

What's in a Word? "Disclosure" v. "Waiver" Under Federal Rule of Evidence 502



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One word can sometimes make a significant difference. Take, for instance, an October 14, 2009 order entered by the Southern District of New York in *SEC v. Bank of America Corporation* (09 Civ. 6829). The SEC brought the case against Bank of America alleging that the bank failed to comply with its shareholder disclosure obligations in connection with the bank's merger with Merrill Lynch. As the SEC lawsuit and two separate investigations by the New York and North Carolina attorneys general progressed, Bank of America came under pressure to disclose to the SEC and the state attorneys general certain documents protected by the attorney-client privilege and the work product doctrine. The bank eventually agreed to disclose certain categories of privileged documents to those government authorities (one assumes because the bank believes the documents are exonerating). But it was concerned that the private plaintiffs in roughly fifty civil actions against the bank and its officers arising out of the same set of operative facts might use the bank's voluntary disclosure of documents to argue that the bank has waived the privilege with respect to additional categories of privileged documents and information that the bank is not willing to disclose.

In an effort to address its concern about unintentionally waiving the privilege with respect to additional categories of documents and information, Bank of America reached for newly enacted Federal Rule of Evidence 502, which became effective on September 19, 2008. In reliance on Rule 502, the bank and the SEC jointly submitted to the Southern District of New York a "Disclosure Stipulation Agreement and Proposed Protective Order." The Disclosure Stipulation says that the bank will "disclose" certain limited categories of documents to the government authorities. It also says, however, that "Bank of America intends to waive the attorney-client privilege and/or work-product protection" with respect to the categories of documents being voluntarily disclosed, while not waiving the privilege with respect to any additional categories of documents. United States District Judge Jed Rakoff, in his October 14, 2009 order endorsing the Disclosure Stipulation, wrote that the stipulation "comports with the new Rule 502 . . . which permits such cabined waivers." The judge's order also says that the court interprets the stipulation as "protecting Bank of America against any claim that the stipulated waiver here attached implicitly effectuates a broader waiver." Thus, the parties and the court all intended and understood that the order would allow Bank of America to disclose select categories of documents without waiving the privilege with respect to other, potentially related, categories of documents.

Contrary to reports elsewhere, it does not appear that the Disclosure Stipulation was intended to address the separate issue of whether the particular documents Bank of America has agreed to disclose to the SEC may themselves be obtained by the private plaintiffs or others. The Disclosure Stipulation does not say that the voluntarily disclosed documents remain privileged as to the rest of the world or are otherwise protected from disclosure to others. It says only that "the effect of the disclosure made pursuant to this Order in any other proceeding, investigation, or litigation shall be determined under Federal law as interpreted by the United States Court of Appeals for the Second Circuit."

The problem with the Disclosure Stipulation and the court's October 14, 2009 order, in this author's opinion, is that Rule 502 does not authorize a blanket order protecting the bank's other documents and information from disclosure in circumstances where, as here, there has been a waiver of the privilege. Rule 502(d) allows a federal court to "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." But that provision contemplates a situation in which a party makes a "disclosure" of documents without making a "waiver." Bank of America expressly "waived" the privilege with respect to the documents it agreed to disclose. Accordingly, Rule 502(d) is inapplicable.

In the absence of an order in accordance with Rule 502(d), Rule 502(a) says that when a 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 undisclosed communications and information in a federal or state proceeding if (1) the waiver is intentional, (2) the disclosed and undisclosed communications and information concern the same subject matter, and (3) they ought in fairness be considered together. Bank of America's waiver was unquestionably intentional. Therefore, under Rule 502(a), the bank's limited waiver may have waived the privilege with respect to additional documents and information that concern the same subject matter and ought in fairness be considered with the documents that the bank voluntarily disclosed. The Disclosure Stipulation itself, likely with the intention to address this point, says (in a self-serving manner) that it would not be unfair under Rule 502(a) for a party to consider the voluntarily produced documents without the bank's other protected documents and information. But the court, in its order, made no particularized inquiry into this assertion in the context of the other cases pending against Bank of America. Nor did the Southern District of New York have jurisdiction over the myriad other civil actions pending against the bank around the country. Nothing in Rule 502 authorizes a blanket order made in advance of any particularized challenge that purports to determine the applicability of Rule 502(a) in all subsequent circumstance arising in other litigation not pending before the court entering the order. As a result, the possibility remains that the plaintiffs in one or more of the other cases against Bank of America might seek an order from another court requiring the bank to produce additional documents on the ground that it has waived the privilege more broadly than it intended.

In addition to its use of the word "waiver," the Disclosure Stipulation, in the opinion of this author, falls outside the contours of Rule 502 because it contemplates disclosure of privileged documents to the two state attorneys general. Rule 502(a) speaks only of disclosures "made in a Federal proceeding or to a Federal office or agency," and Rule 502(d) speaks of disclosures "connected with the litigation pending before the court." Nothing in the rule extends the rule's protections to disclosures that are not connected to pending litigation, such as disclosures in the context of investigations undertaken by state attorneys general that are not themselves connected with a court proceeding. In fact, drafts of Rule 502 contained provisions authorizing selective, non-waiver disclosures in the context of state, local, and federal government investigations, but those provisions were removed prior to the rule's enactment. This fact further undermines any belief that the court's October 14, 2009 order gives Bank of America the protection it sought.

It is too early to know whether Bank of America's Disclosure Stipulation will ultimately be held to have effected a waiver broader than the one the bank, and the court, intended. But what is certain is that the bank's failure to draft a stipulation and obtain an order clearly falling within the scope of Rule 502 has left it vulnerable to attack. Indeed, the American Lawyer reported on November 6, 2009 that lawyers representing shareholders in one of the civil actions against the bank have obtained authorization to serve a subpoena on the law firm that represented the bank in the Merrill Lynch merger. The subpoena seeks "all documents concerning the merger." Only the future will tell how this attempt plays out.