

## GETTING CONTROL OF WAIVER OF PRIVILEGE IN THE FEDERAL COURTS – A PROPOSAL FOR A FEDERAL RULE OF EVIDENCE 502

Kenneth S. Broun  
Daniel J. Capra<sup>1</sup>

Today's litigators – and their clients – will tell you that litigation in cases involving voluminous documents is a harrowing and enormously expensive business. The problems were serious enough when most documents were on paper. The difficulty of the situation is exacerbated in what has become the ordinary case where many if not most of the documents either exist, or are preserved, electronically.<sup>2</sup>

Among the most difficult problems is guarding against disclosure of documents that may be protected by the attorney-client privilege or subject to work product protection.<sup>3</sup> Many courts

---

<sup>1</sup>Kenneth S. Broun is Henry Brandis Professor of Law at the University of North Carolina School of Law. Daniel J. Capra is Philip D. Reed Professor of Law at the Fordham University School of Law. Professor Capra is the reporter for the Federal Rules of Evidence Advisory Committee. Professor Broun is a former member of that Committee and serves as a consultant to the Committee on privilege issues. Professors Capra and Broun drafted both the original version of proposed Rule 502 and the version ultimately released for public comment. They also participated actively in the Committee's discussion of the Rule. However, the views expressed in this article are their own and do not necessarily reflect the views of the Committee or any of its members.

<sup>2</sup>See the Manual for Complex Litigation (4th) § 11.446; Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 73; Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. J. 853 (1998).

<sup>3</sup>Documents protected by other evidentiary privileges, including the psychotherapist-patient and various governmental privileges, may also be at risk. However, especially in private corporate litigation and in controversies between corporations and government agencies, counsel's most pervasive worries concern the attorney-client privilege and work product protection. For that reason, as well as a concern that too broad of a rule would run the risk of both over and under inclusion, the rule proposed in this article deals only with attorney-client privilege and work-product protection. In addition, see also note \_\_\_\_, *infra*, with regard to the possible constitutional implications of a rule that attempted to include a broad set of evidentiary

will hold that even an inadvertent or unintentional disclosure of a document in discovery will result in the forfeiture or waiver<sup>4</sup> of the privilege or protection.<sup>5</sup> Most courts, irrespective of their treatment of inadvertent disclosure, hold that when waiver is found to exist it covers not only the document itself but any communication dealing with the same subject matter.<sup>6</sup>

Thus, counsel must carefully review all documents to assess the possible application of privilege or work product protection. In the not-so-infrequent case involving millions of documents, such a review will cost the client hundreds of thousands of dollars.<sup>7</sup> An innocent

---

privileges.

<sup>4</sup>The term “waiver” is used throughout this article and in the proposed rule to describe a loss of a privilege or protection as a result of disclosure of protected material, regardless of whether that disclosure was intended. An unintentional disclosure of privileged matter should more correctly be considered a “forfeiture” of the privilege rather than a “waiver,” which implies an intentional relinquishment of the protection. Nevertheless, the courts have consistently used the term “waiver” rather than forfeiture in connection with unintentional disclosures. See the cases cited in Parts I and II of this article, notes \_\_\_\_, *infra*. See also the Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004), which uses the term “waiver” in connection with inadvertent or unintended disclosures of privileged material.

<sup>5</sup>See Part I, cases cited in notes \_\_\_\_, *infra*.

<sup>6</sup>See part II, cases cited in notes \_\_\_\_, *infra*.

<sup>7</sup>For a case from almost 30 years ago involving 17 million pages of documents, see *Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978). The problems experienced in the *Transamerica* case have grown even more common and complex with the proliferation of electronically created and maintained documents. See also *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); Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 *Rich. J. L. & Tech.* 15 (2006). Kiker notes that computer users sent approximately 31 billion e-mail messages every day in 2002 – “a figure which [was] expected to double by 2006.” *Id.* at \_\_\_\_, citing Peter Lyman and Hal R. Varian, *How Much Information?* 2003, <http://www.sims.berkeley.edu/how-much-info-2003/execsum.htm>.

slip-up by a paralegal charged with reviewing documents may have catastrophic implications not only for the case in which the discovery took place but in other litigation involving the same documents or issues.

Furthermore, the law governing waiver may cause counsel to include documents in her privilege log that are of no concern to the client. For example, assume an imagined, but not unlikely circumstance in which a cover letter transmitting a contract to a party's attorney is inadvertently disclosed during discovery. The cover letter itself may say nothing about the substance of the contract nor in any way disclose confidential information about any matter. However, the letter is a communication in course of seeking legal advice and is therefore likely to be covered by the attorney-client privilege. If covered by the privilege, a disclosure of the letter to opposing counsel during discovery would constitute a waiver of the privilege with regard to that document. But more significant than the waiver with regard to the disclosed document is the possibility, indeed the likelihood in many courts, that the waiver will extend to all communications on the same subject matter – in this instance the attached contract.<sup>8</sup>

Counsel for both sides in cases involving a large number of documents frequently enter into “claw back” or “quick peek” agreements that permit disclosure of privileged documents without waiver of privilege. The agreements are often embodied in a court order. The Manual for Complex Litigation acknowledges the existence of such agreements:

A responding party's screening of vast quantities of unorganized computer data for

---

<sup>8</sup>Such a draconian result would be consistent with language in many cases to the effect that a disclosure of a privileged document will be deemed to encompass all other such communications on the same subject. *See, e.g.,* *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995); *In re Sealed Case*, 877 F.2d 976, 981-82 (D.C. Cir. 1989). *See* generally discussion in Part II, *infra*.

privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a “nonwaiver” agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to “take back” inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.<sup>9</sup>

The recently amended Federal Rules of Civil Procedure specifically recognize the existence of such agreements by providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.<sup>10</sup>

However useful “claw back” or “quick-peek” agreements are as between the parties to the case, they cannot give counsel and their clients total comfort. At least in the absence of legislation, such agreements cannot bind persons or entities not party to them.<sup>11</sup> Under present

---

<sup>9</sup>Manual for Complex Litigation (4th) § 11.446

<sup>10</sup>See Fed.R.Civ.P. 16(b)(6) and 26(f)(4).

<sup>11</sup>The principle is a long recognized one, perhaps seldom litigated because of its obviousness. Directly on point is *Hartford Fire Ins. Co. v. Guide Corp.*, 206 F.R.D. 249 (S.D. Ind. 2001) (agreement with regard to waiver **waiver** of privileges could not bind third parties). The basic principle was stated by Judge Learned Hand: “[N]o court can make a decision which will bind any one but a party.” *Alemite Mfg. Corp. V. Staff*, 42 F.2d 832 (2d Cir. 1930). See also *United States v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998) (court had no power to issue a restraining order

law, even a court order declaring the continuing viability of the privilege may not be effective as against someone not a party to the litigation.<sup>12</sup> With a claim of waiver made by a non-party hovering in the future, the necessity of a thorough and costly review of all documents produced still exists.

Litigation involving millions of documents is not the only situation in which waiver of privilege presents a problem. Another equally difficult but different issue concerns waiver of the privilege in connection with investigations by government agencies. In the course of an investigation, a government agency such as the Securities and Exchange Commission may seek the cooperation of the target of its investigation through a request to turn over documents relating to the matter in question. The agency may ask that the target waive any privilege that may exist with regard to the documents produced. The production of documents is often accompanied by an agreement that the documents produced will be disclosed to private parties unless there is a public prosecution with regard to the matter.

A crucial issue, especially for the target of the investigation, is whether, when documents are produced under these circumstances, the privilege is waived only with regard to the

---

seizing assets that would be binding on defendant's wife, a non-party); *Mitchell v. Exide Technologies*, 2004 WL 2823230 (D. Kan. 2004) (order preserving confidentiality of business information disclosed in discovery was not binding on non-parties).

An analogous situation is the ineffectiveness of confidentiality agreements between federal agencies and the targets of their investigations with regard to persons not parties to the agreements. *See* *Qwest Communications International Inc. v. New England Health Care Employees Pension Fund*, 450 F.3d 1179 (10th Cir. 1179); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002). These cases are discussed in Part III, *infra* at notes \_\_\_\_.

<sup>12</sup>*See* discussion in Marcus, *supra* note \_\_ at 1612.

government agency or whether the privilege has now been forfeited as to the entire world. Almost every federal court that has considered the question has held that there is a general waiver of the privilege under these circumstances, even if there is an agreement between the agency and the target to maintain confidentiality of the material produced.<sup>13</sup> Courts refer to this issue by saying that they do not recognize “selective waiver” of privilege.<sup>14</sup>

Reasonable persons may differ as to the best policy on all of these issues. The failure to excuse inadvertent waiver may be beneficial in that it requires counsel to be careful in responding to discovery requests.<sup>15</sup> Finding a broad scope of waiver not only further encourages care in disclosure, it prevents a party from disclosing some communications with regard to a matter while hiding behind privilege with regard to other, related communications.<sup>16</sup> A refusal to recognize selective waiver arguably protects the interests of the public at large and takes the use of materials disclosed by the target of an investigation out of the sole discretionary use of a governmental agency.<sup>17</sup> Many lawyers, including some representing corporations that have been the targets of governmental agency investigation, have also argued that the recognition of selective waiver

---

<sup>13</sup>See cases cited in Part III, notes \_\_\_\_, *infra*.

<sup>14</sup>*E.g.*, *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991).

<sup>15</sup>See, *e.g.*, *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 450 (D.Mass. 1988), discussed at notes \_\_\_\_, *infra*.

<sup>16</sup>See, *e.g.*, the discussion in *United States v. Doe*, 219 F.3d 175, 185 (2d Cir. 2000) and other cases discussed in Part II at notes \_\_\_\_, *infra*.

<sup>17</sup>Similar views were expressed by witnesses in a hearing held by the Federal Rules of Evidence Advisory Committee on April 24, 2006. See also the submission of Gregory P. Joseph, Esq. in connection that hearing. The minutes of that hearing may be found at <http://www.uscourts.gov/rules>.

would encourage and exacerbate an existing trend by regulators and prosecutors to demand that persons being investigated waive their attorney-client privileges and work product protection.<sup>18</sup>

Yet, there are strong policy reasons for privilege waiver rules that would clarify and, at least to some degree, change the law of waiver of privilege. A rule that any disclosure of a document necessarily waives privilege or work product protection as to all communications dealing with the same subject matter confronts counsel with a difficult choice – either spend enormous resources on protecting the privileges or risk losing their protection. Where the law on inadvertent waiver or scope of waiver is unclear, the lack of a consistent response by the courts makes counsel’s choice of a less than full review unnecessarily risky. The refusal to recognize selective waiver in all but one federal circuit means either that clients must risk use of the materials produced by private parties or else the government agency will be denied the benefit of full cooperation from a target of its investigation.

The court decisions – even within the federal system – have not given a uniform answer to these issues.<sup>19</sup> If there is going to be a consistent solution, it is going to have to come by rule or

---

<sup>18</sup>See Preserving the Attorney-Client Privilege, a report submitted to the Federal Rules of Evidence Committee in connection with its April 24, 2006 hearing by members of the American Bar Association Task Force on the Attorney-Client Privilege including David M. Brodsky, William Ide, and Mark O. Kasanin. [www.abanet.org](http://www.abanet.org). With regard to the general concern about the erosion of the attorney-client privilege and work product protection, see Report of the the ABA’s Task Force on the Attorney-Client Privilege, 60 Bus. Law. 1029 (May 2005); Report of the Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002), available at <http://actl.com>. Compare this view that expressed by the *amici curiae* in *Qwest Communications International Inc. v. New England Health Care Employees Pension Fund*, 450 F.3d 1179, 1194 (10th Cir. 1179), discussed in the text accompanying note \_\_\_\_, *infra*.

<sup>19</sup>See discussions in Parts I, II and III, *infra*. Because the rule discussed in this article is proposed as a Federal Rule of Evidence, the cases cited throughout are from the federal courts. However, state decisions reflect similar differences in treatment with regard to issues involving inadvertent waiver and scope of waiver. See Edward J. Imwinkelried, *The New Wigmore, Evidentiary*

statute. However, if there is to be a rule dealing with the issue, it will almost certainly have to be enacted by Congress rather than going through the Rules Enabling Act<sup>20</sup> process.

During the debates in Congress on the adoption of what were then the Proposed Federal Rules of Evidence, many opponents of the privilege rules expressed concern that the issues inherent in the recognition or nonrecognition of privileges were ill-suited to the Court initiated rulemaking process.<sup>21</sup> Ultimately, after enacting the Federal Rules of Evidence, Congress returned the primary evidence rulemaking function to the judiciary with regard to future additions, deletions and amendments – except as to rules governing privilege. 28 U.S. C. § 2074(b) provides that “any rule creating, abolishing, or modifying an evidentiary privilege” must be approved by an Act of Congress.<sup>22</sup> Although one could argue that a rule governing waiver of privilege is not within the scope of § 2074(b), such an argument would be a tenuous one indeed. It is unlikely that the Judicial Conference of the United States, which is responsible for initiating the process under the Rules Enabling Act, would interpret the limitation of § 2074 that narrowly.

---

*Privileges*, § 16.12.4, pp. 895-900 (inadvertent waiver); § 16.12.5, pp. 919-34 (scope of waiver) (2002); John W. Strong, McCormick on Evidence, § 93, pp. 371-77 (6th ed. 2006).

<sup>20</sup>Under the Rules Enabling Act, the Supreme Court has the power to prescribe general rules of practice, procedure and evidence for the federal courts. 28 U.S.C. § 2072.

<sup>21</sup>*See, e.g.*, Testimony of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, Proposed Rules of Evidence, 1973: *Hearings Before the Special Subcomm. On Reform of Fed. Criminal Laws*, 93d Cong. 263 (1973) [hereinafter *House Hearings*]; Testimony of Charles R. Halpern and George T. Frampton, Jr. on behalf of the Washington Council of Lawyers, *House Hearings* at 160; Testimony of George S. Leisure on behalf of the New York Trial Lawyers Committee, *House Hearings* at 203-204; Letter from Alvin K. Hellerstein on behalf of the Association of the Bar of the City of New York, Proposed Rules of Evidence, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong. 307.

<sup>22</sup>28 U.S.C. § 2074(b).

Therefore, if there is a change in the law of waiver of privilege in the federal courts, it is likely to come by way of Congressional enactment rather than a rule adopted under the Rules Enabling Act. However, as in the case of Federal Rules of Evidence 413-415,<sup>23</sup> the Congressional enactment could be in the form of an addition to the federal rules – most likely the Rules of Evidence.<sup>24</sup>

Moreover, a Congressionally-adopted rule on waiver of privilege or work product protection would be of limited value to litigants if its effect were limited to federal proceedings. A decision by counsel made with regard to the limits of review of documents during discovery or as to the extent of disclosure in the course of a government agency investigation would not be likely be affected by a rule that simply guarded against disclosure in later federal court litigation. An action in which waiver of privilege was asserted could well take place in a later state court proceeding. Unless a waiver rule is binding on state courts as well, it would have little effect on the conduct of parties in federal litigation.<sup>25</sup>

Thus, any federal legislation dealing with waiver of privilege would have to be applicable in both state and federal courts in order to be fully effective in dealing with the policy concerns in voluminous document and agency investigation cases. A problem that must be addressed is, of course, the Congressional power to enact such legislation binding on the state courts.<sup>26</sup>

---

<sup>23</sup>Pub.L. 103-322, Title XXXII § 320935(a) Sept. 13, 1994, 108 Stat. 2136.

<sup>24</sup>Because of the implication for both civil and criminal cases, the Federal Rules of Evidence is a more appropriate placement than either the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.

<sup>25</sup>See discussion in Parts IV and VI, *infra*.

<sup>26</sup>See discussion in Part IV, *infra*.

This article will describe a rule proposed by the Judicial Conference Advisory Committee on Evidence Rules, dealing with waiver of the attorney-client privilege and work product protection and will argue in favor of the enactment of such a rule by Congress. The rule as proposed addresses the concerns of litigants in cases involving large numbers of documents and of government agencies and the targets of their investigations with regard to the possibility of broad waiver of the privilege. However, it also responds to the very reasonable arguments that some care should be taken to review documents to be disclosed in discovery and that a document should not be used in a way that makes it unfair to claim privilege in connection with other, related communications.

Part I of the article describes the treatment of inadvertent waiver in the federal courts. Part II deals with the scope of waiver in the federal courts. Part III covers selective waiver. Part IV discusses the constitutional ability of Congress to enact a waiver rule binding on the states. Part V sets out the proposed rule. Part VI discusses drafting decisions made in formulating the proposed rule. The article concludes with a statement in favor of the Congressional adoption of what is proposed as Federal Rule of Evidence 502.

## **I. Inadvertent waiver**

Even a careful lawyer might overlook a privileged document produced in discovery with thousands of others. Although the disclosure of such a document may be intentional in the sense that the lawyer intends to hand over all documents in its group, it is unintentional in the sense that, if the lawyer had considered the privileged or protected nature of its contents, she would not have disclosed the document. The courts have generally referred to such an incident as an

“inadvertent disclosure.”<sup>27</sup>

The courts have taken three different approaches to inadvertent disclosure of documents during discovery: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure ; 3) inadvertent disclosure may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.<sup>28</sup>

Perhaps the fewest number of cases take the first approach finding no waiver from **any** inadvertent disclosure. A leading case is *Mendenhall v. Barber-Greene Co.*<sup>29</sup> where a lawyer had simply produced all of his client’s files without determining whether or not they contained privileged matter. The Court stated:

Mendenhall’s lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the *client’s* welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. . . . No waiver will be found here.<sup>30</sup>

---

<sup>27</sup>*E.g.*, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287 (D. Mass. 2000); *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445 (D. Mass. 1988).

<sup>28</sup>Any time there is a waiver of privilege, questions of the scope of the waiver also exist. Some courts hold that an inadvertent waiver will waive the privilege with regard only to the document disclosed, not to other documents dealing with the same subject matter; others hold that even an inadvertent waiver results in a subject matter waiver. See Part II, *infra*.

<sup>29</sup>531 F. Supp. 951(N.D.Ill.1982).

<sup>30</sup>*Id.* at 955. The court cites *Dunn Chemical Co. v. Sybron Corp.*, 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] See also *Berg Electronics, Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263

Despite its seeming ease of application, the no waiver approach has some distinct disadvantages. It encourages the parties to be sloppy in their production of documents – even in cases where the expense of careful production would not be great. A no waiver rule also raises the specter of a party engaging in the gamesmanship of “inadvertently” disclosing privileged information, demanding it back and then arguing that a party has made improper use of the privileged information in its pleadings or arguments at trial.

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*<sup>31</sup> In that case, one lawyer, assisted by three paralegals and thirteen of the client’s employees, had reviewed 500,000 documents. Privileged documents were sorted out through the use of “post-its,” a system that obviously broke down somewhere along the way. Twenty documents, comprising 88 pages, now claimed to be privileged were in fact produced to the other side. In reviewing the waiver of privilege issues with regard to the inadvertently produced documents, the court analyzed the three

---

(D.Del. 1995) (no waiver; no intent to produce where documents were marked privileged and then inadvertently produced); *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege). Texas has adopted a no waiver rule through amendments to its Rules of Civil Procedure. Tex. R.Civ. P. 193.3(d):

(d) *Privilege Not Waived by Production.* A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if--within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made--the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

<sup>31</sup>120 F.R.D. 445 (D. Mass. 1988).

different approaches to inadvertent disclosure. The court was particularly critical of an approach that analyzed the precautions taken, noting that if precautions were adequate “the disclosure would not have occurred.” It stated:

When confidentiality is lost through “inadvertent” disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid “inadvertent” disclosure either.<sup>32</sup>

The court added that a strict rule “would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.”<sup>33</sup>

Among other cases, the court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*,<sup>34</sup> where the court stated:

The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.<sup>35</sup>

As in the case of the no waiver rule, the absolute waiver rule has its disadvantages. It may

---

<sup>32</sup>*Id.* at 449-50.

<sup>33</sup>*Id.* at 450.

<sup>34</sup>314 F. Supp. 546 (D.D.C. 1970).

<sup>35</sup>*Id.* at 549. In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) (“With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position.”); *Ares-Serono v. Organon Int’l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank*, F.S.B. 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

work an enormous hardship and financial burden on parties in cases involving a large volume of documents. The penalty for a mistake in such a case is multiplied many fold where the court also finds a subject matter waiver based upon the inadvertent production of an insignificant document.<sup>36</sup>

The third or balanced approach, criticized by the court in *International Digital*, is taken by many recent decisions. Several decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure first set forth in *Lois Sportswear, U.S.A., Inc., v. Levi Strauss & Company*, where the court stated:<sup>37</sup>

What is at issue here is whether or not the release of the documents was a knowing waiver or simply a mistake, immediately recognized and rectified. The elements which go into that determination include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an overarching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference.

In *Lois Sportswear*, some 22 privileged documents out of some 30,000 were in fact produced. Considering the small number of privileged documents mistakenly produced, the court

---

<sup>36</sup>See discussion in Part II, *infra*.

<sup>37</sup>104 F.R.D. 103, 105 (S.D.N.Y. 1985). *See also* Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985) where the court listed the factors:

- (1) the reasonableness of the precautions to prevent inadvertent disclosure;
- (2) the time taken to rectify the error;
- (3) the scope of discovery;
- (4) the extent of the disclosure; and
- (5) the “overriding issue of fairness.”

found, “by a narrow margin,” that there was no waiver.<sup>38</sup>

A persuasive analysis of the balanced approach or “middle ground” is contained in *Amgen Inc. v. Hoechst Marion Roussel, Inc.*<sup>39</sup>, a 2000 District of Massachusetts opinion written by Chief Judge Young. The court in *Amgen* found a waiver of privilege, largely in light of the sheer magnitude of the disclosure – approximately 200 documents comprising 3821 pages. In comparing its “middle ground approach to the “no waiver” of cases like *Mendenhall* or the strict waiver applied in cases such as *International Digital Systems*, the court stated:

In particular, each of the two rigid alternatives fails to take high relevant issues into account. The “never waived” approach, for example, creates little incentive for attorneys to guard privileged material closely and fails fully to recognize that even an inadvertent disclosure undermines the confidentiality which undergirds the privileges. . . . Likewise, while the strict accountability rule certainly holds attorneys and clients accountable for their lack of care, it nonetheless diminishes the attorney-client relationship because, in rendering all inadvertent disclosures – no matter how slight or justifiable – waivers of the privileges, the rule further undermines the confidentiality of communications. . . .

Providing a measure of flexibility, the “middle test” best incorporates each of these

---

<sup>38</sup>104 F.R.D. at 105. The court noted:

. . . only 22 documents out of some 16,000 pages inspected and out of the 3,000 pages requested to be produced are now claimed to be privileged. Under these particular facts, the evidence is barely preponderate that the disclosure of the privileged documents was inadvertent and a mistake, rather than a knowing waiver.

In contrast, the court in *Hartford Fire, supra* note \_\_\_, 109 F.R.D. at 330, found that work product protection had been waived in light the absence of reasonable precautions in reviewing the “small number of documents involved.”

<sup>39</sup>190 F.R.D. 287 (D. Mass. 2000).

concerns and accounts for the errors that inevitably occur in modern, document-intensive litigation.<sup>40</sup>

In the end, the court in *Amgen* found the lawyer's conduct in producing the privileged documents to be gross negligence, adding:

In fact, if the Court does not hold that a waiver has occurred under the egregious circumstances here presented, it might as well adopt the "never waived" rule and preclude such a holding in all cases.<sup>41</sup>

The middle ground or balanced approach would seem to eliminate the disadvantages of both the no waiver and absolute waiver rules. It is likely to reduce the costs of pre-production privilege review without tolerating sloppy lawyering and gamesmanship. But the persistence of the both the "never waived" and the "strict approach" by many judges makes the rule to be applied uncertain at best.

## II. Scope of waiver

Under existing federal case law, a decision that an inadvertent disclosure results in waiver with respect to the disclosed document may, but does not necessarily, mean that the privilege is

---

<sup>40</sup>*Id.* at 292.

<sup>41</sup>*Id.* at 293. Other cases taking a similar balancing approach to inadvertent disclosure include *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *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). *See also* Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U.Ill. L. Rev. 643, 659; Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 *Cardozo L. Rev.* 1315 (2001).

waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.*,<sup>42</sup> the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating:

Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter.<sup>43</sup>

Even in the leading case for the strict approach to inadvertent waiver, *International Digital Systems Corp. v. Digital Equipment Corp.*,<sup>44</sup> the court refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*,<sup>45</sup> the

---

<sup>42</sup>132 F.R.D. 204 (N.D. Ind. 1990).

<sup>43</sup>*Id.* at 208. Cases that hold that inadvertent disclosure results in subject matter waiver in fact existed at the time of the *Golden Valley Microwave Food* case. See, e.g., *In re Sealed case*, 877 F.2d 976 (D.C. Cir. 1989);

<sup>44</sup>120 F.R.D. 445, 449-50 (D. Mass. 1988), *supra* note \_\_.

<sup>45</sup>116 F.R.D. 46, 52 (M.D.N.C. 1987).

court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley*, other courts have in fact found subject matter waiver even where the disclosure was inadvertent. An important Court of Appeals case from the D.C. Circuit reaching this result is *In re Sealed Case*.<sup>46</sup> In that case, the court took a strict approach to inadvertent waiver, noting that if a “client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels – if not crown jewels.”<sup>47</sup> The court went on to say that the waiver of the privilege extends to all other communications relating to the same subject matter.<sup>48</sup> Although the court noted that it would not disturb a district court’s decision in the absence of abuse of discretion, it remanded the decision as to the dimensions of the scope of waiver for clarification of the trial court’s reasoning.<sup>49</sup>

Numerous district court cases provide for a broad subject matter waiver.<sup>50</sup>

---

<sup>46</sup>877 F.2d 976 (D.C. Cir. 1989).

<sup>47</sup>*Id.* at 980.

<sup>48</sup>*Id.* at 981.

<sup>49</sup>*Id.* See also *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (waiver encompassed subject matter of disclosure).

<sup>50</sup>*E.g.*, *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.*,<sup>51</sup> the court applied subject matter waiver but noted:

The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.<sup>52</sup>

The more reasoned holdings with regard to the scope of waiver emphasize the issue of fairness to the opposing party. Certainly, if the party making the disclosure uses the disclosed matter to its advantage in some way, the opposing party should have the option of disclosing other documents dealing with the same subject matter that may cast a different light on the issue.<sup>53</sup>

---

secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

<sup>51</sup>434 F. Supp. 136, 156 (D. Del. 1977).

<sup>52</sup>*Id.* at 156. *See also* *In re Grand Jury Proceedings* Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455 (D.C. Cal. 1978) (same).

<sup>53</sup>A claim of privilege where a party has used part but not all of the disclosed matter to its advantage is comparable to a party claiming the defense of advice of counsel and then relying on the attorney-client privilege to shield the remaining parts of its conversations with counsel. The privilege is held to be waived under such circumstances. *See, e.g.*, *In re Grand Jury Subpoena*, 341 F.3d 331, 336-37 (4th Cir. 2003). *See also* Fed.R.Evid. 106, which provides that when part

The case law, especially the law involving the scope of waiver of work product privilege, is illustrative of these considerations. The most important case on waiver of work product privilege is *United States v. Nobles*.<sup>54</sup> In *Nobles*, the Court held that the defendant would waive his work product privilege by calling his investigator to testify about interviews with two prosecution witnesses. The Court held that the investigator, if he testified, would have to disclose his report. The defendant refused to turn over the report and the investigator was precluded from testifying. The Court held that the preclusion was appropriate – if the investigator testified, the report would have to be disclosed. The testimony would waive the privilege “with respect to matters covered in his testimony.”<sup>55</sup> The effect of the Court’s ruling was that, not only was the work product protection waived with regard to matters directly reflected in the report but to all related matters – a subject matter waiver.<sup>56</sup>

More recent cases from the Courts of Appeal and District Courts reflect a view that subject matter waiver may be more limited than suggested in *Nobles* and that the limitation will depend upon consideration of fairness under the circumstances. Reflective of that view is the Second Circuit case of *United States v. Doe*.<sup>57</sup> In *Doe*, a corporation had asserted its attorney-client and work-product privileges in its dealing with an ATF investigation concerning sales of firearms. A

---

of a writing is introduced, an adverse party may require the introduction of any other part of the statement “which ought in fairness to be considered contemporaneously with it.”

<sup>54</sup>422 U.S. 225 (1975).

<sup>55</sup>*Id.* at 239.

<sup>56</sup> See also *Chubb Integrated Systems, Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 64 n. 3 (D.D.C. 1984) (*Nobles* cited for the proposition that “the testimonial use of work-product constituted waiver of all work-product of same subject matter).

<sup>57</sup>219 F.3d 175 (2d Cir. 2000).

corporate officer testified and made references to advice of counsel. The primary question was whether his references to advice of counsel and disclosure of communications waived the corporation's attorney-client and work product privileges. The court noted that "the implied waiver analysis should be guided primarily by fairness principles."<sup>58</sup> The court indicated that the district court, in determining the existence and scope of waiver as a result of the corporate officer's disclosures, should consider such things as the witness's lack of legal training and the fact that the disclosures were made before the grand jury where the corporation could gain nothing affirmative. Specifically with regard to waiver of work product privilege, the court stated, "[w]e believe that the district court on remand should consider further whether there was any waiver of Doe Corp.'s work-product privilege, and, if there was, the proper scope of the waiver. The fairness concerns that guide the waiver analysis above are equally compelling in this context."<sup>59</sup>

The court distinguished cases finding subject matter waiver stating:

In this case, however, there was no actual disclosure of any privileged documents. Further the context – a grand jury proceeding – is, as already indicated, quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stands to benefit directly from disclosing privileged materials.<sup>60</sup>

In *Duplan Corp. v. Deering Milliken, Inc.*,<sup>61</sup> the Fourth Circuit held that there would be no subject matter waiver of work product protection under the circumstances. In *Duplan*, the party

---

<sup>58</sup>*Id.* at 185.

<sup>59</sup>219 F.3d at 191.

<sup>60</sup>*Id.*

<sup>61</sup>540 F.2d 1215 (4th Cir. 1976).

seeking protection had made partial and inadvertent waiver of some of the claimed protected documents, which consisted of mental impressions, opinions and legal theories of their attorneys and representatives. In refusing to find subject matter waiver, the court distinguished *Nobles* on two grounds. First, in *Nobles*, the work product was a witness's report, not the mental impressions of a lawyer. Second, the court noted that in this case the party had "neither made nor sought to make any affirmative testimonial use of the documents for which the throwsters [the party seeking protection] claim the work product privilege."<sup>62</sup> The court noted that the principles of *Nobles* may be applicable if the documents were in fact used at trial.

The Fourth Circuit expanded on its reasoning in *Duplan* in *In re Martin Marietta Corp.*<sup>63</sup>. In *Martin Marietta*, the defendant in a criminal case sought documents from Martin Marietta, his former employer, relating to matters on which he had been indicted. Martin Marietta claimed attorney-client and work product privilege. Defendant argued that the privilege had been waived because documents or some portions of them had been disclosed by the corporation to the United States Attorney and the Department of Defense.<sup>64</sup> The Court found a subject matter waiver of the attorney client privilege based upon the disclosure to the government. With regard to the work product privilege, the court held that the delivery to the government constituted a testimonial use of the documents, as in *Nobles*, and held that there would be a subject matter waiver of non-opinion work product. However, it held that there was no subject matter waiver of opinion work product. The court emphasized the added protection given to such work product and added:

---

<sup>62</sup>*Id.* at 1223.

<sup>63</sup>856 F.2d 619 (4th Cir. 1988).

<sup>64</sup>See text accompanying note \_\_\_, *infra*.

[T]he underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in *Nobles*: “where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure.” . . . There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.<sup>65</sup>

By analogy, cases involving the privilege against self-incrimination point out the possibility of distortion of facts if an individual were to waive the privilege with regard to some matters, but claim it as to others.<sup>66</sup>

In an important 1986 article, Professor Richard Marcus surveyed the cases dealing with scope of waiver up to that point in time in great depth.<sup>67</sup> Marcus argued that subject matter waiver should be analyzed in terms of fairness, stating, “the focus should be on the unfairness that results from the privilege-holder’s affirmative act misusing the privilege in some way.”<sup>68</sup> He

---

<sup>65</sup>856 F.2d at 626

<sup>66</sup>*See, e.g.,* *Rogers v. United States*, 340 U.S. 367 (1951) (witness could not testify that she turned over records to another person and then refuse to identify that person).

<sup>67</sup>Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605 (1986).

<sup>68</sup>*Id.* at 1627.

noted:

This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .

Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.<sup>69</sup>

Thus, although courts take different views with regard to scope of waiver, there is authority both in the case law and in scholarly writing for the position that the scope of waiver be governed by considerations of fairness. Subject matter waiver makes sense where production of previously disclosed material is necessary to protect an adversary from a misleading presentation of the evidence. It is unnecessarily punitive in other instances. But as important as it is to adopt a fair rule, it is equally important to have a predictable, uniform rule. Providing uniformity in this area of the law would be a worthwhile pursuit.

### **III. Selective Waiver**

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency.<sup>70</sup> The First,

---

<sup>69</sup>*Id.* at 1607-08.

<sup>70</sup>See text accompanying notes \_\_\_\_, *infra*.

Third, Fourth, Sixth, Tenth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost.<sup>71</sup> Cases from the Third, Sixth and Tenth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement with the federal agency.<sup>72</sup> Other courts have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement.<sup>73</sup>

#### *Cases permitting selective waiver*

The court in *Diversified Industries, Inc. v. Meredith*<sup>74</sup> adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the

---

<sup>71</sup>See text accompanying notes \_\_\_\_, *infra*.

<sup>72</sup>See text accompanying notes \_\_\_\_, *infra*.

<sup>73</sup>See text accompanying notes \_\_\_\_, *infra*. For a survey of the law governing selective waiver, see Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 Baylor L. Rev. 33 (1997). See also Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 Pepp. L. Rev. 723 (2006).

<sup>74</sup> 572 F.2d 596 (8th Cir. 1977).

attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a “separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred.”<sup>75</sup> The court explained, “To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . .”<sup>76</sup>

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*,<sup>77</sup> the District Court for Wisconsin held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege.

#### *General rejection of selective waiver*

In *United States v. Massachusetts Institute of Technology*,<sup>78</sup> the First Circuit held that the

---

<sup>75</sup>*Id.* at 611.

<sup>76</sup>*Id.*

<sup>77</sup>478 F. Supp. 368, 373 (D. Wis 1979). *See also* *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

<sup>78</sup>129 F.3d 681 (1st Cir. 1997).

attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been voluntarily disclosed to the DOD pursuant to a regular audit. The same documents were sought as part of an Internal Revenue Service investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because “agencies usually have means to secure the information they need and, if not, can seek legislation from Congress.”<sup>79</sup> The court added that applying the general principle of waiver of privilege to any third party disclosure “makes the law more predictable and certainly eases its administration. Following the Eighth Circuit’s approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty.”<sup>80</sup>

In the D.C. Circuit case of *Permian Corp. v. United States*,<sup>81</sup> Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the privilege had been waived by the SEC disclosure. The court stated that “[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship.”<sup>82</sup> The court added that the “client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . .

---

<sup>79</sup>*Id.* at 685.

<sup>80</sup>*Id.*

<sup>81</sup>665 F.2d 1214 (D.C. Cir. 1981).

<sup>82</sup>*Id.* at 1221.

The attorney-client privilege is not designed for such tactical employment.”<sup>83</sup>

The Fourth Circuit decision in *In re Martin Marietta Corp.*,<sup>84</sup> rejected selected waiver of the attorney-client privilege where the privilege holder had previously disclosed information in settling a criminal matter and in a Department of Defense investigation. As noted earlier, the court also found a waiver of non-opinion work product protection but no subject matter waiver for opinion work product.<sup>85</sup>

#### *Rejection of selective waiver even with a confidentiality agreement*

Three prominent cases, from the Third, Sixth and, very recently, the Tenth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In the Third Circuit case of *Westinghouse Electric Corp. v. Republic of the Philippines*,<sup>86</sup> Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC regulations that provided that “information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically

---

<sup>83</sup>*Id.*

<sup>84</sup>856 F.2d 619 (4th Cir. 1988).

<sup>85</sup>*Id.* at 624-26. *See also* text accompanying notes \_\_\_\_, *supra*. Another Fourth Circuit case is *In re Weiss*, 596 F.2d 1185 (4th Cir. 1979), where the court, distinguishing *Diversified* as involving a private litigation, held that a lawyer’s testimony before the SEC constituted a waiver of the attorney-client privilege as to future testimony before a grand jury.

<sup>86</sup>951 F.2d 1414 (3d Cir. 1991).

authorized.”<sup>87</sup> The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse’s work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted:

[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*. . . .

The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these

---

<sup>87</sup>*Id.* at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978).

objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, see *Permian*,<sup>88</sup> . . . and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.<sup>89</sup>

The court also noted that in 1984, Congress had rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency.<sup>90</sup>

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that the privilege is waived only as to those communications actually disclosed, “unless a partial waiver would be unfair to the party’s adversary.”<sup>91</sup> If partial waiver disadvantages the adversary by allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege. Disclosures in aid of an attorney’s preparation for litigation would still be protected. However, the court found that disclosure to the federal agencies in this instance did

---

<sup>88</sup>*Permian Corp. v. United States*, *supra* note \_\_\_, 665 F.2d at 1221.

<sup>89</sup>951 F.2d at 1425.

<sup>90</sup>*Id.* at 1425, citing *SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934*, in 16 Sec.Reg. & L.Rep. at 461 (March 2, 1984). For a discussion of a regulation to the same effect proposed in connection with Sarbanes-Oxley Act, see text accompanying notes \_\_\_\_, *infra*.

<sup>91</sup>*Id.* at 1426 n.12.

operate as a waiver because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process.<sup>92</sup>

The Sixth Circuit in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,<sup>93</sup> also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with “stringent” confidentiality provisions.<sup>94</sup> Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was “not a creature of contract, arranged between parties to suit the whim of the moment.”<sup>95</sup> The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to “assist in the obfuscating the truth-finding process.”<sup>96</sup>

There was a strong dissent in the *In re Columbia/HCA Healthcare Corp.* case by Judge

---

<sup>92</sup>*Id.* at 1429.

<sup>93</sup>293 F.3d 289 (6th Cir. 2002).

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 303.

<sup>96</sup>*Id.*

Boggs, who argued for a selective waiver rule. He stated that “[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.”<sup>97</sup> He added:

Faced with a waiver of the attorney-client privilege over the entire subject matter of a disclosure and *as to all persons*, the holder of privileged information would be more reluctant to disclose privileged information voluntarily to the government than if there were no waiver associated with the disclosure.<sup>98</sup>

The 2006 case of *Qwest Communications International, Inc v. New England Health Care Employees Pension Fund*,<sup>99</sup> fell in line with the *Westinghouse* and *In re Columbia/HCA Healthcare Corp* by refusing to adopt selective waiver despite the existence of a confidentiality agreement. In *Qwest*, the company had produced some 220,000 pages of documents protected by the attorney-client privilege and work-product doctrine to the SEC and the DOJ (the “Waiver Documents”). The disclosure of the documents to the government was made under an agreement that provided for confidentiality as to third parties but also that either agency could disclose the documents in furtherance of its “discharge of its duties and responsibilities.”<sup>100</sup> The agreement with DOJ specifically stated that the department could share the documents with other state, local and federal agencies and could “make direct or derivative use of the [waiver documents] in any

---

<sup>97</sup>*Id.* at 311.

<sup>98</sup>*Id.* at 309-10. See further discussion of Judge Boggs’s dissent in the text accompanying notes \_\_\_\_, *infra*.

<sup>99</sup>450 F.3d 1179 (10th Cir. 2006).

<sup>100</sup>*Id.* at 1181.

proceeding and its investigation.”<sup>101</sup> Private parties had filed suit against Qwest in cases raising many of the same issues as those involved in the government investigations both before and after those investigations began. Qwest sought to protect the documents produced for the government agencies against discovery by the private parties.

The court held that both the attorney-client privilege and work product protection had been waived by the disclosure of the documents to the government agencies. After a thorough review of the existing case law in both the federal and state<sup>102</sup> courts, the court reached the conclusion that “the record in this case is not sufficient to justify adoption of selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.”<sup>103</sup> Specifically, the court found that the record would not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver doctrine. After all, 220,000 pages of documents were produced in this case in the face of “almost unanimous circuit-court rejection of selective waiver in similar circumstances.”<sup>104</sup> The court found little support for Qwest’s arguments based upon the broad terms of the confidentiality agreement. The agreements gave such broad discretion to the agencies that it was “not inappropriate to conclude that some undetermined number of Waiver Documents have been widely disseminated and have

---

<sup>101</sup>*Id.*

<sup>102</sup>The court cites *McKesson Corp. v. Green*, 610 S.E.2d 54, 56 (Ga. 2005) and *McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Repr. 3d 812, 819, 821 (Cal. App. 2004) as examples of state court rejections of selective waiver despite the existence of confidentiality agreements. 450 F.3d at 1197.

<sup>103</sup>450 F.3d at 1192.

<sup>104</sup>*Id.* at 1193.

thus become public information.”<sup>105</sup> The court found no basis to conclude that selective waiver would promote an exchange between attorney and client:

If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly. Such reticence and caution could be heightened where, as here, further disclosures by the government mean that the information may be disclosed to countless others.

Finding no basis for selective waiver in the policies underlying the attorney-client privilege, the court likened the doctrine of selective waiver to the creation of a new privilege for materials surrendered in a government investigation.<sup>106</sup> The court found insufficient state support for the creation of such a privilege – unlike the substantial state precedent for the creation of a psychotherapist-patient privilege in *Jaffee v. Redmond*.<sup>107</sup> The court also found no basis for creating a new privilege to guard against what the *amici curiae*, Association of Corporate Counsel and Chamber of Commerce of the United States of America, called a “culture of waiver” instituted by federal prosecutors. The *amici* argued that companies facing federal investigations are coerced into waiving their privileges because of the risk of being labeled as uncooperative by the federal officials. The court found the record insufficient, both generally and in this instance, to justify action by the court to seek to reverse the “culture” argued to exist by the *amici*.<sup>108</sup>

---

<sup>105</sup>*Id.* at 1194.

<sup>106</sup>450 F.3d at 1197-99.

<sup>107</sup>518 U.S. 1, 9-15 (1996). 450 F.3d at 1197-98.

<sup>108</sup>Interestingly, corporate counsel argued before the Federal Rules of Evidence Committee that the same culture of waiver should cause the Committee to reject a selective waiver rule because

Despite the court’s clear and strong rejection of selective waiver in *Qwest*, the opinion does not dismiss the possibility of a selective waiver rule created by rule or statute. The premise of the court’s decision was that the “record” was insufficient to support the application of such a rule in this case.<sup>109</sup> But it added::

Whether a rule-making or legislative venue is appropriate to address the issues raised by *Qwest* and amici is a question for the Standing Committee<sup>110</sup> and Congress. The rule-making and legislative processes, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege and work-product protection is but another source for the legislative and rule-making bodies to draw on to inform their deliberations concerning the need for and parameters of selective waiver or a new privilege.<sup>111</sup>

*Recognition of selective waiver where a confidentiality agreement exists*

A few courts have indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is from the Southern District of New York,

---

such a rule would put further pressure on companies to waive their privilege in government investigations. See note \_\_\_ and accompanying text, *supra*.

<sup>109</sup>450 F.3d at 1192.

<sup>110</sup>The reference is to the Judicial Conference Committee on Rules of Practice and Procedure, to which the Advisory Committee reports.

<sup>111</sup>*Id.* at 1201. The court noted, in connection with its discussion of attempts to deal with the “culture of waiver” issue raised by the *amici*, that Rule 502 had been published by the Advisory Committee on Evidence Rules and would be submitted to the Standing Committee. *Id.* at 1200. The Standing Committee approved the publication of the rule for public comment on June 22-23 meeting, <http://www.uscourts.gov/rules/index.html#standing0606>. See Part V, *infra*.

*Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*<sup>112</sup> The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency “only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party’s claim of privilege as to the material disclosed.” The court noted:

[A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule’s protection and then seeking to retract that decision in connection with subsequent litigation.<sup>113</sup>

The Second Circuit, in *In re Steinhardt Partners, L.P.*,<sup>114</sup> rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated:

In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . .

Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the

---

<sup>112</sup>521 F. Supp. 638 (S.D.N.Y. 1981).

<sup>113</sup>*Id.* at 646.

<sup>114</sup>9 F.3d 230 (2d Cir. 1993).

confidentiality of the disclosed materials.<sup>115</sup>

### *Conclusion*

The weight of authority is clearly against recognition of selective waiver. However, there are policy considerations in favor of it that may be strong enough for Congress to accomplish by rule what the courts have been unwilling to do on a case-by-case basis. The Tenth Circuit in the recent *Qwest* decision, although firmly rejecting judicial adoption of selective waiver, conceded that a rule-making or legislative body might well come to a different conclusion.<sup>116</sup>

As the court in *Westinghouse Electric Corp.* noted, in 1984 Congress had rejected an amendment proposed by the SEC to the Securities and Exchange Act of 1934 establishing a selective waiver rule.<sup>117</sup> A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act.<sup>118</sup> The Commission indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not

---

<sup>115</sup>*Id.* at 236. See also *Dellwood Farms, Inc. v Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost “without steps to protect the privileged nature of such information;” follows *Teachers Insurance*); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party); *In re Subpoenas Duces Tecum*, 738 F.3d 1367, 1375 (D.C. Cir. 1984) (court indicated that a company could “insist on a promise of confidentiality before disclosure to the SEC”); *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) (court rejected selective waiver but noted that the record did not indicate the existence of a confidentiality agreement).

<sup>116</sup>See text accompanying note \_\_\_\_, *supra*.

<sup>117</sup>See text accompanying note \_\_\_\_, *supra*.

<sup>118</sup>See proposed 17 C.F.R. § 205.3 (e)(3), <http://www.sec.gov/rules/final/33-8185.htm> (Viewed 2006).

adopted because of the Commission’s concern about its authority to enact it. In its final report, the Commission reiterated its position that there were strong policy reasons behind such a provision and that, for those reasons, it still intended to enter into confidentiality agreements.<sup>119</sup>

The policy reasons behind the SEC’s proposed regulation seem obvious. The availability of selective waiver will encourage targets of its investigation to cooperate more fully with the agency. The same encouragement would exist with regard to any agency investigation. Not only would selective waiver benefit the agency, it would ease the minds of the target companies who could comply fully with agency requests without the fear that their privileged documents would be used in private litigation. Private parties would be in no worse of a position than they would have been had there been no cooperation between the target and the government agency.

Judge Boggs, in his dissent in the *In Re Columbia/HCA Healthcare Corp.* case, argued that there should be a government investigation exception to the third-party waiver rule.<sup>120</sup> He based his argument on the “increased access to privileged information” that such an exception would provide.<sup>121</sup> He added:

[T]he choice presented in this case is not one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all. In the run of cases, either the government gets the disclosure made palatable because of the exception, or neither the government nor any private

---

<sup>119</sup>*Id.*

<sup>120</sup>*In re Columbia/HCA Healthcare Corp. Billing Practice Litigation*, 293 F.3d 289, 308 (6th Cir. 2002). See text accompanying notes \_\_\_\_, *supra*.

<sup>121</sup>*Id.* at 311.

party becomes privy to the privileged material.<sup>122</sup>

The SEC's fears that it would lack the power to adopt a selective waiver provision are not present if the adoption of such a provision would be by act of Congress. For reasons discussed below, a congressionally adopted rule providing for selective waiver would likely be constitutional.<sup>123</sup>

#### **IV. Binding the states to federal court rules governing waiver of privilege**

If a statute or rule governing inadvertent waiver, scope of waiver and selective waiver of an evidentiary privilege is to be effective in eliminating the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, the provision would have to be binding on all persons, whether or not they were parties to the litigation in which the disclosure took place, and in all courts, state and federal.<sup>124</sup>

In order to be binding in both federal and state courts, the Rule would have to be enacted by Congress. Congress has taken away the power to adopt rules dealing with privilege from the courts under the Rules Enabling Act.<sup>125</sup> A rule governing the effect of the disclosure of a document during discovery in the course of federal litigation could very likely bind all parties and all courts under the power of Congress to legislate in aid of the federal courts under Article III of

---

<sup>122</sup>*Id.* at 312

<sup>123</sup>See text accompanying note \_\_\_\_, *infra*.

<sup>124</sup>See Part VI, text accompanying notes \_\_\_\_, *infra*.

<sup>125</sup>See discussion in text accompanying notes \_\_\_\_, *supra*.

the Constitution. A rule that went beyond governing discovery and dictated the effect of disclosure to a federal agency on parties not before the agency and as well as governing state treatment of disclosure would have to depend on the power of Congress under the commerce clause powers of Article I.

***A. The Constitutionality of a Congressionally adopted rule governing the effect of disclosure of privilege matters in the course of federal litigation.***

**1. Power to bind the states in the absence of a Rule**

Even without a rule, a federal court probably has the power to bind state courts with regard to waiver or non-waiver of an evidentiary privilege – but the issue is not entirely clear.

There is no question that a federal court has the power to limit the use of information obtained in discovery. Protective orders, especially those involving trade secrets, abound and have universally been upheld.<sup>126</sup>

However, limiting the use of documents or even information obtained in discovery is different from ruling that disclosures or other actions taken in federal court do or do not constitute a waiver of state evidentiary privileges. The most significant case dealing with this issue is *Bittaker v. Woodford*.<sup>127</sup> *Bittaker* was an *en banc* decision of the Ninth Circuit involving the scope of a habeas petitioner's waiver of the attorney-client privilege. The district court had held that the petitioner had waived the attorney-client privilege by filing a claim based on ineffective

---

<sup>126</sup>See *E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917); *Chem. & Indus. Corp. v. Druffel*, 301 F.2d 126, 130 (6th Cir. 1962); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2043.

<sup>127</sup>331 F.3d 715 (9th Cir. 2003).

assistance of counsel. The court, however, entered a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition – including barring the state from use of the information in a re-prosecution. The state appealed, claiming that the court had no authority to prevent a state court from dealing with the issue of waiver of privilege under state privilege rules. A majority of the *en banc* court, in an opinion written by Judge Kozinski, held that the district court’s order effectively determined that there would be no waiver of the privilege in a subsequent state trial. The court held that the district court had the power to determine the limits of the waiver and to make that determination binding on the state courts. The opinion noted that a waiver limiting the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interest as well as preserving “the state’s vital interests in safeguarding the attorney-client privilege in criminal cases.”<sup>128</sup> The court further noted that the courts of California “remain free, of course to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation.”<sup>129</sup>

On one level, Judge Kozinski’s opinion is compelling from a policy standpoint. Limiting the use of information covered by the attorney-client privilege to dealing with the ineffective assistance issue appropriately limits the waiver to what is necessary to resolve the petitioner’s claim. Arguably, the petitioner would pay too high a price for his attack on the prosecution if the information were to be permitted to be used by the state in a re-prosecution. Yet, the two concurring judges also make a valid point, one relevant to the power of the federal courts in

---

<sup>128</sup>*Id.* at 722.

<sup>129</sup>*Id.* at 726 [emphasis by the court].

dealing with waiver of privilege in a statute or rule such as the one proposed in this article. Judges O’Scannlain and Rawlinson concurred in *Bittaker* on the basis that the judge’s order should not be interpreted as dealing with the scope of the privilege under state law. Rather, the order should be interpreted as preventing the use of information obtained in the federal litigation but would not prevent the state from the use of the same information obtained from another source if the California law would so permit. The privilege law of California would govern in any re-prosecution of the defendant. The courts of that state should be free to determine whether or not the privilege had been waived. The concurring judges argued that the federal courts have a right to limit the use of information obtained in connection with its litigation – as in trade secrets cases – but no power to determine the application of a state privilege in the state courts.

At least one lower court has refused to issue an order having the effect that the majority in *Bittaker* prescribed. In *Fears v. Bagley*,<sup>130</sup> the court rejected the reasoning of the majority in *Bittaker* and ordered only that the state would be bound to keep the information obtained confidential but that it would not decide of the issue of waiver of privilege in a subsequent state court proceeding.

Even though not a controlling precedent, the *Bittaker* case is useful in framing the issues. Although, as the court notes, the case involves a waiver by implication rather than an intentional or inadvertent disclosure of a privileged document,<sup>131</sup> the case squarely presents the issue of the power of a federal court, at least in the absence of a Congressionally enacted rule, to affect the future application of a state court privilege. As the divided opinion in *Bittaker* graphically

---

<sup>130</sup>2003 WL 23770605 (S.D. Ohio 2003).

<sup>131</sup>See 331 F.3d at 719-20.

illustrates, the result is not entirely clear.

## **2. The power to enact a rule dealing with disclosure during federal court litigation.**

Simply because the question of whether an individual court has the power to issue an order affecting subsequent state court proceedings is in doubt does not necessarily mean that such a power might not be conferred by rule or statute. Arguably, an issue such as that raised in *Bittaker* could be based on the absence of a common law rule conferring authority on the court to make such orders binding on the state courts – an absence that might be corrected by the adoption of a rule or statute governing the issue.

Congress can adopt a Rule without going through the Rules Enabling Act, 28 U.S. C. § 2072(b). Federal Rules of Evidence 413-415 were adopted in exactly that manner.<sup>132</sup>

A rule that governed the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality. Congress has broad powers to legislate in aid of the federal courts, whether through the Rules Enabling Act process or independently. Congress's power stems from Article III, §1 and Article I, § 8 cl. 9, giving it power to establish lower tribunals, as well as the necessary and proper clause of Article I, § 8, cl. 18. The broad power of Congress to describe and regulate modes of proceeding was established early in our Constitutional history.<sup>133</sup>

It is unlikely that a rule limited to disclosures made in the course of federal litigation

---

<sup>132</sup>See text accompanying note \_\_\_, *supra*.

<sup>133</sup> See *Wayman v. Southard*, 23 U.S. 1 (1825); *Livingston v. Story*, 34 U.S. 632, 656 (1835). See also the often quoted dissent by Justice Reed in *Erie RR v. Tompkins*, 304 U.S. 64, 92 (1938) (“no one doubts federal power over procedure”).

would be held invalid. *Hanna v. Plumer* established that the Congress's power delegated under the Rules Enabling Act extends to matters that fall in the "uncertain area between substance and procedure, [but] are rationally capable of classification as either."<sup>134</sup> The Court has never found a Rule invalid for impermissibly affecting a substantive right.<sup>135</sup>

One could argue about whether rules governing evidentiary privileges are essentially procedural or essentially substantive. However, even writers who objected to the enactment of the proposed Federal Rules of Evidence governing privilege assumed the power of Congress to enact such rules, arguing against their adoption on policy grounds.<sup>136</sup>

The ability of the Rules to dictate state court action has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment.<sup>137</sup> The principle of the supremacy of federal law has been applied

---

<sup>134</sup>380 U.S. 460, 472 (1965).

<sup>135</sup>See, e.g., Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence*, 73 Notre Dame L. Rev. 963 (1998); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 Ariz. L. Rev. 461 (1997).

<sup>136</sup>See, e.g., Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. Penn. L. Rev. 594 (1974). See also Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Geo. L. J. 1781 (1994) (arguing for an amendment of Fed.R.Evid.501 to provide for deference to state privileges in most cases).

<sup>137</sup>*Semtek Intl. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). See also *Stewart Organization v. Ricoh*, 487 U.S. 22 (1988) (federal law, not state law with regard to enforceability of forum selection clauses governed transfer under 23 U.S.C. § 1404); *Burlington Northern RR v. Woods*, 480 U.S. 1 (1987) (Fed.R.App.P 38, not state law, governed issue of damages after unsuccessful appeal).

to state procedural rules where federal substantive law is preemptive.<sup>138</sup>

***B. The constitutionality of a rule dealing with selective waiver.***

It would be difficult to argue that a Rule governing the effect of a disclosure outside of the litigation process – *e.g.*, disclosure to an administrative agency – would be within the power of Congress under Article III.

Despite the wide berth to enact procedural rules established both in the cases and the legal literature, the language in *Hanna* would have to be considered on its face – the rule would have to be rationally capable of classification as either substance or procedure. Fairly recent cases, although not invalidating rules of procedure, have interpreted the rules somewhat narrowly so as to avoid application in a way that might conflict with state substantive policy.<sup>139</sup>

A rule seeking to have an effect beyond disclosure in the course of litigation would likely face a challenge that it was not rationally capable of classification as procedural. Arguments could be made in support of such legislation – *e.g.*, that the most significant likely impact of the waiver rules would be in the federal courts – but the risk of a finding that the rule would not be binding on the states would be significant.

---

<sup>138</sup>*See, e.g.*, *Felder v. Casey*, 487 U.S. 131 (1988) (federal civil rights law prevented state from applying its notice of claim rule in a federal civil rights action filed in state court); *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359 (1952) (validity of a release under Federal Employers Liability Act determined by federal law); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (federal pleading test should have been applied in FELA action filed in state court).

<sup>139</sup>*See, e.g.*, *Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90 (1991) (limitations on application of Fed.R.Civ. P. 23.1 dealing with the demand requirement in a shareholders derivative action); *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996) (application of Fed.R. Civ.P. 59 and the test for granting a new trial); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class certification under Fed.R.Civ.P. 23 interpreted in light of constitutional limitations on the powers of Congress).

In order to prevent more constitutional comfort for a rule dealing with disclosures outside the litigation process, Congress's commerce powers would have to come into play.

A strong argument could and has been made for a federalized attorney client privilege enacted by Congress under its Commerce Clause powers. (Art. I, §8, cl. 3). If the power exists for a federalized attorney-client privilege, presumably a rule that affected only an aspect of that privilege (and its close relative – work-product protection) would also pass constitutional scrutiny.

Timothy P. Glynn, in his article, *Federalizing Privilege*,<sup>140</sup> argues that Congress would have the power under the Commerce Clause to enact a federal law of attorney-client privilege that would apply to the states. He recognizes that the Supreme Court has served notice that Congress's powers under the commerce clause have outer boundaries. Thus, in *United States v. Lopez*,<sup>141</sup> the Court invalidated an act making the possession of a gun on or near school premises a crime as beyond the commerce clause powers. In *United States v. Morrison*,<sup>142</sup> it took the same action with regard to an act providing a federal civil remedy for the victims of gender-motivated violence. Glynn points out the obvious differences between legislation such as that involved in *Lopez* and *Morrison* and a regulation that arguably, at least, fosters and protects the economic and commercial activity between attorneys and clients. He adds that the "attorney-client privilege protects communications upon which the industry's article of commerce – provision of legal services – depends."<sup>143</sup>

---

<sup>140</sup>52 Amer. U. L. Rev. 59, 156-171 (2002).

<sup>141</sup>514 U.S. 549 (1995).

<sup>142</sup>529 U.S. 598 (2000).

<sup>143</sup>Glynn, 52 Amer. U. L. Rev. 159.

Glynn also raises the possibility that Congressional action might be limited by Tenth Amendment considerations. There are recent cases that place limits on Congressional action because of a violation of principles of federalism. For example, in *New York v. United States*,<sup>144</sup> the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act because it, in effect, required the states to implement legislation. Likewise, in *Printz v. United States*,<sup>145</sup> the Court invalidated a provision in the Brady Handgun Violence Prevention Act that would have required law enforcement officers to administer a federal program. On the other hand, in *Reno v. Condon*,<sup>146</sup> the Court upheld a provision of the Driver's Privacy Protect Act that made no such demands on state legislators or local executive officials.

A rule that would adopt the principle of selective waiver and apply it to the states would make no demands on the states like the legislation in *New York* and *Printz*. The rule is self-executing. It simply needs to be enforced by the courts of the state. At least one author, Anthony J. Bellia, Jr., has questioned the power of Congress under the Tenth Amendment to enact procedural rules unconnected with substantive federal rights.<sup>147</sup> However, the legislation that was the focus of the Bellia article, the Y2K Act, involved notice to defendants before commencing suit – not a matter as integrally connected to the regulation of legal commerce as is the rule proposed here. Arguably, the attorney-client related protections involve substantive protections. The “privilege regulates, indeed protects and promotes, primary conduct and commercial activity –

---

<sup>144</sup>505 U.S. 144 (1992).

<sup>145</sup>521 U.S. 898 (1997).

<sup>146</sup>528 U.S. 141 (2000).

<sup>147</sup>

Anthony J. Bellia Jr, *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947 (2001).

attorney-client communications and the provision of legal services— and serves interests wholly extrinsic to the litigation in which it is asserted.”<sup>148</sup>

Although one could argue that Glynn takes the concept of a federal attorney-client privilege too far, politically and as a matter of policy, by proposing a federal law totally supplanting state attorney-client privileges, more modest legislation dealing simply with the existence and scope of waiver seems likely to be upheld — especially if it is limited to the effect of disclosures made at the federal level.<sup>149</sup> Controlling subsequent use of matters disclosed in federal proceedings or to federal regulators in all courts, state and federal, is essential if such limitations are to be meaningful to the parties. As will be discussed below, controlling disclosures occurring in state proceedings or to state regulators is another matter.<sup>150</sup>

## **V. Proposed Federal Rule 502: Background of Preparation and Specifics of the Rule**

This section provides a short discussion of how proposed Rule 502 was prepared and ultimately approved for public comment. The text of the Rule and its intended application is then set forth.

### *The Process of the Rule Proposal*

---

<sup>148</sup>Glynn, 52 Amer. U. L. Rev. at 165.

<sup>149</sup>The likely validity of such legislation dealing with attorney-client privilege or work product protection may not extend to a statute that attempted to apply the same rules to evidentiary privileges generally. Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one’s imagination. It is even more difficult to argue for a statute that affected privileges such as those for marital or clergyman communications. Other privileges such as those involving law enforcement and the qualified journalist’s privilege may involve additional constitutional analyses including a determination of the impact of the provisions on First or Sixth Amendment considerations.

<sup>150</sup>See Part VI, *infra*.

On January 23, 2006, Hon. F. James Sensenbrenner, Jr., Chair of the House Committee on the Judiciary, wrote a letter to Ralph Meacham, Director of the Administrative Office of the Federal Courts.<sup>151</sup> The letter requested that the Judicial Conference “initiate a rule-making on the forfeiture of privilege.” Congressman Sensenbrenner explained the reason for seeking a rule on waiver as follows:

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the judicial conference to proceed with a rule-making that would–

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

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

-allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

Congressman Sensenbrenner recognized that “implementation of such a rule would require

---

<sup>151</sup>Letter on file with the author.

approval by an act of Congress in accordance with the Rules Enabling Act” and that “legislation would also be needed to extend the rule’s protection to subsequent litigation in state court.” He concluded that a federal rule protecting parties from waiver “could significantly reduce costs and delay and markedly improve the administration of justice for all participants.”

In response to the letter from Congressman Sensenbrenner, the Advisory Committee on Evidence Rules directed the authors of this article to prepare a discussion draft that would respond to the Congressman’s concerns. The draft was intentionally written to provide broad protection against waiver, and also to provide a uniform rule on waiver for federal and state courts, no matter where the disclosure of information occurred. The idea was to provide for the broadest possible provisions, and allow the Committee to cut back if it thought the draft went too far.

The initial draft of proposed Rule 502 provided as follows:

**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.

---

After conducting a hearing on the draft rule, the Committee decided to cut back on some of its more dramatic provisions. The Committee’s reasoning for its changes will be analyzed in the “drafting alternatives” section, *infra*; the basic changes agreed upon by the Committee were as follows:

1. Instead of providing a broad rule governing all waivers by disclosure, the rule should provide for certain situations in which a waiver will *not* be found even though it otherwise might be under common law. Those situations should track the concerns of the Sensenbrenner letter, specifically a) subject matter waiver; b) inadvertent disclosure; c) selective waiver; and d) confidentiality orders.<sup>152</sup>
2. The controversy over selective waiver warrants bracketing that provision for public comment, indicating to the public that the Committee has not definitively decided to propose the provision, and would especially appreciate public input on its merits — particularly on whether the rule is necessary or useful to encourage cooperation and limit the cost of government investigations.
3. Comity principles warranted against proposing a rule that would extend to disclosures made at the state level, i.e., in state proceedings or before state regulators. Control over state disclosures might come through separate legislation, but the Committee found that a

---

<sup>152</sup>See Part VI, text accompanying notes \_\_\_\_, *infra*.

Federal Rule of Evidence was not a proper vehicle for regulation of disclosures at the state level.<sup>153</sup>

The Committee did adhere to the following important policy choices made in the initial draft:

1. *Subject matter waivers should be found only if fairness so requires.* The Committee determined that any broader use of subject matter waiver would lead back to the unwarranted expenses that the Rule purports to regulate.<sup>154</sup>

2. *Inadvertent disclosures should be waivers only if it can be shown that the disclosing party failed to take proper measures a) at the time of disclosure and b) in seeking return of the information.* This is the predominant approach to inadvertent disclosures taken by the federal courts,<sup>155</sup> and the Committee believed that this negligence-based approach avoided the problems of either an “all” or “nothing” approach to inadvertent disclosure. The “all” approach — all mistaken disclosures are waivers, no matter what — unjustifiably increases the costs of pre-production privilege review. The “nothing” approach — inadvertent disclosures are never waivers — could encourage sloppiness, as well as gamesmanship by parties who claim that their “inadvertent” disclosures have tainted their adversaries’ cases.

---

<sup>153</sup> See Part V, text accompanying notes \_\_\_\_, *infra*.

<sup>154</sup> See Part II, text accompanying notes \_\_\_\_, *supra*.

<sup>155</sup> See text at notes \_\_\_\_, *infra*.

3. *Confidentiality orders entered by a federal court must bind non-parties.* The Committee noted that if non-parties were not bound, the parties to the order could not rely upon it in disclosing information, for fear that the information could be found “waived” in a subsequent litigation — leading, once again, to the heavy expenditures of pre-production privilege review that the Rule is designed to regulate.

4. *Federal law on federal disclosures must be binding on the states.* The Committee determined that while Rule 502 should not govern state disclosures, it needed to bind state courts to the federal rule on *federal* disclosures. Otherwise, again, the rule could not be relied upon by counsel determining the consequences of a disclosure at the federal level.<sup>156</sup>

**The text of the revised proposed Rule 502, as approved by the Advisory Committee and the Standing Committee for release for public comment,<sup>157</sup> provides as follows:**

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

(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

---

<sup>156</sup>See Part VI, text accompanying notes \_\_\_\_, *infra*.

<sup>157</sup>The action of the Standing Committee can be found at <http://www.uscourts.gov/rules/index.html#standing0606>.

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal 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).

[( c ) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]<sup>158</sup>

---

<sup>158</sup> When released for public comment, a footnote was included in this version of the proposed Rule, providing:

The bracketing indicates that while the Committee is seeking public comment, it has not yet taken a position on the merits of this provision. Public comment on this “selective waiver” provision will be especially important to the Committee’s determination. The Committee is especially interested in any statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions.

(d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

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

- 1) “attorney-client privilege” means the protection provided for confidential attorney-client communications, under applicable law; and
- 2) “work product protection” means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

---

The Committee Note to the proposed Rule 502, as revised, explains the reasoning behind the Rule, the need for the Rule, and provides a justification for some of the policy choices that were made. The Committee Note provides as follows:

---

As the Committee has taken no provision on the bracketed provision, it is obvious that there is nothing in the proposed rule that is intended either to promote or deter any attempt by government agencies to seek waiver of privilege or 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 communications 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. For example, 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 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).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product 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 (5<sup>th</sup> Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burlison*, 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 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 protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *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); *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). The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation

that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5<sup>th</sup> Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). 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.

**Subdivision (b).** Courts are in conflict over whether an inadvertent disclosure of privileged information 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 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 in connection with a federal proceeding 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., 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 covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to “inadvertent” disclosure, as opposed to using any other term, because the word “inadvertent” is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the “consequences of inadvertent waiver”); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (“There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.”).

[**Subdivision (c)**]: Courts are in conflict over 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 a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances 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 covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield 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 or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality 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.]

**Subdivision (d).** 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 Center 2004) (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 when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, 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. 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 (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. *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.

**Subdivision (f).** 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.

## **VI. Drafting Alternatives**

The Committee made a number of important policy decisions in drafting proposed Rule 502.<sup>159</sup>

The major choices, and the alternatives taken, can be described as follows:

---

<sup>159</sup> The authors of this article were charged by the Committee to prepare a first draft of proposed Rule 502. That draft was reviewed by the Committee, and the Committee took testimony from members of the bench, bar and academia as part of its Spring 2006 meeting. See the discussion of the first draft of the rule in the text at note —, supra. The Committee then conferred and agreed on a number of drafting changes. These were implemented by the co-authors; the proposed Rule set forth at — supra, was unanimously approved by the Committee and then by the Standing Committee. In this section we attempt to describe the Committee’s views, as expressed during the

1) Should the Rule determine when the privilege or work product is waived, or should the question of waiver be left to the common law and the rule focus on *exceptions* to the common-law waiver rules? The Committee ultimately decided to leave the basic question of waiver to common law, so that the Rule is one that establishes exceptions to whatever waiver rules currently exist.

2) To what extent should the Rule cover state court decisions on waiver? The Committee ultimately decided that the Rule should not establish a waiver rule or exception for any disclosure made in a state proceeding or to a state regulator. However, the Committee found it critical for the federal rule to govern disclosures made at the federal level, either in a federal proceeding or to a federal regulator – even if the information is sought to be used in a subsequent state court proceeding. Otherwise the predictability that is necessary for counsel to determine the consequences of disclosure at the federal level would be substantially undermined.

3) Assuming selective waiver should be enforced, should the Rule require a confidentiality agreement between the client and the regulator? The Committee decided that a confidentiality agreement should not be a necessary condition for limiting the scope of a waiver to a regulatory authority.

#### **A. Waiver Rule or Exception-to-Waiver Rule?**

---

Committee meeting and in the vote on Rule 502; but we do not intend to speak for the Committee.

An initial draft of the Rule provided, in the first subdivision, that any voluntary disclosure of privilege or work product constituted a waiver, but that the scope of such a waiver would not extend to related undisclosed material unless fairness required such a drastic result.<sup>160</sup>

After the hearing on the rule conducted by the Committee, it became clear that problems would arise if the rule purported to establish that all “voluntarily” disclosed material constituted a waiver. First, there are a number of situations under common law in which voluntary disclosures do not constitute waivers. Examples include disclosures to non-clients sharing a common interest;<sup>161</sup> disclosures to experts and others who are necessary for the representation;<sup>162</sup> and disclosures to corporate personnel on a “need to know” basis.<sup>163</sup> The Committee had no desire to change these common-law doctrines under which a waiver would not be found. But if there was a basic rule providing that all voluntary disclosures constituted waivers, it would then be necessary to craft exceptions to that waiver rule for each of these lines of common-law authority — even though there was no real controversy over any of these lines of authority and no real reason for codification. Moreover, the Committee was not confident that it could find, and attempt to codify, all of the exceptions to the basic principle that a voluntary disclosure constitutes a waiver. There was legitimate concern that any attempt to do so would be underinclusive and would then result in

---

<sup>160</sup>See Part V, *supra*.

<sup>161</sup> On the common interest rule, see S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual* ¶ 501.02[5][e][iii] (9<sup>th</sup> ed. 2006).

<sup>162</sup> See, e.g., *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (the privilege extends to communications to a non-lawyer, when hired by the lawyer and necessary to the representation).

<sup>163</sup> See, e.g., *Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D. C. Cir. 2002) (no waiver of privilege where communications are sent to corporate personnel on a need-to-know basis).

an inadvertent and unwarranted change to the common-law waiver rule.

Second, there is often a fine line between whether there has been a waiver of a privilege, and whether a communication is privileged in the first place. Examples include the *Garner* doctrine,<sup>164</sup> under which statements made to counsel by a fiduciary are held not privileged as to the beneficiaries. One could credibly look at this doctrine either 1) as a waiver of privilege, or 2) as a doctrine holding that any communication from the fiduciary was not privileged in the first place, as to the beneficiaries, because of the expectation that the statements were made for their benefit. Another example is a statement made by a client to the attorney with the expectation that it could be disclosed to the public at some later point, e.g., communications made so that the attorney can draft the provisions of a contract.<sup>165</sup> One could credibly argue that this doctrine is grounded in waiver — that the privilege is lost when the communication is disclosed to the public— though the better analysis is probably that the communication was never privileged in the first place because there was no expectation at the time of the communication that it would remain confidential. A final example of the fine line between waiver and privilege is the crime-fraud exception.<sup>166</sup> The crime-fraud exception has been treated as a freestanding exception to the

---

<sup>164</sup> *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). For a discussion and critique of the *Garner* doctrine, and its extension beyond shareholder suits to other fiduciary relationships, see Stephen A. Saltzburg, Saltzburg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817, 846 (1984)

<sup>165</sup> See, e.g., *In re Grand Jury Proceedings*, 33 F.3d 342 (4th Cir. 1994) (information used by counsel to prepare SEC filings was not privileged, since all that was revealed were matters communicated to the attorneys “for their use in connection with public disclosures, which made the communications and data underlying them non-privileged under the relevant case law”); *United States v. (Under Seal)*, 748 F.2d 871 (4th Cir. 1984) (communications were not privileged where they were to be used by the attorney to prepare a public document, and where the client did not impose a conditional limitation on the disclosure of the information).

<sup>166</sup> For a discussion of the crime-fraud exception to the attorney-client privilege, see S. Saltzburg,

privilege, but it could credibly be analyzed under a waiver-forfeiture analysis, i.e., the client waives the privilege when communicating with the attorney with the intent to further a crime or fraud.

Because of the fine line, in many areas, between waiver of privilege and whether a communication is privileged at all (or whether there is some other exception), the Committee was wary of attempting to establish a basic rule that all voluntary disclosures constitute “waivers” unless there is some enumerated exception in the rule. The Committee saw a risk of unnecessarily altering long-established common-law principles establishing when a privilege does or does not exist.

Third, it must be remembered that the Rule is designed to cover waiver consequences for both the attorney-client privilege and the work product protection. It is by no means clear that a voluntary disclosure of work product has exactly the same consequences in all situations as a voluntary disclosure of a privileged communication. For example, the common interest rule can play out differently for privilege and work product: the non-client must be pursuing a common legal objective for the privilege to hold, whereas the work product protection may apply so long as the material is not turned over to an adversary in litigation.<sup>167</sup> The Committee was therefore wary about establishing a single voluntary-disclosure-equals-waiver rule for privilege and work product.

Finally, the Committee was concerned about the merits of a general rule that a voluntary

---

M. Martin & D. Capra, *Federal Rules of Evidence Manual* ¶ 501.02[5][1][iii] (9<sup>th</sup> ed. 2006).

<sup>167</sup> See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (finding waiver of the privilege where communications are turned over to a regulator; but finding no waiver of work product).

disclosure constitutes a waiver. It is not obvious that every disclosure of privilege that can be deemed “voluntary” (in the sense that it is not compelled by a court order) should be presumed to be a waiver. For example, the ABA has charged that the Justice Department employs a policy under which a corporation or individual will be threatened with prosecution unless privileged material is “voluntarily” turned over to the government; the charge is that “cooperation” is gauged by the willingness to turn over privileged material.<sup>168</sup> DOJ officials have denied that there is such a standing practice.<sup>169</sup> But whatever the reality, it is clear that reasonable minds can differ about whether a regulator’s demand for waiver of the privilege (either as a standing practice or on a case-by-case basis) results in a “voluntary” disclosure of that information.<sup>170</sup> True, there is no court order mandating the turnover of information. But in reality, it can often appear that the client has no choice but to cooperate. The Committee did not want to interject itself into the politics of government demands for the “voluntary” disclosure of privileged information; it chose instead to limit the consequences of such a disclosure if it is determined to be voluntary by a court.

---

<sup>168</sup> See Memorandum from Larry D. Thompson, Deputy Attorney General, Department of Justice, to Heads of Department Components, United States Attorneys, Principles of Federal Prosecution of Business Organizations (January 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organization.pdf](http://www.usdoj.gov/dag/cftf/business_organization.pdf) (noting that “one factor may weigh in assessing the adequacy of the corporation’s cooperation” is a waiver of privilege and work product). See also the ABA resolution opposing the allegedly “routine” practice of seeking waiver of privilege and work product as part of any cooperation with the government, available at <http://www.abanet.org/poladv/acprivilege.htm>

<sup>169</sup> See testimony of Associate Attorney General Robert McCallum before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, at an oversight hearing on the subject of government waiver policies, March 7, 2006. Mr. McCallum’s written testimony is available at <http://www.abanet.org/poladv/testimony306.pdf>

<sup>170</sup> See *Qwest Communications International, Inc. v. New England Health Care Employees Pension Fund*, 450 F.3d 1179 (10th Cir. 2006), discussed in the text accompanying notes 98-109, *supra*.

For all these reasons, the Committee decided to promulgate a rule that would leave it to the common law to determine whether a disclosure of privilege or work product was or was not a waiver. The proposed rule thus operates as follows: *assuming* that a disclosure is found to be a waiver under the common law, there are certain situations in which that common-law doctrine must be abrogated or limited in order to protect against inefficient expenditures in litigation and to provide some predictability for choices made in litigation.

## **B. Should the Rule Cover State Court Determinations?**

### *Disclosures Made at the Federal Level; Subsequent Use in State Proceedings*

As discussed above, a major animating principle in proposing Rule 502 is that parties and their counsel must be able to rely on the protections of the Rule. For example, if counsel obtain a confidentiality order allowing each side to take a “quick peek” of the adversary’s materials without a pre-production privilege review, they need to know that the confidentiality order is enforceable in *any* subsequent litigation. Otherwise the concern of a subsequent finding of waiver would provide a disincentive, and return the parties to the exorbitant expenses of pre-production privilege review that the rule is designed to avoid. Likewise with selective waiver: if counsel turns over privileged material to a government regulator in reliance on a rule that this will not constitute a waiver to private parties, then counsel needs to know that this protection will be enforced in *any* subsequent proceeding. Otherwise the concern of a subsequent finding of waiver will again provide a disincentive to cooperate with the government.

The Committee therefore determined that any rule protecting against waiver for disclosures made at the federal level— either in a federal proceeding pursuant to a confidentiality order or to a federal regulator in reliance on the rule of selective waiver — would have to have binding effect at both the state and federal level. The Committee was confident that any rule binding state courts to a federal statute protecting disclosures made in federal proceedings was within Congress’s powers.<sup>171</sup>

### *Disclosures Made at the State Level*

The more difficult question is whether a federal law can or should control an initial disclosure that occurred at the *state* level. For example, assume that state law provides that disclosure to a government regulator constitutes disclosure for all purposes. Despite the state rule and regardless of the court in which the issue arises, the consequences of a disclosure made to a federal regulator are governed by Rule 502. But what if the disclosure is made to a *state* regulator? Is there a legitimate justification for overriding the state privilege rule? Should the law in this area be completely federalized?

The initial draft of Rule 502 (prepared by the authors of this article), provided that the rules on waiver would bind both federal and state courts, regardless of whether the disclosure was made at the federal or state level. It thus opted for full uniformity. The draft relied on a credible basis: that Congress has the power to enact a privilege rule that governs disclosures wherever they are made — whether at the state or federal level.<sup>172</sup> Yet we recognized that the fact that

---

<sup>171</sup> See Section \_\_\_\_, *infra* for a discussion on Congressional power to enact proposed Rule 502.

<sup>172</sup> See Timothy P. Glynn, *Federalizing Privilege*, 52 *Amer. U. L. Rev.* 59, 156-171 (2002), and the discussion in the text at notes \_\_\_\_, *supra*.

Congress might have the *power* to do so did not necessarily mean that the Advisory Committee should ultimately propose a rule that would allow federal law to displace state privilege law in all instances. After all, a concern for state prerogatives on privilege led Congress to reject the Advisory Committee's original proposals for federal rules of privilege.<sup>173</sup> Thus, we drafted the rule broadly to illustrate to the Committee how far we thought the rule *could* go, leaving it to the Committee to make the policy determination as to how far it *should* go.

The Committee believed that any federal rule that would govern privilege for information initially disclosed in a state proceeding would need an especially strong justification. The Committee found no such justification. The fact is that most of the horror stories of excessive costs of litigation on the one hand, and disclosure to regulators on the other, have arisen in federal and not state proceedings.<sup>174</sup> And it would be a dramatic extension of federal privilege to promulgate a rule that would, for example, override a state rule on waiver even for a disclosure made at the state level and offered in a subsequent state proceeding.

The Committee was also made aware of concerns expressed by the Judicial Conference Committee on Federal-State Jurisdiction. In a letter dated June 21, 2006 to the Chair of the Rules Committee, the Chair of the Federal-State Jurisdiction Committee declared that the first draft of the rule:

raised significant concerns for the Federal-State Jurisdiction Committee, which includes three state supreme court chief justices and a former chief justice. That draft would have

---

<sup>173</sup> For a discussion of the history behind Rule 501, and the rejection of the Advisory Committee's proposed privileges, see S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual*, ¶ 501.02 (9<sup>th</sup> ed. 2006).

<sup>174</sup> See *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (collecting examples, all from federal litigation) .

extended the proposed rule’s protection to inadvertent disclosures “made during discovery in federal or state litigation or administrative proceedings” and to selective disclosures “made to a federal, state, or local governmental agency during an investigation by that agency.” Essentially, the discussion draft proposed to federalize the rules of waiver and make them applicable in both state and federal proceedings. The draft was intended to facilitate consideration of a full range of options, but the proposed application to state court systems would have constituted a substantial limitation on the authority of state courts to govern their own proceedings.<sup>175</sup>

Ultimately the Committee determined that it would be overreaching to try to control disclosures made at the state level and that it should focus on the consequences of disclosures initially made in *federal* proceedings. If Rule 502 ultimately is proposed to Congress, the Committee plans to draft an accompanying letter pointing out that disclosures initially made in state proceedings are not specifically covered, and that if Congress wishes to cover such disclosures, it will have to do so in separate legislation.

For its part, the Committee on Federal-State Jurisdiction noted that the revised proposal for Rule 502, governing only the effect of disclosures made at the federal level, “avoid[s] the significant problems that would have been created by the original draft.” The Federal-State Jurisdiction Committee explained as follows, in the context of the rule’s effect on inadvertent disclosures:

As revised, the proposed rule could be viewed as a choice-of-law rule, providing a federal

---

<sup>175</sup> Letter on file with the authors.

rule to govern the consequences of inadvertent disclosures that take place in federal proceedings, and obligating state courts to respect that federal rule in later proceedings in state court. Viewed in this context, the revised rule appears less intrusive because it does not seek to impose on the state courts a federal rule of what constitutes an inadvertent waiver. Rather, it would require the state courts to respect the federally-defined consequences of an inadvertent waiver that initially occurred in a federal proceeding. Such an approach seems consistent with principles of federalism and comity that exist between the federal and state court systems.<sup>176</sup>

*Disclosures at the State Level; Subsequent Use in Federal Court*

This is not to say that an initial disclosure in state proceedings or to a state regulator is necessarily controlled by state law if the information is later demanded in a *federal* proceeding. Under Rule 501, privileges in federal question cases are determined by federal common law or federal statute; where state law provides the rule of decision, privilege is governed by state law. If enacted in its current form, Rule 502 would provide four important federal rules on waiver, but only for disclosures made at the federal level. Those four rules are: 1) no subject matter waiver unless undisclosed information ought in fairness to be disclosed; 2) mistaken disclosures are not

---

<sup>176</sup> Letter on file with the authors. It should be noted, however, that the Federal-State Committee ultimately reserved judgment on even the pared-down version of Rule 502 as released for public comment. Some of the members of the Committee express concern that “requiring all states to adhere to a uniform rule based upon the treatment of disclosures in the course of federal litigation may undermine the traditional control that state courts have exercised over the application of waiver rules.” The Committee noted that some of its members “took the position that state courts should be free to determine what constitutes a waiver, even where the waiver occurred in an

waivers unless there was negligence in the disclosure and in the failure to seek return; 3) disclosure to a regulator does not operate as a waiver to private parties; and 4) confidentiality orders can be entered by a court that will bind non-parties, depriving them of the opportunity to argue that a waiver occurred if the disclosure was in accordance with the court's order. What happens if 1) a disclosure is made at the *state* level (in a state court proceeding or to a state regulator); 2) the state law of waiver is different from Rule 502 (in one of the four respects set forth above); and 3) a party seeks to rely on the state law of waiver in a subsequent *federal* proceeding?

The answer is somewhat complicated, but it appears to be as follows:

1) *Subject matter waiver*: If the state law would find a subject matter waiver for a state disclosure where Rule 502 would not, a party could argue in federal court that subject matter waiver is mandated under the state law even though fairness does not require it. If the subsequent federal case lies in diversity, then it would appear that this argument would be meritorious. The federal court would have to find a subject matter waiver because state law provides the rule on privileges under Rule 501. If it is a federal question case, then a finding on subject matter waiver would depend on federal common law; Rule 502 does not govern because it applies only to disclosures made at the federal level.

The federal common law on subject matter waiver was previously discussed,<sup>177</sup> and as noted, the federal courts are not uniform. This will mean that in federal question cases, the existence of a subject matter waiver for disclosures initially made at the state level may well vary

---

earlier federal proceeding.”

<sup>177</sup> See Part II, *supra*.

from court to court — though it might be hoped that the common law will fall into a uniform line by the persuasive effect of Rule 502.

2) *Inadvertent Disclosures*: Assume that a mistaken disclosure is made in a state proceeding with a waiver rule different from that provided in Rule 502 — for example, that a mistaken disclosure is always a waiver. Will that state rule be enforced in a subsequent federal proceeding? The answer is yes if the action lies in diversity; as previously explained, Rule 501 provides that state law of privilege applies in diversity, and the waiver standard in Rule 502 does not control because it applies only to disclosures made at the federal level. If it is a federal question case, the effect of the disclosure will be governed by federal common law, which is not uniform.<sup>178</sup> But again, it can be hoped that the federal common law, as applicable in this narrow area, will over time come into line with the standard provided for federal disclosure in Rule 502.

3) *Selective Waiver*: Rule 502 *would* end up having some effect on disclosures initially made to state regulators and offered by private parties in subsequent federal proceedings. The selective waiver provision of Rule 502 currently provides specific language indicating that the effect of a state disclosure to a regulator is governed by state law. If this language is ultimately enacted, it would mean that as a matter of federal law, the effect in a federal proceeding of a disclosure made to a state regulator is governed by state law. Thus the proposed language incorporates the relevant state law on waiver and makes it federal law for the purpose; as such it overrides the federal common law that would otherwise apply. The applicable law on waiver (state law) would thus apply in both state and federal cases.<sup>179</sup>

---

<sup>178</sup> See the discussion in the text at notes \_\_\_\_, supra.

<sup>179</sup> It is possible that the language of the Rule, deferring to state law as a matter of federal law, could create a problem if there are disclosures to regulators in a number of states, and the state

One might ask why state law is incorporated into federal law for purposes of selective waiver, but federal common law applies for the other matters addressed by proposed Rule 502 (specifically subject matter waiver and inadvertent disclosure). It must be said that the Committee, in adding language concerning the applicability of state law to disclosure to state regulators, did not consider in detail the choice of law questions that arise with respect to subject matter waiver and inadvertent disclosure. These are the kinds of complexities that are sorted out in the public comment period. It is possible that the Committee might decide that special treatment is necessary for selective waiver, given the controversy over that doctrine. It might be thought too drastic (contrary to comity) to impose a federal law based on the premise of limiting the costs of government investigations, where the investigation is being pursued by a *state* entity in a state

---

law on waiver is different in those states. For example, assume that a corporation discloses privileged information to a regulator in State 1, where the disclosure operates as a waiver to private parties, and the same disclosure to a regulator in State 2, where disclosure does not operate as a waiver to private parties. If an action is now brought in federal court by a private party, does that private party get the information? Proposed Rule 502 provides that the effect of a waiver is governed by state law, but which state's law is applicable? Presumably the answer is found in federal common law choice-of-law rules.

A different problem under proposed Rule 502 arises when the corporation discloses privileged material to both a federal and state regulator, and the state disclosure is made in a state that does not recognize selective waiver. In a subsequent federal action brought by a private party, does the private party get access to the privileged material? Here the question is not really one of choice of law, since it is clear that federal law governs under Rule 501. The problem is that the proposed federal law provides different consequences for a state and federal disclosures. If proposed Rule 502 is enacted in its current form, it will probably mean that any disclosure to a state regulator, in a state without a selective waiver rule, will operate as a waiver to private parties even if the disclosure would also be protected insofar as it was made to a federal regulator.

This is not an anomalous result. It simply means that federal legislation is deferring to state prerogatives concerning the effect of disclosures of privileged information when made at the state level. As a practical matter, it means that counsel needs to inform the client that any disclosure to a state regulator in a state without a selective waiver rule will likely constitute a complete waiver to private parties, even in subsequent federal litigation.

without a selective waiver provision. Shouldn't the decision of whether selective waiver is useful in limiting the cost of state investigations be left to the state?<sup>180</sup>

It is also possible that the Committee might decide that uniform choice-of-law treatment is necessary for subject-matter waiver, inadvertent waiver and selective waiver, as to disclosures made at the state level where use is sought in subsequent federal proceedings. This can be done in one of three ways:

- 1) The language in the selective waiver subdivision, providing that “[t]he effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law”, could be deleted. This would mean that selective waiver would have the same choice of law rule as subject-matter waiver and inadvertent waiver: where the disclosure is made at the state level and the protected information is offered in a federal proceeding, the state waiver rule controls in diversity cases and the federal common law waiver rule controls in federal question cases.
- 2) The language in the selective waiver subdivision, providing that “[t]he effect of disclosure [at the state level] is governed by applicable state law”, could be replicated in the provisions governing subject matter waiver and inadvertent waiver. This would mean that the choice of law rule for all three provisions would be the same, but the actual law chosen would be different from option 1, above, for federal question cases. It would mean that where the disclosure occurs at the state level and the protected information is proffered in a federal proceeding, waiver would be determined by state law. This result

---

<sup>180</sup> All this assumes, of course, that selective waiver will even be part of Rule 502. As released for public comment, the selective waiver provision is in brackets. The Committee is seeking public comment, but it has not yet decided on the merits of selective waiver. See \_\_\_\_, supra.

would give primacy to comity principles, but it might result in more uncertainty for counsel in determining whether to rely on Rule 502.

3) The proposed Rule could be changed to provide that if disclosure is made at the state level, its effect in a federal proceeding is governed by Rule 502. So for example, if a disclosure is made in a state proceeding in a state in which inadvertent disclosures are always waivers, the use of the disclosed information in a subsequent federal proceeding would not be automatic. It would depend on whether the standards of Rule 502 have or have not been met (i.e., whether the party reasonably guarded against disclosure and diligently sought return of the protected information). This option would provide the greatest certainty for parties. They would know that they could rely on Rule 502 whether the disclosure of protected information was made at the federal or state level. (Though it must be remembered that Rule 502 will not apply to state disclosures later offered in *state* litigation.). This option, however, is the most offensive to comity principles because it overrides state law on privileges even where disclosures are made at the state level. While Congress may wish to enact such a law, it may be difficult for the Advisory Committee to propose a rule overriding state law as to state disclosures, given the concerns of the Judicial Conference Committee on Federal-State Jurisdiction.<sup>181</sup>

4) *Confidentiality Orders*: Proposed Rule 502 does not purport to determine the effect of a confidentiality order that is entered by a state court, when the information is sought in a subsequent federal proceeding. Nor does Rule 501 apply. The enforceability in federal court of the order of a state court is not a question of privilege at all, but rather is governed

---

<sup>181</sup> See text at note \_\_\_\_, supra, for concerns expressed by the Judicial Conference Committee on

by law providing the respect that federal courts must give to state court determinations.<sup>182</sup>

Neither Rule 501 nor Rule 502 purports to alter that longstanding body of law.

### *A Federal Rule of Evidence Governing Use in State Courts?*

As discussed above, the proposed Federal Rule 502 does not attempt to impose federal law when disclosures are made at the state level; but it does bind state courts to a uniform federal rule when disclosures are initially made at the *federal* level. Is it appropriate for a Federal Rule of Evidence to extend its reach to a state court determination? To clarify, the question raised at this point is not whether Congress has the power to enact such a rule; the question instead is whether it is advisable to place such a rule in the Federal Rules of Evidence.

There is undeniably some tension between proposed Rule 502 and Fed.R.Evid. 1101(a), which states that the rules apply to “the United States district courts.” It could be argued that Rule 1101 (c) resolves any anomaly by providing that rules of privilege apply to “all stages of all actions, cases and proceedings.” But it could also be argued that the term “all” is implicitly

---

Federal-State Jurisdiction.

<sup>182</sup> See, e.g., 28 U.S.C. § 1738 (the Full Faith and Credit Act), 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 6 Moore’s Federal Practice, § 26.106[1] n.5.2 (3d ed. 2006) (noting that “courts asked to modify another court’s protective order are constrained by principles of comity, courtesy, and, when a court is asked to take action with regard to a previously issued state court protective order, federalism” , citing *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 499 (D. Md. 2000)).

limited by subdivision (a), which refers to federal proceedings only.

Given the fact that it is critical to cover both state and federal proceedings with the same waiver standards, at least as to disclosures initially made in a federal context, is there any drafting alternative to that taken in the draft Rule 502? One alternative would simply be to cover only federal proceedings in the rule, and leave state proceedings to parallel legislation adopted by Congress. This alternative would mean that all references to state proceedings would be eliminated from the draft, and a separate letter to Congress would stress the need for conforming legislation that covers state proceedings.

The Committee decided to include state proceedings within the text of the rule, at least at this point, to make the public aware that there is an explicit intent to cover state proceedings in any legislative attempt to promulgate a rule protecting against waiver when the disclosure is initially made at the federal level. That intent would not be as clear if the references to state proceedings were taken out of the text of the draft and left to an explanation in some kind of covering letter. The Committee thought it better to provide notice about the reach of the rule in the text of the rule, and to leave it to Congress to determine whether to enact a single rule or parallel legislation binding state courts. The Committee intends to make it clear to Congress that whatever path it takes, it is critical to the legislation that states must be bound by the federal rule governing disclosures made at the federal level.

### **C. Enforcing Selective Waiver Even Without a Confidentiality Agreement**

As discussed above, a number of courts suggest that they would enforce selective waiver

only if the client has entered into a confidentiality agreement with the government regulator.<sup>183</sup> A few courts enforce selective waiver even without such an agreement.<sup>184</sup> The Committee has not taken a final position on selective waiver; the language in Rule 502 providing for selective waiver has been bracketed, meaning that the Committee is as yet undecided and is including the provision in order to obtain public comment on it. This is not surprising, as the selective waiver provision is clearly the most controversial provision in the proposed Rule.<sup>185</sup>

The Committee has decided, however, that if a selective waiver provision is to be included, it should not require confidentiality agreements as a condition for protection against a full waiver.

The Committee concluded that a requirement of a confidentiality agreement would not fully implement the policy of encouraging cooperation with government investigations that would be the animating principle of any rule enforcing selective waiver. The Committee came to this conclusion for several reasons.

First, the term “confidentiality agreement” is not self-defining; many agreements entered into by the SEC contain only conditional confidentiality language.<sup>186</sup> The conditions include the possibility that the privileged material will be disclosed to other law enforcement officials, and also that confidentiality is maintained “except to the extent that the Staff determines that

---

<sup>183</sup>See text accompanying notes \_\_\_\_, *supra*.

<sup>184</sup>See text accompanying notes \_\_\_\_, *supra*.

<sup>185</sup>Most of the testimony at the hearing held by the Advisory Committee was addressed to the selective waiver provision. The transcript of the testimony is on file with the author and is available at <http://www.uscourts.gov/rules>.

<sup>186</sup>E-mail from SEC (Morrison), on file with the authors.

disclosure is otherwise required by federal law or in furtherance of the Commission’s discharge of its duties and responsibilities.” The Committee concluded that the SEC needs the flexibility provided by these conditions to fulfil its enforcement obligations; the Commission could not be bound to absolute non-disclosure.

The conditional confidentiality agreements currently in play are not very relevant to the question of whether to enforce a selective waiver. The rationale for conditioning selective waiver on a confidentiality agreement is that the party appears to be trying to limit the breadth of the disclosure of the protected information, i.e., the party is not trying to abuse the privilege by authorizing widespread disclosure, yet trying to prevent use by private parties. But the substantial limitations on confidentiality in the SEC agreements indicate that government use of the protected information after disclosure is likely to be extensive. Thus the current practice cuts strongly against requiring “confidentiality agreements” as a condition to selective waiver; such “confidentiality agreements” do little to protect the privilege.<sup>187</sup>

The Committee also noted that legislation introduced in Congress in 2003 and supported by the SEC<sup>188</sup> did not require a confidentiality agreement to prevent waiver of the privilege when privileged documents were shared with the Commission. To the extent the Committee is doing Congress’s work in drafting Rule 502, the Committee considered this proposed legislation to have some relevance.

The Committee also took note of the SEC’s examination program, which inspects the

---

<sup>187</sup>See the discussion of *Qwest Communications International, Inc v. New England Health Care Employees Pension Fund*, 450 F.3d 1179 (10th Cir. 2006), note \_\_\_\_, *supra*.

<sup>188</sup> H.R. 1729

books and records of brokerage firms, investment advisers and mutual funds.<sup>189</sup> These examinations are not performed pursuant to confidentiality agreements, and yet they rely on cooperation and turnover of privileged communications and work product.<sup>190</sup> The Committee concluded that if selective waiver is to be adopted, it would be as a means to encourage cooperation with government investigations; and if this is so, then the encouragement should apply to all aspects of government regulation.

Fundamentally, the Committee concluded that a confidentiality agreement requirement imposed a formalism that would impede efficient cooperation with the government — a formalism that has very little to do with whether it is fair or appropriate to limit the breadth of a waiver of privilege or work product. Essentially the requirement would create lawyers' work without an apparent corresponding benefit. The reasoning is probably best explained in a paragraph of the draft Committee Note:

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

---

<sup>189</sup> For a description of the SEC examination program, see <http://www.sec.gov/news/speech/spch020706mag.htm>

<sup>190</sup> Morrison e-mail, on file with the authors.

the information for some purpose and then would find it difficult to be bound by an airtight 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.

## **VII. Conclusion**

We have attempted to set out the justification for proposed Rule 502 and the reasons behind its language. The Rule is now out for public comment and we fully expect that there will be considerable discussion of both the need for the Rule and of its language. Certainly, the bracketed selective waiver section will be enormously controversial.

Most litigators report that the burden on them and on their clients of protecting the attorney-client privilege and work product protection during the discovery phase of very many civil and white-collar criminal cases has become overwhelming. Something needs to be done to reduce the costs of such discovery. We believe that the proposed Rule provides a set of provisions that will reduce the expense of the process, but yet guard against the abuses that may occur with a rule that would give a *carte blanche* to turn over privileged documents without any review of their content or permit unfettered use of information dealing with the same subject matter as contained in disclosed documents without regard to considerations of fairness. The

proposed Rule also gives the parties the opportunity to agree on disclosure arrangements that will not only bind the parties to the agreements but others as well. The Rule contemplates an impact not only on future federal court proceedings but on state court proceedings as well. We believe that such an impact is justified and indeed necessary if the Rule is to have a real effect on costs to the parties, but we expect that public comment will better inform us all as to the tolerance for such an intrusion on previously accepted notions of comity between the federal and state courts.

The selective waiver provision is intended to promote a more open dialogue between federal government agencies and individuals or companies investigated by them. As reflected in the case law, there are good reasons both for permitting disclosure of information limited solely to the agency and for holding that any disclosure results in a waiver as to the entire world. The drafted section sets out a rule that we believe effectively limits the waiver of information disclosed to a federal government agency. The difficult policy decision is whether such a provision is justified. Ultimately, the decision of whether to include the selective waiver section is the kind of public policy decision appropriately left to Congress.

Our position is that the Rule as drafted and submitted for public comment deals effectively with the issues involving inadvertent waiver, scope of waiver and selective waiver of the attorney-client privilege and work product protection. We hope that, by this article, we have laid the ground work for a thorough and meaningful discussion on whether we are right about the effectiveness of our drafted language and on the more important issue of whether a Rule of this kind is a good idea.