NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

November 15, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council, to amend Commercial Division Rule 11-g (22 NYCRR § 202.70[g], Rule 11-g[c] and [d]) to include sample "privilege claw-back" language for use in the standard form of stipulation and order for the production of confidential information in matters before the Commercial Division (Exh. A, pp. 3-4, pp. 6-7). The proposed language is designed, in a manner consistent with New York law, to mitigate the risks of inadvertent disclosure associated with voluminous document production in major commercial actions. Parties employing the language would agree to (1) implement and adhere to reasonable procedures to ensure that documents protected from disclosure are identified and withheld from production, (2) take reasonable steps to correct errors when protected information is inadvertently produced, (3) return or destroy copies of inadvertently produced protected information upon request of the producing party, and (4) neither challenge the producing party's document review procedure or its efforts to rectify the production error, nor claim that the return of the protected information has caused it to suffer prejudice (Exh. A, p. 7). The Subcommittee notes that the most efficacious manner of addressing the problem of inadvertent disclosure of confidential information is by legislative enactment – perhaps through amendment of New York's Civil Practice Law and Rules – but that, absent such recourse, the proposed language would serve as a helpful interim measure to maintain the standing of the Commercial Division as a world-class forum for resolving commercial disputes (Exh. A, pp. 3-4).

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than January 16, 2018.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

M E M O R A N D U M

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

DATE: September 5, 2017

RE: **Proposal to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure**

Introduction and Background

Electronic discovery has now become standard fare in commercial litigation, and it has impacted the disclosure process in several ways. Chief among these has been a veritable explosion in the sheer number of documents to be reviewed and an increased complexity in the process surrounding the review of documents for responsiveness and privilege. Of course, with increased volume and complexity invariably comes increased cost to the litigants.

But the cost is not just monetary. It also manifests itself in an increased likelihood of error during the review process. Arguably the most grievous potential error is the inadvertent production of privileged material. Whether the production of privileged material is inadvertent can (and often does) become the subject of satellite litigation, and the consequences of a judicial finding that the inadvertent production constitutes a privilege waiver can be catastrophic. An inadvertent waiver not only results in the surrender of an erstwhile privileged document to the adversary, but it exposes the privilege holder to the risk that waiver will extend to other privileged material that addresses the same subject matter as the mistakenly produced privileged communication.

Federal Rule of Evidence 502 became part of federal practice in 2007. FRE 502 mitigates the risk of privilege waiver by establishing: (1) uniform criteria for what constitutes an "inadvertent" production in the federal system; (2) uniform criteria for determining when waiver

extends to the subject matter of the document disclosed; and (3) a stipulated-to mechanism whereby a party may simply request the return of an inadvertently produced document, and the receiving party must return it without challenging whether the production effectuated a privilege waiver. Moreover, FRE 502 also provides that by embodying their agreement in a court order, the parties' decision to deem inadvertent production not to trigger a waiver binds not only the parties, but nonparties to the litigation (*i.e.* those who might otherwise seek to rely upon the inadvertent production as the basis for privilege waiver in another litigation or proceeding) as well.

Since FRE 502's enactment, several states have followed suit with their own version of the rule -- Alabama, Arizona, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Oklahoma, Tennessee, Vermont, Washington, West Virginia and Wisconsin.[1] By adopting some variant of FRE 502, these states have explicitly recognized both the problems associated with the inadvertent waiver of privilege and the need to mitigate against the risk of such waiver.

All the state law analogs to FRE 502 referenced above share one significant attribute: they are all memorialized in the states' evidence codes. This makes sense; these analogs represent attempts to make uniform and/or modify the parameters surrounding the waiver of privileges that, themselves, are creatures of statewide statute or rule.

There have been proposals made to enact a FRE 502 analog in New York State. *See* e.g. Supporting Statement to New York State Bar Association's Committee on Civil Practice Law and Rules Proposed CPLR 4549 (Undated); New York State–Federal Judicial Counsel's Report on the Discrepancies between Federal and New York State Waiver of Attorney–Client Privilege (January 2014).

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[1] Attached to this explanatory memorandum as **Exhibit A** is a chart, which sets forth those aspects of FRE 502 these other jurisdictions have elected to incorporate.

The Subcommittee's Proposal

It seems clear that the most efficacious approach for addressing privilege waiver during disclosure would be an amendment to the CPLR; a CPLR amendment would maximize the rule's statewide impact and clarity and enhance predictability for counsel (and their clients). While the bench and bar await the passage of such an amendment, however, the Commercial Division can and should implement an interim measure to maintain its standing as a world-class forum for resolving commercial disputes. Accordingly, the Subcommittee recommends an amendment to the Commercial Division's Statewide Rules of Practice.[2]

The most logical context within which to establish this interim measure is by amending Commercial Division Rule 11–g, which addresses confidentiality orders in the Commercial Division. Rule 11–g itself references Appendix B to the Statewide Rules, which contains the standard form of confidentiality order utilized by many of the justices in the Division (the "Standard Form"). The Subcommittee recommends that to the extent parties wish to increase predictability and mitigate against the risk of inadvertent disclosure, they incorporate the

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[2] The promulgation of such a rule via administrative order is entirely appropriate. As this Subcommittee has observed previously:

> "Article VI, Section 30, of the New York State Constitution provides the legislature the power to regulate proceedings in the courts, and permits the legislature to delegate to the chief administrator of the courts any power possessed by the legislature 'to regulate practice and procedure in the courts.'[2] Section 212(2)(d) of the Judiciary Law authorizes the chief administrator to do the following: 'Adopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts, in accordance with the provisions of section thirty of article six of the constitution.'" (*See* Memorandum to the Commercial Division Advisory Council from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution entitled "Public Comments on Proposed Rule on Use of Interrogatories in the Commercial Division of the Supreme Court of New York" (February 24, 2014)).

Accord, *State v Robert F.*, 25 NY3d 448 [2015](New York courts have "latitude to adopt procedures consistent with general practice as provided by statute . . . . Courts may fashion necessary procedures consistent with constitutional, statutory, and decisional law")(internal citations omitted).

following language into the Standard Form[3], or into another form of order utilized by the Justice presiding over the matter:

> "__. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:
>
> a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information")[4] are identified and withheld from production.
>
> b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
>
> c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice."

Rational for Proposal

Because the Subcommittee's proposal takes the form of an amendment to the Statewide Rules, rather than a modification to the CPLR, the Subcommittee has taken steps to ensure that it

[3] If added to the Standard Form, we believe that the language should be included as new paragraph 21. Attached as **Exhibit B** is a copy of the Standard Form, tracked to show the addition of the foregoing non-waiver language.

[4] The referenced CPLR provisions correspond, respectively, to Attorney Work Product, Materials Prepared in Anticipation of Litigation and the Attorney-Client Privilege.

remains consistent with existing law regarding inadvertent privilege waiver. Under established New York precedent, the inadvertent production of documents does not effectuate a waiver if:

a. the producing party had no intention of producing the document;
b. the producing party took reasonable steps to ensure that the document was not disclosed;
c. the producing party took prompt action to rectify the inadvertent production; and
d. the party receiving the inadvertently produced document would not suffer prejudice by having to return the document.

See AFA Protective Sys., Inc. v City of New York, 13 AD3d 564, 565 [2d Dept 2004]; *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 AD2d 169, 172 [1st Dept 2002]; *McGlynn v Grinberg*, 172 AD2d 960 [3d Dept 1991]; *Manufacturers and Traders Tr. Co. v Servotronics, Inc.*, 132 AD2d 392 [4th Dept 1987].

Incorporating New York's standard for determining inadvertence into the Standard Form accomplishes several distinct, but related goals. *First*, it makes it facially apparent that the new provision is intended to be consistent with existing New York state law. *Second*, it ensures that the parties commit to taking appropriate steps to screen for privilege and promptly remediate any error – *i.e.* steps that are necessary under New York law to avoid an inadvertent waiver. *Third*, the new provision eliminates the possibility that the presumptive non-waiver embodied in the so-ordered Standard Form will be litigated, thereby reducing greatly the chance that a non-party seeking to challenge the implications of an inadvertent production in another forum will become aware of its occurrence in the first instance.

There is one obvious limitation on the utility of the proposed non-waiver language. By drafting it to be consistent with existing New York state law, it must, of necessity, exclude

protection for so-called "quick peek" [5] arrangements. Quick peek agreements are inconsistent with New York law, and while they may protect against later claims of waiver by one party against the other, they will be entirely ineffective against waiver claims interposed by non-parties to the agreement. New York law makes clear that the voluntary production of privileged material effectuates a complete waiver of the privilege. *See, e.g. Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [4th Dept 2000]. In addition, there is a real risk under New York law that a party who voluntarily produces privileged material will effectuate a subject matter waiver – a privilege waiver that goes beyond the document disclosed. *See e.g. Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 199 [Sup Ct 2003]. Protecting parties to quick peek arrangements against waiver claims by third parties would require the legislative modification of existing law and the adoption of the so-called selective waiver doctrine. *See Diversified Indus., Inc. v Meredith*, 572 F2d 596, 606 [8th Cir 1977].

Conclusion

Although the optimal solution to shielding against inadvertent waiver of privilege involves legislative action, the Subcommittee believes that its proposed amendment to the Standard Form will mitigate greatly against claims of inadvertent waiver and provide significantly more predictability than currently exists.

Accordingly, we respectfully submit that Statewide Commercial Division Rule 11-g be amended as set forth below.

(I) The text of current rule 11-g(c) shall be deleted and replaced with the following language:

[5] A "quick peek" agreement involves parties to a litigation exchanging documents without first conducting any privilege review whatsoever. Under these arrangements, the producing party turns over all material responsive to the production request, the receiving party takes a "quick peek" at the material and designates the documents it wants to use, and the producing party then asserts or foregoes the privilege.

"(c) In the event the parties wish to incorporate a privilege claw-back provision into the confidentiality order to be utilized in their commercial case, they shall insert the following text as separate paragraph:

'__. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:

a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information") are identified and withheld from production.

b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.'

In the event the parties wish to deviate from the foregoing language, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter."

(II) A new subsection (d) shall be added to Rule 11-g, which shall read:

"Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules."

Exhibit A

Analysis of State Analogues to FRE 502*

State	State Rule of Evidence	502(a) Equivalent (Subject Matter Waiver)	502(b) Equivalent (Inadvertent Waiver)	502(c) Equivalent (Disclosure Made in Another Proceeding)	502(d) Equivalent (Controlling Effect of Court Order)**	502(e) Equivalent (Controlling Effect of Party Agreement)
Alabama	510	☑	☑	☑	☑	☑
Arizona	502	☑	☑	☑	☑	☑
Colorado	502	☑	☑	☑	☑	☑
Delaware***	510	☑	☑	☑	☑	☑
Illinois	502	☑	☑	☑	☑	☑
Indiana	502	☑	☑	☒	☑	☑
Iowa	5.502	☑	☑	☑	☑	☑
Kansas	60-426a	☑	☑	☑	☑	☑
Oklahoma	2502	☑	☑	☒	☒	☒
Tennessee	502	☒	☑	☒	☒	☒
Vermont	510	☑	☑	☑	☑	☑
Washington	502	☑	☑	☑	☑	☑
West Virginia	502	☑	☑	☑	☑	☑
Wisconsin	905.03	☑	☑	☒	☒	☒

*Copies of FRE 502 and each of the listed state rules of evidence are attached hereto.

**FRE 502(d) provides: "A federal court may 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." (Emphasis added). All but three of the states that implemented a state court analogue to FRE 502 have incorporated an equivalent to sub-section (d). Of the states that have done so, all of them—save for one—simply say that the court order prevents waiver "in any other proceeding" (which will likely be read to mean "any other [insert name of State] court proceeding.") The one exception is Alabama, which refers in its rule to "any other Alabama proceeding."

***Per the attached, many of the state rules mirror almost precisely the form and substance of FRE 502. Delaware—the chief competitor to New York's Commercial Division—does not. *See, e.g.* D.R.E. 510(e).

FEDERAL RULE OF EVIDENCE 502

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article V. Privileges

Federal Rules of Evidence Rule 502, 28 U.S.C.A.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the 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 an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

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

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. A federal court may 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.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

CREDIT(S)

(Pub.L. 110-322, § 1(a), Sept. 19, 2008, 122 Stat. 3537; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADVISORY COMMITTEE NOTES

2011 Amendments

Rule 502 has been amended by changing the initial letter of a few words from uppercase to lowercase as part of the restyling of the Evidence Rules to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTES

Explanatory Note (Revised 11/28/2007)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-

production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order

is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order--predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(f) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

Committee Letter

The letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Committee on the Judiciary of the U.S. Senate and House of Representatives, dated September 26, 2007, provided:

On behalf of the Judicial Conference of the United States, I respectfully submit a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress adopt this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Unlike all other federal rules of procedure prescribed under the Rules Enabling Act, those rules governing evidentiary privilege must by approved by an Act of Congress, 28 U.S.C. § 2074(b).

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested that the Judicial Conference consider proposing a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would:

- protect against the forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake; and

- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to litigation.

The task of drafting a proposed rule was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers, and academics to testify before the Advisory Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August 2006 and ended February 15, 2007. The Advisory Committee received more that [sic] 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee's Subcommittee on Style. In April 2007, the Advisory Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style, and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference. It is enclosed with this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule

412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work-product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work-product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

•*Limitations on Scope of Waiver.* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

•*Protections Against Inadvertent Disclosure.* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

•*Effect on State Proceedings and Disclosures Made in State Courts.* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

•*Orders Protecting Privileged Communications Binding on Non-Parties.* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

•*Agreements Protecting Privileged Communications Binding on Parties.* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings--and even when the disclosed material is then offered in a state proceeding (the so-called "state-to-state" problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the "state-to-state" problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called "federal-to-state" problem).

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.

- In the Advisory Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

The Judicial Conference has no position on the merits of separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal protection orders. The other protections against waiver in Rule 502--against mistaken disclosure and subject matter waiver--would also bind state courts as to disclosures initially made at the

federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even when a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work-product doctrine.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively--to the government--and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is available on request.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee, as well as their reporters and consultants, are ready to assist Congress in any way it sees fit.

Sincerely,

Lee H. Rosenthal

Chair, Committee on Rules of Practice and Procedure

Addendum to Advisory Committee Notes

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or

state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases--for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)--Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to a federal office or agency, they do not apply to uses of information--such as routine use in government publications--that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)--Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate In the circumstances.

Subdivision (e)--Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

Notes of Decisions (44)

Fed. Rules Evid. Rule 502, 28 U.S.C.A., FRE Rule 502
Including Amendments Received Through 8-1-17

End of Document

ALABAMA

Code of Alabama
Alabama Rules of Evidence
Article V. Privileges

ARE Rule 510

Rule 510. Waiver of privilege by voluntary disclosure.

Currentness

(a) *Generally.* A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) *Attorney-Client Privilege and Work Product; Limitations on Waiver.* Notwithstanding section (a) of this rule, the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(1) DISCLOSURE MADE IN AN ALABAMA PROCEEDING; SCOPE OF WAIVER. When the disclosure is made in an Alabama proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Alabama proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) the disclosed and undisclosed communications or information should, in fairness, be considered together.

(2) INADVERTENT DISCLOSURE. When made in an Alabama proceeding, the disclosure does not operate as a waiver in an Alabama proceeding if:

(A) the disclosure is inadvertent;

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedure set out in Alabama Rule of Civil Procedure 26(b)(6)(B).

(3) DISCLOSURE MADE IN A PROCEEDING IN FEDERAL COURT OR IN ANOTHER STATE. When the disclosure is made in a proceeding in federal court or in another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Alabama proceeding if the disclosure:

(A) would not be a waiver under this rule if it had been made in an Alabama proceeding; or

(B) is not a waiver under the law governing the federal or state proceeding in which the disclosure occurred.

(4) CONTROLLING EFFECT OF A COURT ORDER. An Alabama court may 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 Alabama proceeding.

(5) CONTROLLING EFFECT OF A PARTY AGREEMENT. An agreement on the effect of disclosure in an Alabama proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) DEFINITIONS. In this rule:

(A) “Attorney-client privilege” means the protection that applicable law provides for confidential attorney-client communications; and

(B) “Work product protection” means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
(Amended eff. 10-1-2013.)

Editors' Notes

ADVISORY COMMITTEE'S NOTES

This rule, stated substantially in the language of the corresponding Uniform Rule of Evidence, sets forth in express terms what is to be implied from the statement of all privileges -- i.e., the privilege falls when that which is protected by the privilege is voluntarily disclosed by the holder. See Unif.R.Evid. 510. Such a waiver may occur, for example, when the holder allows an unnecessary third party to be privy to an otherwise privileged communication. Additionally, it may arise when the holder tells a third party about the privileged matter. See, e.g., Perry v. State, 280 Ark. 36, 655 S.W.2d 380 (1983) (clergyman privilege waived by disclosure of inculpatory statements to others); State v. Jackson, 97 N.M. 467, 641 P.2d 498 (1982). This waiver doctrine is consistent with preexisting Alabama law. See Ex parte Great Am. Surplus Lines Ins. Co., 540 So.2d 1357 (Ala.1989) (attorney-client privilege); Swoope v. State, 115 Ala. 40, 22 So. 479 (1897) (husband-wife privilege); C. Gamble, McElroy's Alabama Evidence §§ 394.01 (waiver of attorney-client privilege), and 103.01(4) (husband-wife privilege) (4th ed. 1991).

The waiver doctrine has two significant limitations. First, waiver arises only when the holder has disclosed, or allowed disclosure of, the “privileged matter.” The client does not waive the attorney-client privilege, for example, by disclosing the subject discussed without revealing the substance of the discussion itself. See Fed.R.Evid. 511 (not enacted) advisory committee's note; E. Cleary, McCormick on Evidence § 93 (3d ed. 1984). Even if the holder discloses a portion of the privileged matter, however, the second limitation is that the

disclosure must be of a "significant part" of it. Disclosure of an insignificant part of the privileged matter does not waive the privilege. Whether a significant part of the privileged matter has been disclosed is a common sense question for the judge. See N.D.R.Evid. 510 explanatory note. It should be observed, of course, that the holder need not disclose every detail of the privileged matter in order to waive the privilege. See Or.R.Evid. 511 legislative commentary. No waiver occurs if the disclosure, even of a significant part of the privileged matter, is made in the course of another privileged communication. Perry v. State, 280 Ark. 36, 655 S.W.2d 380 (1983).

The concept of fairness underlies the waiver doctrine. It has been held unfair to permit offensive assertion of a privilege. When a party, for example, offers a portion of the privileged matter in proof of his or her case, fairness dictates that the opponent be allowed to offer or discover the remainder. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105 (Tex. 1985). This is consistent with preexisting Alabama law under which the attorney-client privilege falls when a plaintiff client puts the attorney-client communications at issue or charges the attorney with misconduct. Ex parte Malone Freight Lines, Inc., 492 So.2d 1301 (Ala.1986); Dewberry v. Bank of Standing Rock, 227 Ala. 484, 150 So. 463 (1933).

ADVISORY COMMITTEE'S NOTES TO AMENDMENT TO RULE 510 EFFECTIVE OCTOBER 1, 2013

Rule 510 has been amended to establish a standard for determining whether inadvertent disclosure in an Alabama proceeding of matter otherwise protected by the attorney-client privilege or the work-product doctrine results in waiver of the privilege or protection. This amendment is to be read consistent with revisions made to the Alabama Rules of Civil Procedure in 2010 to accommodate the discovery of electronically stored information (ESI).

The amendment is also intended to align Alabama law with Federal Rule of Evidence 502 and to provide predictable, uniform standards whereby parties can protect against waiver of the privilege or protection in an Alabama proceeding. All substantive changes to Rule 510 are found in a new section (b), which is modeled on Federal Rule 502.

Section (a). Generally. No changes have been made to the original paragraph of Rule 510, which is now designated as Rule 510(a). Rule 510(a) governs the consequences of voluntary disclosure of privileged matter generally, in circumstances not covered by Rule 510(b).

Section (b). Attorney-Client Privilege and Work Product; Limitations on Waiver. Rule 510(b) addresses only the effect of disclosure, in an Alabama proceeding, of information otherwise protected by the attorney-client privilege or the work-product doctrine and whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility. The failure to address in Rule 510(b) other waiver issues or other privileges or protections is not intended to affect the law regarding those other waiver issues, privileges, or protections. The amendment does not alter existing Alabama law for determining whether a communication or information qualifies for protection under the attorney-client privilege or the work-product doctrine in the first instance.

Subsection (b)(1). Disclosure Made in an Alabama Proceeding; Scope of Waiver. Rule 510(b)(1) adopts the standard set forth in Federal Rule 502(a). The advisory committee's notes accompanying Federal Rule 502(a) provide a clear description of this standard.

"[A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, *e.g.*, *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C.1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in

an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver."

Fed.R.Evid. 502(a) (Advisory Committee's Notes).

Subsection (b)(2). Inadvertent Disclosure. Subsection (b)(2) fills a gap in Alabama law regarding the proper standard for determining whether an inadvertent disclosure of matter protected by the attorney-client privilege or work-product doctrine during discovery results in waiver of the privilege or protection. See *Koch Foods of Alabama LLC v. Gen. Elec. Capital Corp.*, 531 F.Supp.2d 1318, 1320-21 (M.D.Ala.2008) (observing that courts have used three standards for determining whether an inadvertent waiver has occurred but that "Alabama law does not fall neatly into any of these categories"). See also Ala.R.Civ.P. 26(b)(6)(B) (Committee Comments to 2010 Amendment) (2010 amendment "provides a procedure to assert a claim of attorney-client privilege or work-product protection after production [that is] applicable to both non-ESI and ESI data, but [the change] is procedural and does not address substantive waiver law").

The substantive standard set forth in this subsection is intended to apply in the absence of a court order or a party agreement regarding the effect of disclosure. In determining whether waiver has occurred, court orders and party agreements should ordinarily control. *Cf.* Ala.R.Civ.P. 16(b)(6) (Committee Comments to 2010 Amendment) ("subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced").

Alabama Rule 510(b)(2) adopts verbatim the three-part standard set out in Federal Rule 502(b). Under this standard, disclosure does not operate as a waiver if: (1) the disclosure was inadvertent, (2) the holder took reasonable steps to prevent disclosure, and (3) the holder took prompt and reasonable steps to rectify the error including (if applicable) providing the notice and following the other steps set forth in Rule 26(b)(6)(B) of the Alabama Rules of Civil Procedure.

The standard adopted is intended to be flexible. Accordingly, no attempt is made to define "reasonable steps" or to list factors that must be considered in every case. Guidance for applying this standard can be found in the advisory committee's notes accompanying Federal Rule 502(b), which provide:

"Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal.1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

"The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the

producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently."

Fed.R.Evid. 502(b) (Advisory Committee's Notes).

Subsection (b)(3). Disclosure Made in a Proceeding in Federal Court or in Another State. Alabama Rule 510(b)(3) corresponds to Federal Rule 502(c) and addresses the situation where the initial disclosure occurred in a proceeding in federal court or in another state's court and the disclosed matter is subsequently offered in an Alabama proceeding. Rule 510(b)(3) provides that, in the absence of a court order, the disclosure will not operate as a waiver in an Alabama proceeding if: (1) the disclosure would not have resulted in a waiver in an Alabama proceeding by application of Ala.R.Evid. 510(b), or (2) if the disclosure would not have resulted in waiver under the law applicable to the federal or state proceeding in which it occurred. Stated differently, the law that is the most protective of privilege and work-product should be applied.

Subsection (b)(4). Controlling Effect of a Court Order. Alabama Rule 510(b)(4) corresponds to Federal Rule 502(d). Under Rule 510(b)(4), a confidentiality order governing the consequences of disclosure entered in an Alabama proceeding is enforceable against nonparties in a subsequent Alabama proceeding. Rule 510(b)(4), like its federal counterpart, is intended to provide predictability and reduce discovery costs. See Fed.R.Evid. 502(d) (Advisory Committee's Notes) ("[T]he utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation."). *Cf.* Ala.R.Civ.P. 16(b)(6) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's scheduling order); Ala.R.Civ.P. 26(f) (party agreements for asserting claims of privilege or work-product protection after production may be included in court's discovery-conference order).

Subsection (b)(5). Controlling Effect of a Party Agreement. Alabama Rule 510(b)(5) corresponds to Federal Rule 502(e) and recognizes that parties may enter into agreements concerning the effect of disclosure of privileged or protected materials in an Alabama proceeding. However, such an agreement is binding only on the parties unless it is incorporated into a court order as provided in Rule 510(b)(4).

Subsection (b)(6). Definitions. Alabama Rule 510(b)(6) adopts verbatim the definitions for "attorney-client privilege" and "work-product protection" contained in Federal Rule 502(g). The definitions are general. No substantive change in existing Alabama law is intended. *Cf.* Ala.R.Evid. 502(a) (attorney-client privilege); Ala.R.Civ.P. 26(b)(4) (trial-preparation materials).

Notes of Decisions (5)

Ala. Rules of Evid., Rule 510, AL ST REV Rule 510
Current with amendments received through July 15, 2017

ARIZONA

Arizona Rules of Evidence, Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in an Arizona proceeding; scope of a waiver.

When the disclosure is made in an Arizona proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in an Arizona proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure.

When made in an Arizona proceeding, the disclosure does not operate as a waiver in an Arizona proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Arizona Rule of Civil Procedure 26(b)(6)(B).

(c) Disclosure made in a proceeding in federal court or another state.

When the disclosure is made in a proceeding in federal court or another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Arizona proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Arizona proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling effect of a court order.

An Arizona court may 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 proceeding.

(e) Controlling effect of a party agreement.

An agreement on the effect of disclosure in an Arizona proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions.

In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Added Sept. 3, 2009, effective Jan. 1, 2010. Amended Sept. 8, 2011, effective Jan. 1, 2012; Sept. 2, 2016, effective Jan. 1, 2017.

17A Pt. 1 A. R. S. Rules of Evid., Rule 502, AZ ST REV Rule 502
Current with amendments received through 7/1/17

COLORADO

West's Colorado Revised Statutes Annotated
Title 13. Courts and Court Procedure
Related Court Rules
Chapter 33. Colorado Rules of Evidence (Refs & Annos)
Article V. . Privileges

CRE Rule 502

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Colorado Proceeding or to a Colorado Office or Agency; Scope of a Waiver. When the disclosure is made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Colorado proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Colorado proceeding or to an office or agency of a Colorado state, county, or local government, the disclosure does not operate as a waiver in a Colorado proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following C.R.C.P. 26(b)(5)(B).

(c) Disclosure Made in a Federal or other State Proceeding. When the disclosure is made in a proceeding in federal court or the court of another state and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Colorado proceeding if the disclosure:

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

(2) is not a waiver under the law governing the state or federal proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Colorado court may 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 proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Colorado proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted eff. March 22, 2016.

Rules of Evidence., Rule 502, CO ST REV Rule 502
Current with amendments received through July 15, 2017

End of Document

DELAWARE

West's Delaware Code Annotated
Delaware Rules of Court
Delaware Uniform Rules of Evidence
Article V. Privileges

D.R.E., Rule 510

RULE 510. WAIVER OF PRIVILEGE OR WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of information or communications that are privileged under these rules or that are subject to work-product protection.

(a) Waiver by Intentional Disclosure. A person waives a privilege conferred by these rules or work-product protection if such person or such person's predecessor while holder of the privilege or while entitled to work-product protection intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information. This rule does not apply if the disclosure itself is privileged or protected.

(b) Disclosure; Scope of a Waiver. When the disclosure waives a privilege conferred by these rules or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(c) Inadvertent Disclosure. A disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including following any applicable court procedures to notify the opposing party or to retrieve or request destruction of the information disclosed.

(d) Disclosure Made in a Non-Delaware Proceeding. Notwithstanding anything in these rules to the contrary, a disclosure made in a non-Delaware proceeding does not operate as a waiver if the disclosure is not a waiver under the law of the jurisdiction where the disclosure occurred.

(e) Disclosure to a Law Enforcement Agency. Notwithstanding anything in these rules to the contrary, a disclosure made to a law enforcement agency pursuant to a confidentiality agreement does not operate as a waiver of an existing privilege.

(f) Controlling Effect of a Court Order. Notwithstanding anything in these rules to the contrary, a court may 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 proceeding.

(g) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(h) Definition. In this rule:

(1) "work-product protection" means the protection that applicable law provides for documents and tangible things (or their intangible equivalents) prepared in anticipation of litigation or for trial.

Credits

[Adopted effective July 1, 2014.]

Editors' Notes

COMMENT

The revisions to D.R.E. 510 are based on F.R.E. 502, which rule has been the subject of almost 200 law review articles. At least 30 articles are comprehensive discussions of the rule and post-enactment judicial use of the rule. This proliferation of learned journal commentary on inadvertent disclosure of privileged communications parallels the exponential increase in e-discovery requests and responses in major cases. F.R.E. 502 takes a "middle ground" position on inadvertent disclosure, requiring an inquiry into the means taken by counsel to identify and protect privileged communications, unless the parties agree on a different protocol for dealing with inadvertent disclosure. The revised D.R.E. 510 contains similar protection against the admission or use of inadvertently disclosed privileged or protected communications to ensure the integrity of the litigation process in Delaware.

D.R.E. 510 conforms to the federal rule in terms of handling inadvertent disclosure. A leading case interpreting F.R.E. 502 is *Rhoads Industries, Inc. v. Building Materials Corp.*, 254 F.R.D. 216 (E.D. Pa. 2008). At least one Delaware decision deals with claims of waiver of attorney-client privilege through inadvertent disclosure and contains the following discussion:

An inadvertent disclosure of privileged communications will not necessarily operate to waive the attorney-client privilege. In order to determine whether the inadvertently disclosed documents have lost their privileged status, the Court must consider the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and extent of disclosure; and (4) the overall fairness, judged against the care or negligence with which the privilege is guarded.

In re Kent County Adequate Public Facilities Ordinances Litigation, 2008 Del. Ch. LEXIS 48, at *24 (Apr. 19, 2008) (Noble, V.C.) (citations omitted). The factors set forth in these decisions are not explicitly codified in D.R.E. 510, as they constitute non-determinative guidelines that may vary from case to case.

As in F.R.E. 502, new D.R.E. 510 also clarifies that when a voluntary disclosure constitutes a waiver of attorney-client privilege as to a communication or information, the scope of the waiver is generally limited to the privileged communication or information disclosed. The rule does not disturb existing Delaware law regarding the scope of waiver of work-product protection by voluntary disclosure. *See Rollins Properties, Inc. v. CRS Sirrine, Inc.*, 1989 WL 158471 (Del. Super. Dec. 13, 1989).

The rule governs only certain waivers by disclosure and is not intended to alter existing law with respect to waiver of privilege or work product protection by other means. *See, e.g.*, *Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051 (Del. Ch. Sept. 17, 2004) (discussing "at issue" exception to attorney-client privilege as form of waiver "where the issue was lack of good faith" (citation omitted)).

Subsection 510(e) codifies the ruling by Chancellor Chandler in *Saito v. McKesson HBOC, Inc.*, Civ. A. 18553, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002). *Saito* involved the question of whether the defendant waived its work-product protection as to the documents at issue by sharing them with the SEC in an investigation.

Subsection 510(f) contains the introductory clause, "[n]otwithstanding anything in these rules to the contrary," in part so that a court may allow the parties in a matter to agree to quick-peek arrangements without pre-production privilege review. Otherwise, the parties to such an arrangement may be deemed to have waived a privilege pursuant to subsection 510(a).

D.R.E., Rule 510, DE R REV Rule 510

Delaware Uniform Rules of Evidence, Rules of the Supreme Court, Delaware Supreme Court Internal Operating Procedures, Chancery Court Rules, Superior Court Rules of Civil Procedure, Superior Court Rules of Criminal Procedure, and The Delaware Lawyers' Rules of Professional Conduct are current with amendments received through August 15, 2017. All other state and local court rules are current with amendments received through August 15, 2017.

End of Document

ILLINOIS

West's Smith-Hurd Illinois Compiled Statutes Annotated
Court Rules
Illinois Rules of Evidence (Refs & Annos)
Article V. Privileges

Evid. Rule 502
Formerly cited as IL ST Evid. Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Supreme Court Rule 201(p).

(c) Disclosure Made in a Federal or Another State's Proceeding or to a Federal or Another State's Office or Agency. When the disclosure is made in a federal or another state's proceeding or to a federal or another state's office or agency and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Illinois proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in an Illinois proceeding; or

(2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. An Illinois court may 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 proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted Nov. 28, 2012, eff. Jan. 1, 2013.

I.L.C.S. Evid. Rule 502, IL R EVID Rule 502
Current with amendments received through 6/1/2017

INDIANA

West's Annotated Indiana Code
Title 34 Court Rules (Civil)
State Court Rules (Civil)
Indiana Rules of Evidence (Refs & Annos)
Article V. Privileges

Rules of Evid., Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Intentional disclosure; scope of a waiver. When a disclosure is made in a court proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a court proceeding, a disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Indiana Rule of Trial Procedure 26(B)(5)(b).

(c) Controlling effect of a party agreement. An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(d) Controlling effect of a court order. If a court incorporates into a court order an agreement between or among parties on the effect of disclosure in a proceeding, a disclosure that, pursuant to the order, does not constitute a waiver in connection with the proceeding in which the order is entered is also not a waiver in any other court proceeding.

Credits

Adopted Sept. 20, 2011, effective Jan. 1, 2012. Amended Sept. 13, 2013, effective Jan. 1, 2014.

Rules of Evid., Rule 502, IN ST REV Rule 502
Current with amendments received through June 15, 2017.

End of Document

IOWA

I.C.A. Rule 5.502

Rule 5.502. Attorney-client privilege and work product; limitations on waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

a. *Disclosure made in a court or agency proceeding; scope of a waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) The waiver is intentional;

(2) The disclosed and undisclosed communications or information concern the same subject matter; and

(3) They ought in fairness to be considered together.

b. *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver if:

(1) The disclosure is inadvertent;

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

(3) The holder promptly took reasonable steps to rectify the error, including (if applicable) following Iowa Rule of Civil Procedure 1.503(5)(b).

c. *Disclosure made in a federal or state proceeding.* When a disclosure is made in a federal or state proceeding and is not the subject of a federal or state court order concerning waiver, the disclosure does not operate as a waiver in an Iowa proceeding if the disclosure:

(1) Would not be a waiver under this rule if it had been made in an Iowa proceeding; or

(2) Is not a waiver under the law of the jurisdiction where the disclosure occurred.

d. *Controlling effect of a court order.* A court may 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 proceeding.

e. *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

f. *Controlling effect of this rule.* Notwithstanding rules 5.101 and 5.1101, this rule applies to all proceedings in the circumstances set out in the rule.

g. *Definitions.* In this rule:

(1) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications.

(2) "Work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
Adopted Sept. 28, 2016, eff. Jan. 1, 2017.

I. C. A. Rule 5.502, IA R 5.502
State court rules are current with amendments received through July 15, 2017.

End of Document

KANSAS

West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
E. Privileges

K.S.A. 60-426a

60-426a. Attorney-client privilege and work product; limitations on waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) *Disclosure made in a court or agency proceeding; scope of waiver.* When the disclosure is made in a court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) The waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness be considered together.

(b) *Inadvertent disclosure.* When made in a court or agency proceeding, the disclosure does not operate as a waiver in any proceeding if:

(1) The disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including, if applicable, following subsection (b)(7)(B) of K.S.A. 60-226, and amendments thereto.

(c) *Disclosure made in a non-Kansas proceeding.* When the disclosure is made in a non-Kansas proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Kansas proceeding if the disclosure:

(1) Would not be a waiver under this section if it had been made in a Kansas proceeding; or

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(d) *Controlling effect of a court order.* A court may 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 proceeding.

(e) *Controlling effect of a party agreement.* An agreement on the effect of disclosure in a proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) *Definitions.* As used in this section:

(1) "Attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications.

(2) "Work-product protection" means the protection that applicable law provides for tangible material, or its intangible equivalent, prepared in anticipation of litigation or for trial.

Credits

Laws 2011, ch. 96, § 1, eff. July 1, 2011.

K. S. A. 60-426a, KS ST 60-426a

Statutes are current through laws effective on or before July 1, 2017, enacted during the 2017 Regular Session of the Kansas Legislature.

End of Document

OKLAHOMA

Oklahoma Statutes Annotated
Title 12. Civil Procedure (Refs & Annos)
Chapter 40. Evidence Code (Refs & Annos)
Article V. Privileges

12 Okl.St.Ann. § 2502

§ 2502. Attorney-Client Privilege

Currentness

A. As used in this section:

1. An "attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

2. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney;

3. A "representative of an attorney" is one employed by the attorney to assist the attorney in the rendition of professional legal services;

4. A "representative of the client" is:

a. one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or

b. any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client; and

5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;

2. Between the attorney and a representative of the attorney;

3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;

4. Between representatives of the client or between the client and a representative of the client; or

5. Among attorneys and their representatives representing the same client.

C. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. There is no privilege under this section:

1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

3. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;

4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

E. A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if:

1. The disclosure was inadvertent;

2. The holder of the privilege took reasonable steps to prevent disclosure; and

3. The holder of the privilege took reasonable steps to rectify the error including, but not limited to, information falling within the scope of paragraph 4 of subsection B of Section 3226 of this title, if applicable.

F. Disclosure of a communication or information meeting the requirements of an attorney-client privilege as set forth in this section or the work-product doctrine to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of nongovernmental persons or entities. Disclosure of such information does not waive the privilege or protection of undisclosed communications on the same subject unless:

1. The waiver is intentional;

2. The disclosed and undisclosed communications or information concern the same subject matter; and

3. Due to principles of fairness, the disclosed and undisclosed communications or information should be considered together.

Credits

Laws 1978, c. 285, § 502, eff. Oct. 1, 1978; Laws 2002, c. 468, § 32, eff. Nov. 1, 2002; Laws 2009, c. 251, § 2, eff. Nov. 1, 2009; Laws 2013, c. 316, § 1, eff. Nov. 1, 2013.

Editors' Notes

EVIDENCE SUBCOMMITTEE'S NOTE

Prior Oklahoma statutory law dealing with the attorney client privilege was sparse indeed. Sections 335(4) and (6) of Title 12 of the Oklahoma Statutes were applicable to this privilege. Section 385 provided:

"The following persons shall be incompetent to testify: ... (4) An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent. .... (6) .... Provided, that if a person offer himself as a witness, that is to be deemed a consent. ...."

Section 502 represents a much more comprehensive approach to the privilege and should furnish much better guidelines for lawyer and judge alike in dealing with this privilege.

Section 502(A) containing the definitions is, with a rearrangement of subdivisions (1) through (5) by the Legislature, in substance, the same as Uniform Rule 502(a).

Section 502(A)(1) defines "attorney". Oklahoma has not dealt with so much of the substance of § 502(A)(1) involving communications made with a good faith mistaken belief that the person was an attorney. The "reasonable belief" of the client test is a reasonable approach to take on this question.

Section 502(A)(2) defining "client" is consistent with the law in the Tenth Circuit in that it covers corporate clients (See Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968)) and does not make actual employment necessary as long as the consultation was with a view to retaining the attorney's professional services. See Hurt v. State, 303 P.2d 476 (Okla.Cr.1956).

Under § 502(A)(3) defining "representative of the attorney", Gaines v. Gaines, 207 Okla. 619, 251 P.2d 1044 (1952), indirectly supports the proposition that an attorney's secretary would be a "representative" within the meaning of this rule. Legal interns, office administrators, and the like would also appear to be covered if analogies to the physician-patient privilege are to be followed. See the Note to § 503, infra. The definition in this subdivision of § 502 would be broad enough to encompass secretaries, interns and office administrators since attorneys need the services of people in different capacities to meet the needs of their clients in the best manner possible and the privilege should apply.

No prior Oklahoma authority has been found defining a "representative of a client" as in § 502(A)(4) and it would have a supplementing effect.

Section 502(A)(5) deals with the meaning of confidential communications. To be protected, the communication should be made under circumstances manifesting an intent of nondisclosure. Parnacher v. Mount, 207 Okla. 275, 248 P.2d 1021 (1952). The presence of a third person will not destroy the confidential character of a communication if there was an intention that the communication remain confidential and the presence of a third person was reasonably necessary to the transmission of the communication. Oklahoma law is consistent with the rule. See Ratzlaff v. State, 122 Okla. 263, 249 P. 934 (1926); Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942); and Blankenship v. Rowntree, 219 F.2d 597 (10th Cir. 1955).

Section 502(B), with the exception of substituting the word "attorney" for "lawyer" is identical to the Uniform Rule and would be an excellent addition to the law in Oklahoma since there are few, if any expository principles enunciated in the law dealing with the scope of privilege.

Section 502(C) deals with whom may claim the privilege and, except for terminology change is also identical to the Uniform Rule. It has been held the privilege exists for the benefit of the client as a general rule. Hurt v. State, 303 P.2d 476 (Okla.Cr.1956). The case law in Oklahoma is consistent with the thrust of the statute. It has been held that the privilege may be claimed by an incompetent and his general guardian, Jayne v. Bateman, 191 Okla. 272, 129 P.2d 188 (1942), by an executor of the estate, Marcus v. Harris, 496 P.2d 1177 (Okla. 1972), and by an administrator of the estate. In re Wilkins' Estate, 199 Okla. 249, 185 P.2d 213 (1947).

Sections 502(D)(1) through (6) set forth the exceptions. As to § 502(D)(1) dealing with the furtherance of crime or fraud, in Oklahoma professional communications between the attorney and client are not privileged when made for the purpose of assisting in the commission of a crime. Cole v. State, 50 Okla.Cr. 399, 298 P. 892 (1931). This is the view of the Code of Professional Responsibility stating that "A lawyer may reveal: .... (3) The intention of his client to commit a crime and the information necessary to prevent the crime." Furthermore, Canon 37 of the Canons of Professional Ethics exemplify these principles. The statute is consistent with Oklahoma law though it does go further in providing for what the client knew or reasonably should have known and protects the client who is erroneously advised that the action is within the law.

As to the exception of § 502(D)(2) dealing with claimants through the same deceased client, it is consistent with prior Oklahoma law (Gaines v. Gaines, 207 Okla. 619, 251 P.2d 1044 (1952)) though § 502(D)(2) is even clearer by stating that the manner in which the claim arose is not a factor.

With reference to the breach of duty exception of § 502(C)(3), the Code of Professional Responsibility provides that "A lawyer may reveal: .... (4) Confidences or secrets necessary to .... defend himself .... against an accusation against wrongful conduct." Canon 37 of the Canons of Professional Ethics is consistent with this view and with the statute.

Oklahoma has also adhered to the attested document rule of § 502(D)(4). See In re Wilkins' Estate, 199 Okla. 249, 185 P.2d 213 (1947).

Section 502(D)(5) deals with the "joint client" exception. The "joint client" exception has also been recognized on Oklahoma. Bush v. Bush, 142 Okla. 152, 286 P. 322 (1930).

Section 502(D)(6) has not heretofore been dealt with in Oklahoma. The rule is sound in principle and a good rule for the Oklahoma Evidence Code.

Notes of Decisions (95)

12 Okl. St. Ann. § 2502, OK ST T. 12 § 2502
Current with legislation of the First Regular Session of the 56th Legislature (2017) effective through September 1, 2017

End of Document

TENNESSEE

West's Tennessee Code Annotated
State and Local Rules Selected from West's Tennessee Rules of Court
Tennessee Rules of Evidence
Article V. Privileges

Rules of Evid., Rule 502

Rule 502. Limitations on Waiver of Privileged Information or Work Product

Currentness

Inadvertent disclosure of privileged information or work product does not operate as a waiver if

(1) the disclosure is inadvertent,

(2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure, and

(3) the holder promptly took reasonable steps to rectify the error.

Credits
[Adopted December 14, 2009, effective July 1, 2010.]

Editors' Notes

2010 ADVISORY COMMISSION COMMENT
This language is taken from Federal Rule of Evidence 502(b). Compare Tennessee Rule of Civil Procedure 26.02(5) on discovery of electronically stored information.

Rules of Evid., Rule 502, TN R REV Rule 502
State court rules are current with amendments received through June 15, 2017.

End of Document

VERMONT

West's Vermont Statutes Annotated
West's Vermont Court Rules
Rules of Evidence (Refs & Annos)
Article V. Privileges

Vermont Rules of Evidence, Rule 510

RULE 510. WAIVER OF PRIVILEGE AND WORK-PRODUCT BY DISCLOSURE

Currentness

(a) General rule. A person upon whom these rules confer a privilege against disclosure waives the privilege if that person or that person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Limitations on waiver. Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out below, to disclosure of a communication or other information covered by the lawyer-client privilege or work-product protection.

(1) *Disclosure made in a Vermont proceeding or to a Vermont office or agency; scope of waiver*. When a disclosure is made in a Vermont proceeding or to a Vermont office or agency and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness be considered together.

(2) *Inadvertent disclosure*. When made in a Vermont proceeding or to a Vermont office or agency, the disclosure does not operate as a waiver in any proceeding if:

(A) the disclosure is inadvertent;

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder took reasonable steps to rectify the error, including (if applicable) following V.R.C.P. 26(b)(5)(B).

(3) *Disclosure made in non-Vermont proceeding*. When the disclosure is made in a non-Vermont proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Vermont proceeding if the disclosure:

(A) would not be a waiver under this rule if it had been made in a Vermont proceeding; or

(B) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(4) *Controlling effect of a court order*. A Vermont court may 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 proceeding.

(5) *Controlling effect of a party agreement*. An agreement on the effect of a disclosure in a Vermont proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(6) *Definitions*. In this rule:

(A) "lawyer-client privilege" means the protection that these rules provide for confidential lawyer-client communications; and

(B) "work-product protection" means the protection that the applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(c) Other provisions governing waiver and work-product. The provisions of this rule governing waiver of privilege and work-product are subject to the Uniform Mediation Act, chapter 194 of Title 12 of the Vermont Statutes Annotated. V.R.C.P. 16.3(g), and V.R.C.P. 26(b)(4).

Credits

[Amended November 22, 2011, effective January 23, 2012.]

Editors' Notes

REPORTER'S NOTES--2012 AMENDMENT

The amendment is based upon F.R.E. 502 adopted by Congress in 2008. The rule was adopted because of the enormous costs involved in reviewing documents, especially electronic ones, for privileged and work-product protected materials and to resolve disputes regarding subject matter waiver and inadvertent disclosures. Explanatory Note on Rule 502. Vermont has adopted an amendment to the discovery rules which provides for a claw back of inadvertently disclosed information, V.R.C.P. 26(b)(5)(B), but the rule does not control whether the disclosure constitutes a waiver of protection for the information in that or other proceedings. The rule fills the gap and accomplishes the first of the purposes of the federal rule. The rule avoids disputes which will arise in Vermont courts as the scope of electronic evidence continues to expand. Adoption of the amendment will also harmonize state and federal practice.

The amendment is placed in V.R.E. 510 because that section of the rules governs waiver of privilege. Consequently, the numbering of the Vermont amendment does not follow that of the federal rule. The Vermont rule utilizes the term "attorney-client privilege" rather than the "lawyer-client privilege" terminology from the federal rule for consistency

with V.R.E. 502. The title of V.R.E. 510 has been changed to reflect that the waiver rule now encompasses nonvoluntary disclosures and work-product. The amendment governs only certain types of waiver by disclosure. Sections (a) and (b)(6) require that parties must consider whether the disclosure involves privilege or work-product, and also whether a form of disclosure not protected by (b), and falling within the general waiver provisions of (a), might apply under the circumstances.

Section (a) is amended to make the language gender neutral and internally consistent.

Section (b)(1) addresses the scope of waiver. The section generally provides for waiver only of the information actually disclosed, and provides for limited rather than subject matter waiver. It provides that "subject matter waiver (of either privilege or work-product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation to the disadvantage of the adversary." Explanatory Note on Rule 502.

Section (b)(2) addresses inadvertent waiver. The section adopts the most prevalent approach to the issue of whether such disclosure results in a waiver of the disclosed information. This approach appears consistent with that taken by the Court in *Hartnett v. Medical Center Hospital of Vermont*, 146 Vt. 297, 503 A.2d 1134 (1985). The Court examined the circumstances surrounding disclosure of a document containing work-product and affirmed a trial court determination that the disclosure did not constitute a waiver. The party who made the disclosure will be protected if the court finds the party met the conditions set forth in (b)(2)(B) & (C). The drafters of the federal rule did not attempt to "explicitly codify that test because it is really a set of non-determinative guidelines that vary from case to case." Explanatory Note on Rule 502. The Note refers readers to considerations identified in the pre-rule cases and suggests two avenues a party may use to advance a claim of reasonable steps: use of advanced analytical software applications and linguistic tools, and adoption of an efficient system of records management before the litigation.

The Explanatory Note explains why the rule extends to offices and agencies: "[T]he consequences of waiver, and the concomitant cost of pre-production review, can be as great with respect to disclosures to offices and agencies as they are in litigation."

Section (b)(3) provides protection comparable to (b)(2) for parties in Vermont proceedings who make the inadvertent disclosures in another jurisdiction. F.R.E. 502(c) provides that the federal courts will accord that protection to litigants in the federal courts. Rather than leave the question of how Vermont would treat out-of-jurisdiction disclosures to full faith and credit and comity, the Vermont Advisory Committee chose to adopt the clearer federal model to best effectuate the purpose of the rule.

Section (b)(4) provides an important means to control the costs of pre-production review and provide predictability with regard to whether disclosure will result in waiver. The "non-determinative guidelines" of (b)(2) do not ensure that a court will protect an inadvertently disclosing party from a finding of waiver. In spite of the apparent policy of the rule favoring protection against inadvertent disclosure, courts which have decided early cases under F.R.E. 502 have often come to different conclusions about waiver under similar circumstances. See, e.g., *P. Oot, The Protective Order Toolkit: Protecting Privilege With Federal Rule Of Evidence 502*, 10 Sedona Conf. J. 137 (2009). Section (b)(4) provides predictable protection with a court order even if the party has not taken the care necessary for protection under (b)(2). It provides for protection against nonparties. "[T]he rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work-product." Explanatory Note on Rule 502. To promote predictability and control costs, the section attempts to provide protection embodied in a Vermont court order in other jurisdictions.

A section (b)(5) party agreement provides much more limited protection than a court order, binding only the parties to the agreement.

Section (b)(6) sets forth limits of the amendment. The rule applies only to attorney-client privilege and work-product protection, not other privileges and privilege-like protections. The rule incorporates existing meanings of these two doctrines.

Discovery of intangible work-product in Vermont has traditionally been governed by the common-law principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). The 2011 amendment to V.R.C.P. 26(b)(4) protects as work-product various communications with expert witnesses in both tangible and intangible form. See Reporter's Notes to that amendment. Likewise, this amendment of Rule 510 makes no distinction between the forms of inadvertent disclosure.

Section (c) advises the bar that the general waiver provisions of Rule 510 are subject to the more specific statute and the civil rules cited. The reference to V.R.C.P. 26(b)(4) is to make it clear that matters deemed work-product under that rule are not waived by counsel's disclosure of most information to his expert and preparation of draft disclosures or reports required under Rule 26(b). The Uniform Mediation Act contains restrictive waiver provisions to further the policy of protecting "mediation disclosures."

REPORTER'S NOTES

This rule is identical to Uniform Rule 510 and varies from proposed Federal Rule 511 only in detail.

The rule includes waiver by testimony of the holder of the privilege and by allowing testimony of another to the privileged matter without objection. Once disclosure has been made, no claim of privilege will restore it. See Federal Advisory Committee's Note to proposed Federal Rule 511.

No Vermont case directly in point has been found, but the rule is consistent with cases holding that there is no privilege for statements made in the presence of others. See State v. Fitzgerald, 68 Vt. 125, 126, 34 A. 429, 429 (1896); State v. Hodgdon, 89 Vt. 148, 149, 94 A. 301, 301 (1915). Also, failure to testify as to a privilege at a preliminary hearing has been held a waiver. State v. Louanis, 79 Vt. 463, 467, 65 A. 532, 533 (1907). If the waiver in that case is assumed to have been voluntary, it was a form of voluntary consent to disclosure of the allegedly privileged matter. See discussion of these cases in Reporter's Notes to Rule 502. It should further be noted that 12 V.S.A. § 1612, providing for a patient's privilege, expressly allowed for waiver by the patient, presumably including voluntary disclosure. See discussion in Reporter's Notes to Rule 503.

Rules of Evid., Rule 510, VT R REV Rule 510
State court rules are current with amendments received through August 15, 2017.

WASHINGTON

West's Revised Code of Washington Annotated
Part I Rules of General Application
Washington Rules of Evidence (ER)
Title V. Privileges

Washington Rules of Evidence, ER 502

RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Washington Proceeding or to a Washington Office or Agency; Scope of a Waiver. When the disclosure is made in a Washington proceeding or to a Washington office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a Washington proceeding or to a Washington office or agency, the disclosure does not operate as a waiver in any proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following CR 26(b)(6). [1]

(c) Disclosure Made in a Non-Washington Proceeding. When the disclosure is made in a non-Washington proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Washington proceeding if the disclosure:

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

(2) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(d) Controlling Effect of a Court Order. A Washington court may 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 proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a Washington proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications: and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits

[Adopted effective September 1, 2010.]

Footnotes

1 The Court has published for comment a suggested amendment to add a new CR 26(b)(6). The text of this suggested amendment assumes adoption of the new CR 26(b)(6). If the Court does not adopt that new subsection, the phrase ", including (if applicable) following CR 26(b)(6)" should be removed from this suggested new rule.

ER 502, WA R REV ER 502

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 8/15/17. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 8/15/17.

End of Document

WEST VIRGINIA

West's Annotated Code of West Virginia
State Court Rules
West Virginia Rules of Evidence
Article V. Privileges

West Virginia Rules of Evidence (WVRE), Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) Disclosure Made in a Court or Agency Proceeding; Scope of a Waiver. When the disclosure is made in a West Virginia court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a West Virginia court or agency proceeding, the disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error.

(c) Disclosure Made in a Proceeding in a Federal or Another State's Court or Agency. When the disclosure is made in a federal or another state's court or agency proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a West Virginia proceeding if the disclosure would not be a waiver under this rule if it had been made in a West Virginia court or agency proceeding.

(d) Controlling Effect of a Court Order. A West Virginia court may 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 court or agency proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a West Virginia proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Credits
[Effective September 2, 2014.]

Editors' Notes

COMMENT ON RULE 502

This a new rule patterned after Rule 502 of the Federal Rules of Evidence. Subsection (c)(2) of the federal rule has been eliminated, because it is not needed under West Virginia law. Under West Virginia law, attorney-client privilege determinations are governed by the law of the forum. *See Kessel v. Leavitt*, 204 W.Va. 95, 184-85, 511 S.E.2d 720, 809-10 (W. Va. 1998) (citing Syl. Pts. 2 & 3, *Forney v. Morrison*, 144 W. Va. 722, 110 S.E.2d 840 (1959)). The substance of subsection (c)(1) of the federal rule has been retained to protect a party in a West Virginia proceeding who made an inadvertent disclosure in another jurisdiction.

Rules of Evid. Rule 502, WV R REV Rule 502
Current with amendments received through June 1, 2017.

WISCONSIN

West's Wisconsin Statutes Annotated
Evidence (Ch. 901 to 937)
Chapter 905. Evidence--Privileges (Refs & Annos)

W.S.A. 905.03

905.03. Lawyer-client privilege

Effective: March 29, 2014
Currentness

(1) Definitions. As used in this section:

(a) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(c) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

(d) A communication is "confidential" if not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(2) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

(3) Who may claim the privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The lawyer's authority to do so is presumed in the absence of evidence to the contrary.

(4) Exceptions. There is no privilege under this rule:

(a) *Furtherance of crime or fraud.* If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(b) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) *Joint clients.* As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Forfeiture of Privilege. (a) *Effect of inadvertent disclosure.* A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if all of the following apply:

1. The disclosure is inadvertent.

2. The holder of the privilege or protection took reasonable steps to prevent disclosure.

3. The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).

(b) Scope of forfeiture. A disclosure that constitutes a forfeiture under par. (a) extends to an undisclosed communication only if all of the following apply:

1. The disclosure is not inadvertent.

2. The disclosed and undisclosed communications concern the same subject matter.

3. The disclosed and undisclosed communications ought in fairness to be considered together.

Credits

<<For credits, see Historical Note field.>>

Editors' Notes

JUDICIAL COUNCIL NOTE--2012

Attorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession's highest duties. Arguably, strict rules about the consequences of disclosing confidences, even inadvertently, may serve to promote greater care in dealing with privileged information. However, precaution comes at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than in earlier eras, thorough preproduction privilege review often can be prohibitively expensive. Most clients seek a balanced approach.

The various approaches available are discussed in the Advisory Committee Note and in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, ¶¶28-32, nn.15-17, 271 Wis. 2d 610. Sub. (5) represents an "intermediate" or "middle ground" approach, which is also an approach taken in a majority of jurisdictions. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling any holding in Sampson. Sampson holds that a lawyer's deliberate disclosure, without the consent or knowledge of the client, does not waive the lawyer-client privilege. Neither subpart of sub. (5) alters this rule. Sub. (5)(a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures might come into play under sub. (5)(b), which provides that, when a disclosure is not inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undisclosed communications and information as well. However, such an extension ensues only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the Sampson rule.

In judging whether the holder of the privilege or protection took reasonable steps to prevent disclosure or to rectify the error, it is appropriate to consider the non-dispositive factors discussed in the Advisory Committee Note: (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of disclosure, (5) the number of documents to be reviewed, (6) the time constraints for production, (7) whether reliable software tools were used to screen documents before production, (8) whether an efficient records management system was in place before litigation; and (9) any overriding issue of fairness.

Measuring the time taken to rectify an inadvertent disclosure should commence when the producing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

In judging the fourth factor, which requires a court to determine the quantity of inadvertently produced documents, it is appropriate to consider, among other things, the number of documents produced and the percentage of privileged documents produced compared to the total production.

In assessing whether the software tools used to screen documents before production were reliable, it is appropriate, given current technology, to consider whether the producing party designed a search that would distinguish privileged documents from others to be produced and conducted assurance testing before production through methods commonly available and accepted at the time of the review and production.

Sub. (5) employs a distinction drawn lately between the terms "waiver" and "forfeiture." See *State v. Ndina*, 2009 WI 21, ¶¶28-31, 315 Wis. 2d 653.

Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice-of-law analysis. See *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶¶24-25, 270 Wis. 2d 356.

The language of sub. (5) also differs from the language of Rule 502 in a way that should not be considered material. Sub. (5) applies to a privileged "communication." Rule 502 applies to a privileged "communication or information." The reason for the difference is that sub. (5) is grafted onto sub. (2), which states the general rule regarding the lawyer-client privilege in terms of "communications" between lawyers and clients, not "communications and information." Sub. (5) follows suit. This different language is not intended to alter the scope of the lawyer-client privilege or to provide any less protection against inadvertent disclosure of privileged information than is provided by Rule 502.

Sub. (5) is modeled on subsections (a) and (b) of Fed. R. Evid. 502. The following excerpts from the Committee Note of the federal Advisory Committee on Evidence Rules (Revised 11/28/2007) and the Statement of Congressional Intent regarding Rule 502 are instructive, though not binding, in understanding the scope and purposes of those portions of Rule 502 that are borrowed here:

This new [federal] rule has two major purposes:

> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.
>
> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").
>
> The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.
>
> ...

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. See, e.g., *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rule provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D. N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of preproduction privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)--Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)--Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases-for example, as to whether steps taken to rectify an

erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

JUDICIAL COUNCIL COMMITTEE'S NOTE--1974

Sub. (1)(a). Wisconsin is in acord. Definition of "client" in Wis.Stat. s. 885.22 (1969) includes persons, State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969), Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); corporations, State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967), Tomek v. Farmers Mutual Automobile Ins. Co., 268 Wis. 566, 68 N.W.2d 573 (1955); and public officers, State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 112 N.W.2d 686, 113 N.W.2d 537 (1961). Wis.Stat. s. 885.22 (1969) is repealed.

(b). Wisconsin is in accord with definitions of a lawyer authorized to practice law in a state, Wis.Stat. s. 256.28 (1969) [SCR 40.02]. However, the adoption of this subsection extends the privilege of the client to communications had with persons who the client "reasonably believed" was authorized to practice law. The burden is placed on the client to show that he had information or facts which would lead a reasonable person to believe that the person he disclosed a confidential communication to was an authorized lawyer. This is contrary to Brayton v. Chase, 3 Wis. 456 (1854), where it was held that the communication must be made to a licensed lawyer.

(c). Wisconsin is in accord. State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967).

(d). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Koeber v. Somers, 108 Wis. 497, 84 N.W. 991, 52 L.R.A. 512 (1901); Herman v. Schlesinger, 114 Wis. 382, 90 N.W. 460, 91 Am.St.Rep. 922 (1902); State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Estate of Hoehl, 181 Wis. 190, 193 N.W. 514 (1923).

Sub. (2). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Kearney & Trecker v. Giddings and Lewis, Inc., 296 F.Supp. 979 (E.D.Wis.1969); State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1962); Continental Casualty Co. v. Pogorzelski, 275 Wis. 350, 82 N.W.2d 183 (1957); Dickson v. Bills, 144 Wis. 171, 128 N.W. 868 (1910); Dudley v. Beck, 3 Wis. 274 (1854); Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272 (1913); Wojciechowski v. Baron, 274 Wis. 364, 80 N.W.2d 434 (1957).

The protection against eavesdropping has been extended in this section.

Sub. (3). Wisconsin is in accord. Wis.Stat. s. 885.22 (1969). Petition of Sawyer, 129 F.Supp. 687 (E.D.Wis.1955); State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Foryan v. Firemen's Fund Ins. Co., 27 Wis.2d 133, 133 N.W.2d 724 (1965); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 150 N.W.2d 387, 35 A.L.R.3d 377 (1967); Tomek v. Farmers Mutual Automobile Ins. Co., 268 Wis. 566, 68 N.W.2d 573 (1955); State ex rel. Reynolds v. Circuit Court for Waukesha County, 15 Wis.2d 311, 113 N.W.2d 537 (1961).

Sub. (4). Exceptions.

(a). Wisconsin is in accord. In Re Sawyer's Petition, 229 F.2d 805 (1956), certiorari denied Sawyer v. Barczak, 76 S.Ct. 1025, 351 U.S. 966, 100 L.Ed. 1486, rehearing denied 77 S.Ct. 24, 352 U.S. 860, 1 L.Ed.2d 70; Dudley v. Beck, 3 Wis. 274 (1854).

(b). Wisconsin is in accord. Estate of Smith, 263 Wis. 441, 57 N.W.2d 727 (1953); Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929).

(c). Wisconsin is in accord. Wis.Stat. § 885.22 (1969); State v. Markey, 259 Wis. 527, 49 N.W.2d 437 (1951); Murphey v. Gates, 81 Wis. 370, 51 N.W. 573 (1892).

(d). Wisconsin is in accord. Boyle v. Robinson, 219 Wis. 567, 109 N.W. 623 (1906); McMaster v. Scriven, 85 Wis. 162, 55 N.W. 149, 39 Am.St.Rep. 829 (1893).

(e). Wisconsin is in accord. Allen v. Ross, 199 Wis. 162, 225 N.W. 831, 65 A.L.R. 180 (1929); Johnson v. Andreassen, 227 Wis. 415, 278 N.W. 877 (1938); Hoffman v. Labutzke, 233 Wis. 365, 289 N.W. 652 (1940); Boyle v. Kempkin, 243 Wis. 86, 9 N.W.2d 589 (1943).

Notes of Decisions (209)

W. S. A. 905.03, WI ST 905.03
Current through 2017 Act 57, published August 10, 2017.

End of Document

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____,	Plaintiff,	Index No. _____
- against –		**STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION**
_____,	Defendant.	

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, (individually "Party" and collectively "Parties") for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the Parties and, as appropriate, non-parties, agree merit confidential treatment (hereinafter the "Documents" or "Testimony").

2. Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on each page of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means.

3. As used herein:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, non-party designating the material as confidential, be detrimental to the conduct of that Party's or non-party's business or the business of any of that Party's or non-party's customers or clients.

(b) "Producing Party" shall mean the parties to this action and any non-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the Party or non-party asserting the confidentiality privilege, as the case may be.

(c) "Receiving Party" shall mean the Parties to this action and/or any non-party receiving "Confidential Information" in connection with depositions, document production, subpoenas or otherwise.

4. The Receiving Party may, at any time, notify the Producing Party that the Receiving Party does not concur in the designation of a document or other material as Confidential Information. If the Producing Party does not agree to declassify such document or material within seven (7) days of the written request, the Receiving Party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such

documents or materials shall continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise. Notwithstanding anything herein to the contrary, the Producing Party bears the burden of establishing the propriety of its designation of documents or information as Confidential Information.

5. Except with the prior written consent of the Producing Party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

(a) personnel of the Parties actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

(b) counsel for the Parties to this action and their associated attorneys, paralegals and other professional and non-professional personnel (including support staff and outside copying services) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

(c) expert witnesses or consultants retained by the Parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

(d) the Court and court personnel;

(e) an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer;

(f) trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

(g) any other person agreed to by the Producing Party.

6. Confidential Information shall be utilized by the Receiving Party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving Party making such disclosure shall provide to the expert witness or consultant a copy of this Stipulation and obtain the expert's or consultant's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Receiving Party obtaining the certificate shall supply a copy to counsel for the other Parties at the time designated for expert disclosure, except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any Party or, as appropriate, non-party, to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such Party or, as appropriate, non-party may do so

only after taking such steps as the Court, upon motion of the Producing Party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for any Party from using during any deposition in this action any Documents or Testimony which has been designated as "Confidential Information" under the terms hereof. Any deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute a written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the Party obtaining the certificate shall supply a copy to counsel for the other Parties and, as appropriate, a non-party that is a Producing Party. In the event that, upon being presented with a copy of the Stipulation, a witness refuses to execute the agreement to be bound by this Stipulation, the Court shall, upon application, enter an order directing the witness's compliance with the Stipulation.

11. A Party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, produced by a non-party, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the Party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the Party (or, as appropriate, non-party) asserting the confidentiality. Prior to the expiration of such fifteen (15) day period (or until a designation

is made by counsel, if such a designation is made in a shorter period of time), all such Documents and Testimony shall be treated as Confidential Information.

In Counties WITH Electronic Filing

12.

(a) A Party or, as appropriate, non-party, who seeks to file with the Court (i) any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, pleading, brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the "Redacted Filing"). If the Producing Party fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(b) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is a non-party, the filing Party shall so notify that Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant Producing Party's Confidential Information unredacted.

(c) If the Producing Party makes a timely motion to seal, and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF

system. If the Producing Party's timely motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) Any Party filing a Redacted Filing in accordance with the procedure set forth in this paragraph 12 shall, contemporaneously with or prior to making the Redacted Filing, provide the other Parties and the Court with a complete and unredacted version of the filing.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any materials which have previously been designated by a party as comprising or containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

In Counties WITHOUT Electronic Filing

13. (a) A Party or, as appropriate, non-party, who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, or any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall (i) serve upon the other Parties (and, as appropriate, non-parties) a Redacted Filing and a complete and unredacted version of the filing; (ii) file a Redacted Filing with the court; and (iii) transmit the Redacted Filing and a complete unredacted version of the filing to chambers. Within three (3) days thereafter, the Producing Party may file a motion to seal such Confidential Information.

(b) If the Producing Party does not file a motion to seal within the aforementioned three (3) day period, the Party (or, as appropriate. non-party) that seeks to file the Confidential Information shall take steps to file an unredacted version of the material.

(c) In the event the motion to seal is granted, all (or, if directed by the court, portions of) deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a Party (or, as appropriate, non-party) as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as well as an indication of the nature of the contents and a statement in substantially the following form:

> "This envelope, containing documents which are filed in this case by (name of Party or as appropriate, non-party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court."

In the event the motion to seal is denied, then the Party (or, as appropriate, non-party) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

(d) In the event that the Party's (or, as appropriate, non-party's) filing includes Confidential Information produced by a Producing Party that is non-party, the Party (or, as appropriate, non-party) making the filing shall so notify the Producing Party within twenty four (24) hours after the Redacted Filing by providing the Producing Party with a copy of the Redacted Filing as well as a version of the filing with the relevant non-party's Confidential Information unredacted.

(e) All pleadings, briefs or memoranda which reproduce, paraphrase or disclose any documents which have previously been designated by a party as comprising or

containing Confidential Information shall identify such documents by the production number ascribed to them at the time of production.

14. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof and shall use reasonable measures to store and maintain the Confidential Information so as to prevent unauthorized disclosure.

15. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

16. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

17. The production or disclosure of Confidential Information shall in no way constitute a waiver of each Producing Party's right to object to the production or disclosure of other information in this action or in any other action. Nothing in this Stipulation shall operate as an admission by any Party or non-party that any particular document or information is, or is not, confidential. Failure to challenge a Confidential Information designation shall not preclude a subsequent challenge thereto.

18. This Stipulation is entered into without prejudice to the right of any Party or non-party to seek relief from, or modification of, this Stipulation or any provisions thereof by

properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

19. This Stipulation shall continue to be binding after the conclusion of this litigation except that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a Receiving Party may seek the written permission of the Producing Party or further order of the Court with respect to dissolution or modification of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of the parties, continue to be binding after the conclusion of this action.

20. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

[OPTIONAL PARAGRAPH 21]

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21. In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:

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(a) to implement and adhere to reasonable procedures to ensure that documents protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.

(b) if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error.

~~20.~~(c) upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify

the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

~~21.~~22. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof shall be returned to the Producing Party or, at the Receiving Party's option, shall be destroyed. In the event that any Receiving Party chooses to destroy physical objects and documents, such Party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the Parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable rules of professional conduct. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any Receiving Party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any Party or non-party or their affiliate(s) in connection with any other matter.

22. If a Receiving Party is called upon to produce Confidential Information in order to comply with a court order, subpoena, or other direction by a court, administrative agency, or legislative body, the Receiving Party from which the Confidential Information is sought shall (a) give written notice by overnight mail and either email or facsimile to the counsel for the Producing Party within five (5) business days of receipt of such order, subpoena, or direction, and (b) give the Producing Party five (5) business days to object to the production of

such Confidential Information, if the Producing Party so desires. Notwithstanding the foregoing, nothing in this paragraph shall be construed as requiring any party to this Stipulation to subject itself to any penalties for noncompliance with any court order, subpoena, or other direction by a court, administrative agency, or legislative body.

23. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a Party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

24. This Stipulation may be signed in counterparts, which, when fully executed, shall constitute a single original, and electronic signatures shall be deemed original signatures.

[FIRM]	[FIRM]
By: _____	By: _____
_____	_____
New York, New York	New York, New York
Tel: _____	Tel: _____
Attorneys for Plaintiff	*Attorneys for Defendant*
Dated: _____	

SO ORDERED

_____

J.S.C.

EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

---------- x

_____, :

Plaintiff, :

- against – :

_____, :

Defendant. :

---------- x

Index No. _____

AGREEMENT WITH RESPECT TO CONFIDENTIAL MATERIAL

I, _____, state that:

1. My address is_____.

2. My present occupation or job description is _____.

3. I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on _____.

4. I have carefully read and understand the provisions of the Stipulation.

5. I will comply with all of the provisions of the Stipulation.

6. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.

7. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or retained, or to counsel from whom I received the Confidential Information.

8. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated:_____ _____