Advisory Committee on Evidence Rules
Proposed Amendment: Rule 502

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if

applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements. — Notwithstanding subdivision (a), an agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protections

provided for confidential attorney-client communications under either federal or state law; and

2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine—specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the*

Advisory Committee on the Federal Rules of Civil Procedure, September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *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 information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level. 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 in both state and federal courts. If a federal court's confidentiality order is not enforceable in a state court (or vice versa) then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Subdivision (a). This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver is reserved for those unusual

situations in which fairness requires a further disclosure of related, protected information. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted). The rule thus 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 rule governs only waiver 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 (b). This subdivision collects the basic common-law exceptions to waiver by disclosure of attorney-client privilege and work product.

Protected disclosure: Disclosure does not constitute a waiver if the disclosure itself is protected by the attorney-client privilege or work product immunity. For example, if a party privately discloses a privileged communication to another party pursuing a common legal interest, that disclosure is itself protected and the privilege covering the underlying information is not waived. *See, e.g., Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987) (communications by a client to his lawyer remained privileged where the lawyer shared the communications with codefendants pursuing a common defense); *Hodges, Grant & Kaufman v. United States Gov't Dept. of Treasury*, 768 F.2d 719, 721 (5th Cir. 1985) (noting that the privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication"). Similarly, the protection of the attorney-client privilege or work product immunity is not waived if protected information is disclosed by one lawyer to another in a law firm.

Inadvertent disclosure during discovery: Courts are in conflict on whether an inadvertent disclosure of privileged information or work product, made during discovery, 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 preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes 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 privileged or protected information during discovery constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g.*, *Alldread* v. *City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *Zapata v. IBP*, Inc., 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information protected by the attorney-client privilege or work product immunity should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure during discovery threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g.*, *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g.*, *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981).

And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

Subdivision (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See*

Manual for Complex Litigation Fourth § 11.446 (Federal Judicial Center2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a case-management order."). 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 information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *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 such orders are enforceable against non-parties. As such the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (c) contemplates that the court may order production and guarantee confidentiality under criteria different from those providing exceptions to waiver under subdivision (b). 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..

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *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"). Of course such an agreement can

bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Subdivision (d) contemplates that the parties may agree to production and guarantee confidentiality under criteria different from those providing exceptions to waiver in subdivision (b). For example, the parties may provide for return of documents without waiver irrespective of the care taken by the disclosing party, and may agree to "claw-back" or "quick peek" arrangements to reduce the cost of pre-production review for privilege and work product.

Subdivision (e). This subdivision makes clear that the rule governs waiver by disclosure for the attorney-client privilege and work product immunity under both state and federal law.

The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of 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.