When made in a
17 Federal proceeding or to a Federal office or agency, the
18 disclosure does not operate as a waiver in a Federal or
19 State proceeding if:

20 “(1) the disclosure is inadvertent;

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

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

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

2 When the disclosure is made in a State proceeding and
3 is not the subject of a State-court order concerning waiver,
4 the disclosure does not operate as a waiver in a Federal
5 proceeding if the disclosure:

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

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

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

11 A Federal court may order that the privilege or protection
12 is not waived by disclosure connected with the litigation
13 pending before the court—in which event the disclosure
14 is also not a waiver in any other Federal or State pro-
15 ceeding.

16 “(e) CONTROLLING EFFECT OF A PARTY AGREE-
17 MENT.—An agreement on the effect of disclosure in a
18 Federal proceeding is binding only on the parties to the
19 agreement, unless it is incorporated into a court order.

20 “(f) CONTROLLING EFFECT OF THIS RULE.—Not-
21 withstanding Rules 101 and 1101, this rule applies to
22 State proceedings and to Federal court-annexed and Fed-
23 eral court-mandated arbitration proceedings, in the cir-
24 cumstances set out in the rule. And notwithstanding Rule

1 501, this rule applies even if State law provides the rule
2 of decision.

3 “(g) DEFINITIONS.—In this rule:

4 “(1) ‘attorney-client privilege’ means the pro-
5 tection that applicable law provides for confidential
6 attorney-client communications; and

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

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

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

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

○