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Memorandum To: Advisory Committee on Evidence Rules
From: Professors Daniel Capra, Reporter and Kenneth Broun, Consultant
Re: **Proposed Rule 502: Possible Changes to Rule as Released for Public Comment**
Date: March 15, 2007

At its Spring 2006 meeting, the Committee approved for release for public comment a rule that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule — proposed Rule 502 — was approved for release for public comment by the Standing Committee. The public comment period began in August and ended February 15, 2007. The Committee received more that 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. In addition, the Committee received comments from the Style Subcommittee of the Standing Committee, as well as informal comments from a number of judges and practitioners. Finally, at its Fall 2006 meeting, the Committee agreed to two changes to the Rule as released for public comment: 1) delete the language in the court order provision (Rule 502(d)), that made enforceability dependent on an agreement among the parties; and 2) add a sentence to the Committee Note that the mistaken disclosure provision (Rule 502(b)) was intended to apply to court-annexed and court-ordered arbitrations.

This memorandum is intended to bring to the Committee's attention all of the colorable suggestions for change to Rule 502 as it was issued for public comment. At the Spring 2007 meeting, the Committee will vote on whether to send proposed Rule 502 to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference, for ultimate approval and enactment by Congress.

With one major exception, it is for the Committee to determine whether any of the suggestions for change discussed in this memo should be added to Rule 502 as issued for public comment. That exception is the stylistic changes approved by the Style Subcommittee to the Standing Committee. Under protocol adopted by the Standing Committee, the style changes approved by the Style Committee are binding on the Advisory Committee, unless the Advisory Committee determines that a change is substantive. The style changes will be set forth below in this memo.

This memorandum is in ten parts (we know that's a lot, but this whole thing is really complicated):

Part One sets forth Rule 502, and its Committee Note, as it has been released for public comment, *with the additions approved by the Committee at its Fall 2006 meeting.*

Part Two sets forth the text of Rule 502 with the suggestions for style changes (and with the deletion to Rule 502(d) concerning agreement of the parties that has already been approved by the Committee). That version will be considered the working version of Rule 502 on which other suggestions for change will be evaluated.

Part Three discusses suggested changes to the *scope* of the Rule, e.g., application to diversity cases, application to disclosures made in state proceedings, etc.

Part Four discusses suggested changes to the provision on subject matter waiver, Rule 502(a), and/or the accompanying Committee Note.

Part Five discusses suggested changes to the provision on mistaken disclosures, Rule502(b), and/or the accompanying Committee Note.

Part Six discusses suggestions for deletion of, or changes to, the provision on selective waiver, Rule 502(c).

Part Seven discusses a suggestion for change to the court order provision (Rule 502(d)), made by the Federal-State Committee on the Conference of State Chief Justices.

Part Eight discusses a suggestion for change to the definition of work product in Rule 502(f).

Part Nine briefly discusses a proposal by the ABA for treatment of a completely different aspect of privilege waiver, and provides the heartfelt suggestion that the proposal for a substantial addition to the Rule be tabled lest the Rule itself be delayed.

Part Ten puts together some combinations of suggestions so that the Committee can see what the changes put together might look like in the Rule as a whole.

In addition, three separate memoranda pertinent to Rule are included in this agenda book and should be considered along with this memorandum:

1. A memorandum summarizing all of the public comment on Rule 502 — that summarization will be appended to the rule if and when it is submitted to the Standing Committee and further up the chain.

2. A draft of a cover letter to Congress that explains the historical background of Rule 502, the need for the rule, and some of the choices made by the Committee.

3. A report prepared by the Reporter on state laws of inadvertent disclosure. This report was prepared for the assistance of the State Federal Jurisdiction Committee, to assure that Committee that Rule 502(b) would not substantially disrupt state laws on inadvertent disclosure.

I. Proposed Rule 502 as released for public comment, with the two changes previously agreed upon by the Advisory Committee

What follows is Rule 502 and the Committee Note, as released for public comment, with the two changes previously agreed upon by the Advisory Committee: deleting the provision making enforceability of court orders dependent on agreement among the parties, and adding language to the Committee Note on court-ordered and court-annexed arbitrations.

We note that the deletion of the language on party agreements received significant support in the public comment. Commenters noted that in many cases one party may have less discovery obligations than the other, and may not want to enter a confidentiality agreement — but that should not prevent the court from entering one in order to control the costs of discovery. Other commenters noted that the parties may agree in principle on a confidentiality agreement, but may differ on the details; if the court enters an order in those circumstances, the Rule as issued for public comment may have given rise to litigation as to whether the order incorporated an agreement by the parties. All in all, it seems very sound to delete the language in Rule 502(d) that conditioned enforceability of a court order on agreement among the parties. (Also note that a reference to party agreements has to be deleted from the Committee Note to Rule 502(d)).

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.

(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 office or agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]*

* 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

(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

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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.

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.

2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

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 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure 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 (5th 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.").

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

[**Subdivision (c)**: Courts are in conflict over whether disclosure of privileged or protected information to a government office or 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 office or 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 office or 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 office or 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 office or 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 office or 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.

II. *Style amendments approved by the Standing Committee Subcommittee on Style*

As discussed above, the protocol approved by the Standing Committee provides that style suggestions made by the Subcommittee on Style are binding on the Advisory Committees — the Advisory Committee can reject a suggestion only if it determines that the proposal would change the substantive meaning or coverage of the Rule as it was issued for public comment.

Professor Joe Kimble, the Standing Committee's consultant on style, proposed a number of changes to the rule as issued for public comment. Professor Capra engaged in an extensive dialog with Professor Kimble, arguing that a few of the changes were substantive. Professor Kimble made adjustments, further dialog ensued, and further adjustments were made. After a long process, Professor Capra tentatively agreed that the changes set forth immediately below did not change any substantive meaning or coverage in the Rule as issued for public comment. The changes set forth below were then approved by the Style Subcommittee.

The Committee is encouraged to evaluate independently whether any of the changes below will result in a change of substantive meaning or coverage to Rule 502 as issued for public comment. It should be noted that the style revision was applied to the Rule with the assumption that the language in 502(d) conditioning enforceability of court orders on party agreement would be deleted.

Style Changes (additions underlined, deletions struck):

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

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal proceedings, ~~the waiver by disclosure of an~~ when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information ~~concerning the same subject matter~~ only if ~~that undisclosed communication or information~~ it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, ~~A~~ the 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:

(1) the disclosure is inadvertent and is made in connection with federal litigation or

federal administrative proceedings; ~~and if~~

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

(3) the holder 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 the 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~~ waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the ~~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~~ This rule does not limit or expand ~~the authority of~~ a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law.]

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

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

1) "attorney-client privilege" means the protection that applicable law provides ~~provided~~ for confidential attorney-client communications~~, under applicable law~~; and

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial~~, under applicable law~~.

Clean Copy of Style Changes:

If the Committee determines that the changes above are stylistic, not substantive, then the "working" version of Rule 502, on which other suggested changes will be measured, reads as follows:

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

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

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

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the effect of disclosure to a state or local-government office or agency with respect to non-governmental persons or entities. This rule does not limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is

incorporated into a court order.

(f) Definitions. — In this rule:

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

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial.

III. Suggestions for change to Rule 502 as a whole

This section considers the suggestions made in the public comment for change to Rule 502 as a whole, as opposed to any specific subdivision. Generally these suggestions are for changes to, or clarification of, the scope of the Rule.

A. Clarification that Rule 502 applies to diversity (and pendent jurisdiction) cases:

It is fair to state that the Committee decided that the protections of Rule 502 should apply to all proceedings brought in a federal court. But Lawyers for Civil Justice (LCJ), as well as others in public comment, point up that there is an ambiguity on whether the Rule applies to diversity cases. Rule 502 (a),(b), (c) and (d) all refer to "federal proceedings" and federal courts. But there is an ambiguity because Rule 501 provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law provides the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." This means that the state law of privilege governs diversity cases and also state causes of action that are pendent to federal causes of action.

So the argument can be made that there is a conflict between Rule 502, which provides a federal law of privilege for a "federal proceeding" (without distinguishing between federal question and diversity or pendent jurisdiction) and Rule 501. This conflict could be resolved by concluding that Rule 502 supersedes Rule 501 because it is later in time. But it would also be plausible to argue that Rule 502 is not applicable to diversity or pendent jurisdiction cases, because supersession on such an important question (a question which led Congress to scrap the Advisory Committee's proposed rules on privilege in favor of Rule 501) should not be inferred, but rather should be found only if the supersession is express.

The bottom line is that as written, Rule 502 could give rise to litigation on whether it is applicable to diversity and pendent jurisdiction cases. The Committee may therefore wish to consider a change to Rule 502 as it was issued for public comment, to clarify that Rule 502 applies to diversity and pendent jurisdiction cases.

One possibility for change, suggested by LCJ, is that the Committee Note specify that Rule 502 is intended to apply in diversity and pendent jurisdiction cases. That change could be made to the last of the introductory paragraphs of the Committee Note (i.e., before the notes that are tied to individual subsections) as follows:

* * *

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged

information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made. The rule is intended, however, to apply to state causes of action brought in federal court, as well as federal question cases. The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings.

* * *

Certainly the above addition will provide useful information in the Note. But a strong argument can be made that the text of the Rule should be amended as well. Given the importance of applying Rule 502 to diversity and pendent jurisdiction claims, and given the possible conflict between the text of Rule 502 and that of Rule 501, it may well be prudent to provide clarification in the Rule as well as the Committee Note. We have conferred with Professor Joe Kimble and he suggests that if the text is to be changed, the reference to coverage of diversity and pendent jurisdiction cases should be placed in a separate subdivision, which would be a new subdivision (g). That subdivision could read as follows:

(g) Federal or state law as the rule of decision.— Notwithstanding Rule 501, this rule applies regardless of whether the court is applying federal or state law to the elements of a claim or defense.

The Committee Note to this subdivision would then be the language for the Note set forth above:

Subdivision (g). The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings. Accordingly, the rule applies to state causes of action brought in federal court, as well as federal question cases.

Of course it is for the Committee to determine whether and how the Rule and/or Note should be amended to specify its coverage of diversity and pendent jurisdiction cases. But it does seem important to address the question of diversity and pendent jurisdiction coverage, in order to avoid uncertainty and future litigation.

B. Application of Rule 502 to State Court proceedings in light of Evidence Rules 101 and 1101.

Rule 502 as issued for public comment would, of course, have an effect on state court proceedings. State courts would be bound by federal confidentiality orders, and state courts could not find a waiver after a mistaken disclosure if the holder took reasonable precautions and reasonably prompt measure to retrieve the material. The Federal Bar Council suggests that Rule 502's impact on state court proceedings creates some tension with Evidence Rules 101 and 1101.

Rule 101 provides that the Evidence Rules "govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in rule 1101." Rule 1101 provides that the Evidence Rules apply to "the United States district courts" and other federal courts in all proceedings, with the exceptions stated in Rule 1101(d) (which exceptions include grand jury proceedings, sentencing proceedings, etc.). Rule 1101(c) provides that privilege apply "at all stages of all actions, cases and proceedings."

It could be argued that any tension between Rules 502 and 101/1101, with respect to applicability to state proceedings, is rectified by the language of Rule 1101(c) providing that privilege rules apply "at all stages of all actions, cases, and proceedings." But it could also be argued that this apparently broad provision must be read in context — Rule 1101 provides that the Evidence Rules are applicable to federal proceedings, and then sets forth exceptions to that general principle for certain proceedings. Rule 1101(c) could fairly be read only as an exception to those exceptions: in, say, grand jury proceedings, the Evidence Rules in general do not apply, but the rules of privilege remain applicable.

A good argument can be made that the tension between Rules 502 and 101/1101 should be addressed, because otherwise litigation could arise in state court proceedings where a disclosure of relevant privileged information has been made at the federal level. A litigant could argue that the state court is not bound by the federal waiver rule, despite its specific language, because Rule 502 has a jurisdictional limitation imposed by Rules 101 and 1101. It would seem useful and prudent to forestall that threat of litigation by some clarification.

There are two ways to extend Rule 502 to state proceedings and account for the tension raised by the jurisdictional limitations of Rules 101 and 1101.

1. One possibility is to delete all of the references to state court proceedings in the rule as issued for public comment, and, in a report to Congress, indicate that separate legislation should be implemented to bind state courts to the federal rules on waiver where the disclosure is initially made at the federal level. An example of the deletion, as applied to the mistaken disclosure provision, would be as follows:

> **(b) Inadvertent disclosure.** — In a federal ~~or state~~ proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;
(2) the holder of the privilege or work-product protection took reasonable precautions to prevent disclosure; and
(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

This proposal has the virtue of keeping Rule 502 within the general rubric of the other Evidence Rules, i.e., applicability limited to federal court proceedings. It could also be argued that separate legislation would be useful because parties looking to determine the admissibility of disclosed information in a state court proceeding might not think of looking to a Federal Rule of Evidence for the answer.

A possible disadvantage of separate legislation to bind state courts is that there might be a problem of interfacing that legislation with the passage of Rule 502. Given the vagaries of the legislative process, it is possible that Rule 502 could be enacted and the separate legislation binding state courts could be lost in the shuffle, or enacted with language that did not track the language of Rule 502. This would be unfortunate because, as written, Rule 502 at least assures a predictable result for any disclosure made in federal proceedings. If the application to state proceedings is deleted, then the protection for disclosures made in federal proceedings is substantially undermined.

Moreover, the specific question here concerns disclosures that are initially made at the *federal* level. It seems logical to think that the effect of a disclosure made at the federal level could and would be addressed in a federal rule of evidence — even if the enforceability question is later raised in state court. (A different result may attach to disclosures initially made at the state level and offered in state court proceedings, as discussed below; the parties are unlikely to look to the Federal Rules of Evidence for guidance in such a situation).

Finally, taking state proceedings out of the Rule as released for public comment would probably raise alarms among the practicing bar. As discussed below, the practicing bar believes that the rule should be *extended* to cover disclosures initially made in state proceedings. Deleting the references to state proceedings in the existing Rule might be considered a retreat, even with the assurance that the Committee would do its best to recommend separate legislation.

As the Committee has already recognized, it is critical that state courts are to be bound by the federal rule on waiver. Otherwise parties will not be able to rely on the federal rule to determine the consequence of disclosure of privileged information in a federal proceeding. If state courts are not bound, the rule will have little if any effect. Given the importance of binding state courts, it seems important to address that question in the text of Rule 502; the risks of having the question of state enforceability dropped in the legislative process, even if remote, need to be addressed given the

equences of such an oversight. There is, then, much to be said for retaining the language in Rule that imposes a binding effect on state courts.

The Committee may wish, in addition, to raise the question of binding state courts in the report to Congress, a draft of which we provide in a separate memorandum. In that report, the Committee might suggest legislation that simply says something like "the effect of a disclosure of privileged or protected information made in a federal proceeding is determined, in state proceedings, by Federal Rule of Evidence 502." If enacted, the legislation could serve to protect state litigants who might not look to a Federal Rule of Evidence for guidance (though query whether they would look to a federal statute), without raising the risk that the legislation might somehow be dropped and Rule 502 would not independently provide for binding effect on state courts.

2. If the option of deleting state proceedings from the Rule is rejected, then the second optino is to amend the rule to resolve the possible jurisdictional limitations imposed by Rules 501 and 101/1101.

One way to address the Rule 101/1101 question is to add language to the Committee Note. But as with the diversity question, the "jurisdictional" limits arguably imposed by Rules 101/1101 is probably important enough that it should not be left to a note. Like the diversity question, it seems that a new subdivision, together with a Committee Note, is the best solution if the Committee decides that the problem should be addressed.

Drafting Suggestion:

The textual addition to the Rule could provide as follows:

(h) State proceedings. — Notwithstanding Rules 101 and 1101, this rule applies to state proceedings, under the circumstances set out in the rule.

The Committee Note to this new subdivision could provide as follows:

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

C. Extending Rule 502 to determine the effect in State proceedings of disclosures initially made in State proceedings.

The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Federal-State Committee and the Conference of State Chief Justices; they argued that the Rule offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even where the disclosed material is then offered in a state proceeding (the so-called "state to state" problem). In response to these objections, the Committee voted unanimously to cut back on the Rule, so that it would not apply to disclosures initially made in state proceedings. Under the Rule as issued for public comment states are bound by the Federal Rule only with respect to disclosures initially made at the federal level. The Federal-State Committee and the Conference of Chief Justices withdrew their objections to Rule 502, and now suggest only a minor change to Rule 502(d) that will be discussed below.

While the Federal-State Committee and the Conference of Chief Justices supported the scaling back of Rule 502, the public comment from lawyers was virtually unanimously in favor of going back to the initial version of the Rule. More than a dozen public comments ardently urge that Rule 502 be extended to cover disclosures of protected information initially made in state proceedings — even if the disclosed material is offered in a state proceeding and there is no federal court involvement. Their reasoning is that without absolute uniformity, the protections of Rule 502 will be diminished, because lawyers will have to act in accordance with the state that has the least protective law of waiver. For example, the argument goes that the protections against waiver in Rule 502(b) will not be effective because if a state has a rule that every inadvertent disclosure is a waiver, then lawyers will have to protect against the possibility of waiver in that state by doing what they do now — they will have to engage in extensive and excessive preproduction privilege review in order to avoid mistaken disclosures and consequent waiver under the unfavorable state law. (A memo that Professor Capra prepared for the Federal-State Committee, in this agenda book, indicates that this scenario is unlikely because a large majority of states have a rule on inadvertent waiver that is the same as Rule 502(b), and most of the remaining states are even more protective that Rule 502(b)).

The benefits of extending Rule 502 to all disclosures and all courts, state and federal, are fairly apparent. The "lowest common denominator" would be Rule 502. Lawyers could be sure that if they followed the dictates of Rule 502, no matter what court they are in, there would not be a waiver in any court in the United States. This predictability and assurance would hopefully lead to a reduction in the costs of discovery nationwide.

But there are a number of arguments that can be made against extending Rule 502 to disclosures initially made in state proceedings, at least when the effect of that disclosure is at issue in a state proceeding:

1. It can be argued that the public comment overstates the lowest common denominator argument. Under Rule 502 as issued for public comment, there is predictable and uniform protection for disclosure of protected information that is initially made in a *federal* proceeding. Because the Rule as written binds state courts if the disclosure is initially made in federal proceedings, lawyers in federal proceedings can be assured that if they follow Rule 502, there will not be a waiver in any court in the United States. Thus, the costs of discovery in *federal court* are likely to be reduced by Rule 502 as issued for public comment.

2. The Rule as written is within the confines of a *federal* rule on privilege — it is intended to regulate conduct that occurs at the federal level, and its basic impact is to limit costs in federal court. It has an impact on state proceedings, but only because that is necessary to provide predictability and protection for federal disclosures. It can be argued that extending the Rule to disclosures initially made in state court, where the effect is to be determined in a state court proceeding, will bring the Rule outside the interests that ordinarily animate a federal privilege rule. It is true, of course, that if the Rule is extended to bind state courts as to state disclosures, the costs of discovery in state proceedings are likely to be reduced, but it can be argued that this interest is outside the scope of a Federal Rule of Evidence.

3. As discussed above in the section on Rules 101 and 1101, parties in a state proceeding are unlikely to look to Federal Rule 501 to determine the effect of a disclosure of protected information that was initially made at the state level — and especially so if that effect is to be determined in a state proceeding. It is one thing for Rule 502 to bind state courts when the disclosure is initially made in a federal proceeding. Parties might reasonably look to a federal rule to determine the evidentiary consequences of a disclosure either made or offered in a federal proceeding. But parties in a state proceeding would logically think that the evidentiary consequence of disclosures made in state proceedings, and then determined in state proceedings, would be covered by a state rule of evidence, not Rule 502.

4. If the Rule is extended to supplant state rules on waiver — so that a state court would have to apply Rule 502 even to determine the consequences of disclosure of protected information in a state proceeding (i.e., the state-to-state question) — the Committee will likely receive strong objections from the Federal-State Committee and the Conference of Chief Justices. The federalism concerns expressed by those bodies to the initial draft of Rule 502 were certainly colorable, and would have to be addressed if such a Rule were presented to the Judicial Conference.

If the Committee decides that Rule 502 should be extended to cover disclosures initially made in state proceedings, even where the waiver issue arises in state court, then the pertinent provisions of the Rule would look something like this:

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

The following provisions apply, under the circumstances set out, to disclosure of a communication protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal or state proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal or state litigation or ~~federal~~ administrative proceedings;

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

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal or state public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. ~~State law governs the effect of disclosure to a state or local government agency with respect to non-governmental persons or entities.~~ This rule does not limit or expand a government office or agency's authority to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal or state court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

Possibility of Separate Legislation.

The letter from Congressman Sensenbrenner that began this process recognized the possible need for independent legislation to govern waiver of privilege and work-product for disclosures in state proceedings. Questions have been raised in the public comment about whether Congress has

the constitutional authority to regulate state privileges in state courts; academic commentary indicates that Congress probably has the authority under the Commerce Clause to do so. It appears that the Evidence Rules Committee does not need to decide the question of congressional power to enact rules of privilege that abrogate state law. The question of congressional power is appropriately left to Congress, not rulemakers.

Assuming Congress has the power to enact rules of privilege governing the state-to-state problem, and assuming that the Committee decides that such a rule is not appropriately placed in Rule 502, the Committee may wish to raise the question of independent legislation to Congress. It is anticipated that if the Judicial Conference approves Rule 502, the proposed Rule will eventually be sent to Congress with a cover report describing the process of preparing the Rule, and highlighting any issues that Congress may wish to address that are not covered by the Rule. If the Committee does decide to raise the question of a uniform federal law of privileges binding state courts even as to disclosures made in state proceedings, it is probably most effectively raised in the proposed cover letter. A draft of the cover letter is included in a separate memorandum in this agenda book.

With respect to a federal law of privilege covering state disclosures offered in state proceedings, the cover letter to Congress might provide as follows:

> The Committee received many public comments suggesting that Rule 502 must be extended to provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers would not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.
>
> The Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:
>
> > 1) Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure in those proceedings and in other state courts are unlikely to look to the Federal Rules of Evidence for the answer.
> >
> > 2) In the Committee's view, Rule 502 does fulfill its primary goal of reducing the costs of discovery in federal proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure of protected information; there is no possibility that a state court could find a waiver when Rule 502 would not.

While the Committee determined that Rule 502 should not be extended to disclosures initially made in state proceedings, when the protected information is then offered in a state proceeding, the Committee does take this opportunity to notify Congress of the substantial public comment advocating a uniform rule of privilege waiver that would apply to all disclosures of protected information made or offered in state or federal courts. The public comment noted an alternative to extending Rule 502: separate legislation that would extend the substantive provisions of Rule 502 to state court determinations of waiver with respect to disclosures in state proceedings.

D. Disclosures made in state proceedings and offered in a subsequent federal proceeding

This section assumes that Rule 502 will not be extended to provide a uniform rule of privilege waiver applicable to state and federal courts for disclosures at both the state and federal level. It also assumes that Congress will not (has not) passed independent legislation providing for such a uniform rule of waiver. This section addresses a narrower question: should Rule 502 be extended to govern the effect of disclosures of protected information made in a state proceeding, when the information is subsequently offered in a *federal* proceeding on the ground that the protection has been waived?

As issued for public comment, the substantive provisions of Rule 502 do not govern the effect of disclosures made in state proceedings, where the information is offered subsequently in a federal proceeding. Indeed, Rule 502(c) specifically provides that with respect to selective waiver, *state* law governs the effect of a waiver to a state regulator, even if the information is later offered in federal court. The Rule is silent on which law applies when the question is subject matter waiver or mistaken disclosure.

The remainder of this section discusses the choice of law problems that arise when a state disclosure is sought to be used in a subsequent federal proceeding. Specifically, 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 the result provided by Rule 502 ; and 3) a party seeks to rely on the state law of waiver in a subsequent *federal* proceeding?

The following examples can arise with a state-level disclosure offered in a subsequent federal proceeding: 1) state law provides for a subject matter waiver where, if the disclosure had been made at the federal level, there would be no subject matter waiver; 2) state law provides for waiver by mistaken disclosure where Rule 502 would not, or, to the contrary, Rule 502(b) would find a waiver where state law would not; 3) state law does not enforce selective waiver for disclosure to state regulators, whereas if the disclosure had been made at the federal level, it would be protected against disclosure to third parties. Must the federal court apply the state law of waiver in any or all of these

circumstances? (The question of enforceability of state confidentiality orders is left to a later section of this memo, as it presents a special question of comity and is the subject of a specific request from the Federal-State Committee and the Conference of State Chief Justices.)

Under Rule 502 as written, the answer is somewhat complicated, but it appears to be as follows:

1) Subject matter waiver (subdivision (a)):

Rule 502 mandates subject matter waiver only where fairness requires a full disclosure. 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 state law would indeed apply. The federal court would have to find a subject matter waiver because state law provides the rule of decision 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, again under Rule 501. Rule 502 as issued for public comment does not govern because it applies only to disclosures made at the federal level. Since there is nothing in Rule 502 governing the result, Rule 501 becomes the default rule. (Note that this is so even if the Rule is amended to provide, as discussed above, that "Notwithstanding Rule 501, this rule applies regardless of whether the court is applying federal or state law to the elements of a claim or defense." That provision only makes a difference if Rule 502 actually applies to a particular disclosure. Under the Rule as issued for public comment, Rule 502 does not apply to disclosures made in state proceedings.)

The federal common law on subject matter waiver is not uniform. As discussed in a previous memo to the Committee, some courts apply subject matter waiver virtually automatically, and others apply it only if the holding party uses privileged information selectively and fairness demands a disclosure of other privileged information on the same subject matter. (Indeed, this split in the federal courts is the reason that Rule 502 addresses subject matter waiver). Thus, under Rule 501, the federal court's ruling on subject matter waiver for disclosures initially made at the state level may well vary from court to court.

It might be hoped that the common law will fall into a uniform line by the persuasive effect of Rule 502. After all, federal courts determining the federal common law of privilege — including the Supreme Court in *Jaffee v. Redmond* — often rely on the proposed rules of privilege prepared by the Advisory Committee. And those rules were never enacted; it would seem that the enacted law of Rule 502 would be even more persuasive guidance on what the federal common law of privilege should be. But even if Rule 502 is used as persuasive authority, it will take some time before uniformity is achieved.

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, or never, 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 the 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 — as discussed in a previous memo to the Committee, some courts find that mistaken disclosure is automatically a waiver, while most courts determine waiver by applying a negligence standard such as that provided in Rule 502. Again, it seems possible that the federal common law will eventually end up tracking the standard of Rule 502(b).

3) Selective Waiver:

Assuming that the selective waiver provision is retained in the Rule (a matter discussed in a later section of this memorandum), Rule 502(c) as written *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. ("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."). If this language is ultimately enacted, it would mean that as a matter of *federal law*, the effect in any 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. Rule 501 is no longer the default rule. The applicable law on waiver (state law) would thus apply in both diversity and federal question cases.

Different Choice of Law Results for Different Subdivisions

Looking at Rule 502 as it was issued for public comment, and as applied to disclosures made at the state level and later offered in federal court, one might ask why state law is incorporated into federal law for purposes of selective waiver, but federal common law applies in federal question cases for the other matters addressed by proposed Rule 502 (specifically subject matter waiver and inadvertent disclosure). It appears that the Committee, in adding language to the selective waiver provision 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 for disclosures made at the state level and then offered in a federal proceeding.

In pursuing the choice of law questions further, 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 without a selective waiver provision. So the Committee might adhere to its position that state law on selective waiver should determine the consequences of waiver in federal court, even in federal question cases, whereas a different result should apply to subject matter waiver and mistaken disclosure.

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. On balance, it would appear that uniformity within the Rule makes a good deal of sense. Parties will likely be confused, and litigation will result, as they try to work through the choice of law questions within the rule — especially if one subdivision has a different choice of law result from the others. The choice of law questions are complex enough without having different choice of law results depending on the subdivision.

A uniform result on choice of law for disclosures initially made in state proceedings can be reached in one of three ways:

1) ***Federal Common Law Determines:*** 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, i.e., Rule 501. Where the disclosure is made at the state level and the protected information is offered in a federal proceeding, the state waiver rule would control in diversity cases and the federal common law waiver rule would control in federal question cases.

There are a number of problems with this alternative. First, because federal courts differ about the federal common law of waiver, there will be disuniformity of results even in federal question cases when a state disclosure is offered in a federal proceeding. This seems contrary to the very purpose of Rule 502, which is to provide a uniform result in federal courts on privilege waiver questions. Second, there will be disuniformity within a single case where the action is grounded in both diversity/pendent jurisdiction and federal question jurisdiction. It could be that the federal law would find no waiver of privilege when a disclosure was made in a state proceeding, but state law would find a waiver. The party seeking to admit the information on grounds of waiver would argue that the information is admissible on the state claim, even if not on the federal claim. In comparable situations, federal courts generally apply federal law of privilege to both the federal and diversity claims. See *In re Sealed Case,* 381 F.3d 1205 (D.C.Cir. 2004) (applying federal law of privilege to state and federal claims, because application of an inconsistent state rule "could undermine the federal evidentiary interest"). While it is likely that a federal court would come out the same way in this instance, it would seem advisable to avoid such complexities and uncertainties if possible.

A major problem with the Rule 501 alternative will arise if Congress enacts independent legislation establishing a uniform rule of privilege waiver that will apply to state disclosures. If that happens, then there will be a conflict between that legislation and the Federal Rules. The legislation would provide that federal law a fortiori governs the effect of a disclosure made in state proceedings where the information is later offered in federal court; but the Federal Rules would provide that choice of law is governed by Rule 501 — meaning that state law would sometimes apply. It is true that this conflict would be resolved by the standard principle that the later statute would supersede the federal rule. But parties may well be unaware of that principle, and even if aware may find it difficult or at least inconvenient to determine which came first, the rule or the statute. And some parties will simply be unaware of the statute and will operate as if the rule applies. It follows that, all things being equal, Rule 502 should adopt a uniform federal law of waiver, to the extent possible in the rule, in anticipation of possible legislation. That solution is set forth below.

2) ***State Law Determines:*** 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, even in federal question cases.

This result would give primacy to comity principles; but it might result in more uncertainty for counsel in determining whether to rely on Rule 502, as it would end up giving more primacy to what in some cases will be the less protective state law. There might also be a problem of determining *which* state's law of privilege is applicable. Especially with selective waiver but even with mistaken disclosures, there is a possibility that the same disclosure was made in a number of states. If those states have different laws on waiver, and the information is later offered in a federal proceeding, there will be thorny questions of which state's law of waiver applies. It is true that federal courts sort through choice of law problems in other contexts, but it seems problematic to create such a difficult choice of law question in a rule designed to provide predictability and assurance to the parties.

Another problem with applying state law would arise if the same disclosure is made at *both* the state and federal level, for example, a mistaken disclosure of information in parallel state and federal proceedings, or disclosures made to federal and state regulators. In the later federal court action, what is the court supposed to do — find that the federal disclosure was not a waiver but the state disclosure was? This would seem to undermine the federal interest in determining waiver for federal disclosures.

A final problem with applying state law was discussed above in analyzing the federal common law approach. If Congress enacts independent legislation establishing a uniform rule of privilege waiver that will apply to state disclosures there will be a conflict between that legislation and Rule 502.. The legislation would provide that federal law a fortiori governs the effect of a

disclosure made in state proceedings where the information is later offered in federal court; but the Federal Rules would provide that choice of law in that circumstance is governed by state law. This is even more of a direct conflict than that presented by the federal common law approach. Again, all things being equal, the Federal Rule should probably adopt a uniform federal law of waiver approach, to the extent possible in the rule, in anticipation of possible legislation.

3) ***Standards of Rule 502 Control if More Protective:*** 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 the substantive result reached by Rule 502. So for example, if a mistaken 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). And selective waiver would be enforced in federal court even if it would not apply under state law in a state court action.

This third option would provide the greatest certainty for parties. They would know that they could rely on Rule 502 in federal court, in both diversity and federal question cases, no matter whether the disclosure of protected information was made at the federal or state level. Most importantly, it would not be disrupted by federal legislation imposing a uniform waiver rule on state courts— because it would reach the same result as that legislation.

This option, however, raises comity questions because it overrides state law on privileges even where disclosures are made at the state level. The Judicial Conference Committee on Federal-State Jurisdiction and the Conference of State Chief Justices may have concerns over this option. On the other hand, most of the objection from those bodies was over Federal law that would tell a state court how to rule in its *own* proceedings. Applying Rule 502 to state disclosures offered in *federal* proceedings might not raise the same objections. (Those bodies are concerned with respect for state court *confidentiality orders*, a topic which is separable and which will be discussed in a separate section of this memorandum).

The third option does raise a possible problem if the state rule on privilege is *more* protective than Rule 502. Realistically this question could arise in one situation. Assume a party in a state proceeding is not careful in its production and/or does not take reasonable and prompt measure to retrieve privileged material. In a federal proceeding that conduct would constitute a waiver under Rule 502. But as seen in the attached memorandum on state laws concerning mistaken waiver, a number of states provide that a mistaken disclosure can never be a waiver. So in these states, the sloppy but unintentional disclosure would not be a waiver — but if Rule 502(b) applies when the information is offered in a federal proceeding, then the party seeking to admit the information would argue that there is a waiver for purposes of the federal proceeding.

It seems unfair to apply a waiver rule retroactively in this manner. Moreover, states with a

"no waiver" rule could object that their policies are being countermanded by the federal provision — even in state proceedings, the parties would not be able to rely on the flexibility given them by the state rule, for fear that a disclosure will be found to be a waiver in a subsequent federal proceeding. In effect, these states would object that Rule 502(b) becomes the lowest common denominator. And state chief justices promoting principles of comity and reciprocity may well be concerned with such a result.

There is an argument that a more protective state rule on waiver would still apply even if Rule 502(b) applies to state disclosures where the information is later offered in a federal court. It could be argued that Rule 502(b) only tells you what is *not* a waiver. It sets a floor, not a ceiling. But the language of Rule 502(b) creates a clear implication that in federal proceedings, a mistaken disclosure is a waiver if the standards of Rule 502(b) are not met.

If the Committee decides that the standards of Rule 502 should apply to disclosures made in state proceedings when the information is later offered in federal court, it may well wish to provide that the state law of privilege operates when it is more protective (less likely to find waiver) than the federal law. That seems to be the fair result, and it will avoid the comity arguments that states with more protective waiver rules would otherwise raise. It is true that the phenomenon of greater state protection may be ended by legislation providing a uniform law of waiver. But even if that is so, it makes sense to adopt the greater state protection until such legislation is enacted. And the Committee could recommend to Congress that any legislation providing for uniformity should specify that the uniform rule is to provide a floor, not a ceiling, and states retain the option to provide greater protection against waiver if they wish. If Congress takes that approach, then language in Rule 502 applying state law when it is more protective will retain validity.

The next part of this section deals with the drafting solutions to implement each of the three options that the Committee has for disclosures made in state proceedings when the information is subsequently offered in federal court.

Drafting Alternative 1 — Federal Common Law Applies:

To effectuate the federal common law approach, the language in subdivision (c) referring to state law would be deleted, and a new subdivision could be added to cover the specific situation of a state disclosure later offered in federal court. It could be argued that it is unnecessary to say anything about the matter, because in the absence of any language on point, Rule 501 operates as the default rule for choice of law. But that argument is probably outweighed by two considerations. First, the question of applicable law for state disclosures of information later offered in federal court is to say the least complex. Parties could spend hours teasing out the default rule without any guidance in the rule— as did the Reporter who had to figure all of this out. Second, Rule 502 probably needs to be amended at any rate to specify that its substantive provisions are applicable to diversity cases (as discussed above). That amendment presents a good opportunity to address the applicable law question for state disclosures of information later offered in a federal court. Moreover, if the diversity

question is addressed and the applicable law question as to state disclosures is not, there would be even more confusion — because the proposed amendment would provide that Rule 502 governs diversity cases "notwithstanding Rule 501."

So it appears that if the Committee decides on the federal common law alternative, the most sensible solution is to add to the new subdivision reference Rule 501. That change could look something like this (blacklined from the diversity provision set forth earlier in this memorandum):

> **(g) ~~Federal question and diversity cases~~ Applicable law.**— Notwithstanding Rule 501, this rule applies regardless of whether the court is applying federal or state law to the elements of a claim or defense. But Rule 501 governs a federal court's determination of the effect of a disclosure made in a State proceeding or to a state or local-government office or agency, when that disclosure is not protected by a state court's confidentiality order.

The Committee Note to this subdivision could then read as follows (blacklined from the diversity note set forth earlier):

> **Subdivision (g).** The costs of discovery can be equally high in diversity and federal question cases, and the rule seeks to limit those costs in all federal proceedings. Accordingly, Rule 502 applies to diversity cases as well as federal question cases, despite any contrary indication in Rule 501. But where the disclosure is made in a state court or to a state or local agency, the state court has not entered a confidentiality order, and the information is later offered in a federal proceeding, then the applicable Rule on waiver is determined under Rule 501. This means that the state rule on waiver would apply in diversity actions, and the federal common law rule on waiver would apply where the claim or defense arises under federal law. Where both state and federal claims are presented, the court should apply the federal common law of waiver to all the claims. See *In re Sealed Case*, 381 F.3d 1205 (D.C.Cir. 2004) (applying federal law of privilege to state and federal claims, because application of an inconsistent state rule "could undermine the federal evidentiary interest").

Note that state court confidentiality orders are excepted from the provision applying Rule 501 to disclosures made at the state level. The enforceability in federal court of the *order* of a state court is not a question of privilege at all, but rather is governed by law requiring that federal courts must respect state court determinations. *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)). Neither Rule 501 nor Rule 502 purports to, or should, alter the longstanding body

of law on full faith and credit. This point will be raised again in the separate discussion of Rule 502(d), later in this memorandum.

Drafting Alternative 2: State Law Applies.

If state law on waiver is to apply in federal court where the disclosure is made at the state level, then the provision in Rule 502(c) providing for that result can be modified slightly and added to Rules 502(a) and (b) as well. But it is probably more efficient to put such language in a separate subdivision that would apply the same choice of law rule to Rule 502(a)-(d). The style convention is to provide language in a single place rather than replicating it in every subdivision — that is why the introductory language to the rule was added by the Style Subcommittee.

The language applying state law would not be placed in the provision to be added on diversity jurisdiction. That was necessary, and also efficient, when the alternative was to apply Rule 501. But if there is a straight application of state law, that will be done independently of Rule 501. So the new subdivision applying state law would look something like this (coming after the subdivisions on diversity and rules 101 and 1101):

> **(i) Disclosures made in a state proceeding or to a state or local government office or agency.** — State law governs a federal court's determination of the effect of a disclosure made in a state proceeding or to a state or local government office or agency.

The Committee Note to this subdivision could read as follows:

> **Subdivision (i).** When a disclosure of protected information is made in a state court or to a state or local agency and the information is later offered in a federal proceeding, the applicable Rule on waiver is determined by state law. State interests in determining waiver are predominant when the disclosure is made at the state level. If the same disclosure is made in more than one state, the federal court will have to determine which state's law will apply.

Note that there is no need for an exception for state court confidentiality orders, as is the case under the Rule 501 alternative. Because state law applies to all state disclosures, no separate treatment of state confidentiality orders is necessary.

Drafting Alternative 3: Rule 502 governs, unless state law provides more protection:

This solution, which is probably the most sensible, the most protective of the privilege, and the most in accordance with comity principles, is also the most difficult to draft. The reason is that simply adding a subdivision that "Rule 502 governs" does not take account of more protective state

rules on waiver. Nor does it take account of the fact that the substantive provisions of Rule 502 are dependent on disclosures in federal proceedings.

Here is one possible way to draft the provision:

(i) Disclosures made in a state proceeding or to a state or local-government office or agency. — When the disclosure is made in a state proceeding or to a state or local-government office or agency, is not the subject of an order of the state court, and the disclosed communication or information is offered in a federal proceeding, the disclosure does not operate as a waiver if:

(A) it would not be a waiver under this rule if it had been made in a federal proceeding or to a federal public office or agency; or

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

The Committee Note could read as follows:

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

If the disclosure is the subject of a state court order, then this subdivision does not apply, as enforceability of state court orders is controlled by statute as well as principles of comity and federalism. See the Committee Note to subdivision (d), *supra*.

IV. Suggestions for Change to Rule 502(a)

Rule 502(a) as restylized provides as follows:

(a) Scope of a waiver. — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

The Committee Note on Rule 502(a) provides as follows:

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 (5th 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.

There are a number of public comments suggesting changes either to the text of Rule 502(a) or to the Committee Note. The comments really boil down to three suggestions: 1) the Rule should clarify that a mistaken disclosure can never be a subject matter waiver; 2) the Rule or the Note should emphasize that subject matter waivers are reserved for narrow situations in which the holder is using privileged information offensively and selectively; and 3) the Rule should apply when the disclosure is made in federal proceedings and a subject matter waiver is later sought in state proceedings.

A. Amending the rule to provide that mistaken disclosure can never constitute a subject matter waiver.

LCJ and a number of other commenters express the concern that the "ought in fairness" test for subject matter waiver is malleable enough to permit a court to find a subject matter waiver when a party makes a mistaken disclosure that would constitute a waiver under Rule 502. They argue that the Rule should clarify that a mistaken disclosure can never constitute a subject matter waiver.

The "ought in fairness" language of Rule 502(a) was lifted from Rule 106, the rule of completeness. Under that rule, a party who makes a selective presentation of writings is subject to having them completed by the adversary, i.e., the deleted portions are introduced by the adversary to correct the misleading impression given by the selective presentation. The analogy to subject matter waiver is apparent — subject matter waiver should be found when the holder of a privilege selectively presents of privileged information in the attempt to mislead and prejudice the adversary. The advice of counsel cases are a good example. If a party says it relied on counsel, that is a potentially selective presentation of privileged information, because it is possible that counsel's advice was more nuanced, or even contrary, to what the holder states; or it could be that counsel's advice was based on misinformation from counsel. In any case, the holder of the privilege, in using the privileged information offensively and selectively, can be found to make a subject matter waiver in order to avoid an unfair result.

While it can be argued that the "ought in fairness" language of Rule 502(a) imposes a clear and substantial limitation on subject matter waiver, there seems to be enough public concern about the language that clarification may be warranted. This is especially so because some, or many, practitioners believe that the rule of completeness is applied by courts more liberally than might be thought from a reading of the appellate cases interpreting Rule 106. Moreover, it is fair to state that the Committee intended subject matter waiver to be a very limited doctrine, applicable only when the holder is exploiting the privilege and making a misleading presentation. The Committee did not intend that subject matter waiver could be found simply because a party mistakenly discloses privileged information during discovery (as shown by the Committee Note's rejection of the D.C. Circuit case finding a subject matter waiver after a mistaken disclosure).

Drafting Solution:

If the Committee agrees that a mistaken disclosure should never result in a subject matter waiver, and that the Rule should be changed to clarify that point, then Rule 502(a)might be changed as follows:

> **(a) Scope of a waiver.** — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if ~~it~~
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communication or information concerns the same

subject matter; and ~~(2)~~
(3) they ought in fairness to be considered ~~with the disclosed communication or information~~ together.

The above language has been approved for style by Professor Kimble.

The Committee Note would have to be changed as well, but the extent of that change will depend on the Committee's consideration of the next set of comments.

B. Expanding the Committee Note to emphasize that subject matter waiver should only apply if the holder is making a selective presentation through privileged information.

LCJ and others suggest that the Committee Note on subject matter waiver is essentially too mild. They argue that the Note does not come out and say that subject matter waiver is to be reserved for unusual situations in which the holder is using protected information offensively and in a misleading way.

Again, the intent of the Committee was to limit the possibility of subject matter waiver— it would only be required where fairness demands it. The case law cited in the Committee Note in support of the language in fact limits subject matter waiver to situations in which the holder is using protected information offensively and in a misleading way that will harm the adversary in litigation. And the Note does say specifically that subject matter waiver "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." But the volume of public comment on this question is such that it might be useful to make the Note somewhat more emphatic. And it should be noted that the Note needs to be amended anyway if the Committee agrees with the suggestion discussed immediately above, i.e., that an intent requirement should be added to the rule.

Drafting Solution:

What follows are changes that could be made to the Rule 502(a) Committee Note, if the Committee wishes to add more emphatic language on the narrowness of subject matter waiver. The proposed change below also includes language that addresses the possible change to the text discussed above, i.e., the addition of an intent requirement.

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). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b).The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. 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 (5th 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.~~

C. Applicability of subject matter waiver rule for federal disclosures later offered in state courts:

The Federal Bar Council and other commenters contend that Rule 502(a) is unclear on whether its subject matter waiver rule binds state courts as to disclosures made in federal court. They suggest that the rule expressly bar a state court from finding a subject matter waiver with respect to a disclosure in a federal court proceeding; otherwise Rule 502(a) will be inconsistent with Rule 502 (b), (c), and (d), all of which bind state courts to respect federal law on waiver when the disclosure is made at the federal level.

The uncertainty seems to arise from the fact that Rule 502(a) refers only to federal proceedings:

> In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only

if . . .

The intent was to limit the scope of the rule to disclosures made at the federal level — as opposed to the initial draft, which provide a single rule of waiver for all disclosures, state and federal. But in making that change, the Committee did not specifically address what would happen if a party in a subsequent state proceeding argued that a waiver in federal court was a subject matter waiver under state law.

The basic thrust of Rule 502 is to bind state courts to the federal law on waiver when the disclosure is made at the federal level. This is made clear in Rule 502(b), (c), and (d); and it is arguably implicit in Rule 502(a) as well. But given the fact that state courts are specifically bound in the other subdivisions, it would seem sensible to make it clear that state courts are similarly bound by the federal law on subject matter waiver where the disclosure is made at the federal level.

Drafting Solution

If the Committee decides that Rule 502(a) should clarify that state courts are bound by the federal rule on subject matter waiver when the disclosure is made at the federal level, then Rule 502(a) could be changed as follows (note that the change is included with the other additions previously discussed in this section):

> **(a) Scope of a waiver.** — ~~In a federal proceeding, when the~~ When the disclosure is made in a federal proceeding [or to a federal public office or agency], and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if ~~it~~
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communication or information concerns the same subject matter; and ~~(2)~~
>
> (3) they ought in fairness to be considered ~~with the disclosed communication or information~~ together.

Note: The coverage in the draft language includes bracketed language covering disclosures to federal public offices or agencies. This is intended to track the coverage in response to a suggestion in the public comment that Rule 502(b) should be extended to disclosures made to federal public offices or agencies. If that change is implemented, it would make sense for the subject matter waiver provision to be extended as well. But if the Committee decides that Rule 502(b) should not be so extended, then the bracketed language in Rule 502(a), above, should then be deleted. See the section below on Rule 502(b) for a further discussion.

The Committee Note would be changed as follows (including the changes added earlier in this section).

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). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. 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 (5th 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.~~

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

V. Suggestions for Change to Rule 502(b)

Rule 502(b) as restylized provides as follows:

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

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

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

The Committee Note to Rule 502(b) provides as follows:

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.").

The Committee received a number of comments suggesting changes to Rule 502(b). The substantive comments expressed concerns about the standards of "reasonable precaution," "should have known" and "reasonably prompt measures." Other comments suggested that Rule 502(b) should be extended to regulatory proceedings – a question previously considered by the Committee, but which might be revisited, for reasons discussed below, especially if the Committee decides to drop the selective waiver provision from the Rule.

One stylistic comment was that a particular sentence in the Committee Note should be framed in positive rather than negative terms, and that the Committee Note accurately restate the "reasonably prompt" standard in the text of the Rule (instead of "reasonable and prompt"). We are taking the liberty of making these minor changes to the Note, as indicated below (if the Committee disagrees, we can turn it back to the negative). We now address the substantive comments.

A. Suggestions for change to the "reasonable precautions" standard:

Three different concerns were expressed about the "reasonable precautions" standard:

1. It is subject to being interpreted to require the producing party to take such strenuous efforts to avoid waiver that there will be no cost-savings, and thus the goal of the rule would be undermined. Those expressing this concern argued that the text or the note should clarify that herculean efforts are not required and that the use of such procedures as scanning software can be found to be reasonable precautions. Other suggestions included clarification that the court should take into account factors such as the scope of discovery and the discovery schedule.

2. The reasonable precautions standard provides a single factor, whereas the predominant test in the federal courts is to employ a multi-factor test.

3. The reasonableness standard does not take into account the burdens of retrieval on the party receiving the protected information.

Each of these concerns will be addressed in turn. The drafting solution will be combined to address all three concerns.

1. Explicating "reasonable precautions" and clarifying that it is not a strict or rigid standard.

The public comment is clearly correct that if "reasonable precautions" is read to mean that parties must undertake strenuous measures of privilege screening, then the Rule will have failed in its goal of reducing costs. The trick is to draft a standard that discourages sloppiness and negligence in production of data, and yet does not require the parties to act as they are now doing in order to meet the standard, i.e., three levels of lawyers, all looking at the data email by email, etc.

A standard of "reasonable precautions" does not on its face seem to set the bar particularly high. It sounds like, "don't be sloppy." But there are certain facts that might lead the Committee to conclude that more guidance is needed in the Rule and Note: 1) electronic discovery raises unique challenges of retrieving and reviewing data; 2) there is a possibility that software can be employed to reduce the costs of privilege review; 3) consideration should be given to the volume of information that must be reviewed, and the time constraints imposed by discovery schedules; 4) the costs of electronic discovery are related to the record management system used by the holder; and 5) electronic discovery is a relatively new phenomenon on which many lawyers can probably use some guidance and assurance.

In sum, it does not seem unreasonable for the Bench and Bar to expect that the term "reasonable precautions" should receive some elaboration in the rule or the note — and that part of that elaboration should be to emphasize that the rule is intended to limit the current costs of discovery and so demands something less than the eyes-on, email-by-email preproduction privilege review that is currently the coin of the realm. Among other things, it might make sense to refer to the use of software as a means of satisfying the reasonable precautions standard. And it might make sense to change the word "precautions" if for no other reason than the public comment indicates that it sounds like a scary term. Most of the comments suggest "reasonable steps" rather than "reasonable precautions."

2. The five-factor test in the federal and state case law on inadvertent disclosure.

The ABA and another commenter observe that the "reasonable precautions" standard does not exactly track the five-factor test employed by most federal courts in determining whether an inadvertent disclosure is a waiver. A typical statement of the majority view is found in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), in which the court stated that the "majority rule" on waiver for mistaken disclosures focuses on the following 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.

The ABA notes that Rule 502(b) does capture the "reasonable precautions" factor; and also embraces the "time taken to rectify the error" factor by requiring reasonably prompt measure to obtain a return

of the disclosed material. But it finds three factors to be missing from the standard set by Rule 502(b): the scope of discovery, the extent of disclosure, and the overriding issue of fairness. The ABA also recognizes, however, that two of those factors are probably embraced within the concept of reasonable precautions — that is, "reasonable precautions" probably takes into account the scope of discovery and extent of disclosure. The greater the scope of discovery, the more likely that mistaken disclosure will be the result of a reasonable mistake; conversely, the greater the disclosure, the less likely that the mistake will be found to have occurred after reasonable precautions. But the ABA says that it would be useful nonetheless to articulate these factors separately, as the case law has done so. As to the overriding issue of fairness, the ABA contends that this factor is not covered by the term "reasonable precautions", and courts should be allowed some flexibility to find or not find waiver as fairness demands in the specific circumstances.

The draft of Rule 502(b) approved by the Committee for public comment intentionally boiled down the five factors from the case law into two. Committee members expressed the opinion that a two-factor test would be more predictable and easy to apply than a five-factor test — and predictability is critical because lawyers engaged in discovery need to know in advance how careful they have to be in reviewing the material for privilege. Moreover, as the ABA recognizes, two of the factors left out of the text are encompassed within the concept of reasonable precautions anyway.

As to the overriding concept of fairness, that factor was not explicated in Rule 502(b) for two reasons. First, as even the ABA recognizes, a "fairness" standard operating independently of the other factors could lead to unpredictability of results — exactly what parties do not need in determining their obligations of preproduction privilege review. Second, a court so inclined could probably tease out a fairness factor from the terms "reasonable precautions" to prevent dislcosure and "reasonably prompt measures" to seek return. That is, a court could say that, under the circumstances it would be fair, or unfair, to hold that the precautions taken were reasonable or unreasonable, and the measures reasonably prompt or not. So the fairness standard was not exactly dropped; it was just not advertised as an independent factor, so as not to invite unpredictable results.

If the Committee wishes to return to, or at least refer to, the five-factor test, it can be argued that the best way to do so is in the Note, rather than the text of the Rule. It's fairly easy to state a five-factor test in the course of a written opinion applying federal common law (or in a Committee Note). It's much more of a challenge in rulemaking. A five-factor test set forth in a rule is difficult to state concisely, especially where each factor is not an admissibility requirement, but is rather a non-dispositive, non-exclusive factor for the court's consideration. We note that there is no Rule of Evidence that lists, in the text, a number of factors that are part of an admissibility consideration.(The closest analog to a multi-factor test is the illustrations of authenticity in Rule 901(b), but even these are not multiple factors that are combined to decide a particular question of admissibility). For example, Rule 702 sets forth a number of admissibility requirements in the text of the Rule, and then the Committee Note explicates some factors for courts to consider in determining whether those admissibility requirements are met. It seems problematic to set forth a number of nondispositive, overlapping factors in the text of a rule that is supposed to provide predictability, especially if this would be the only one of the Federal Rules to take that approach.

In the drafting solution below, we use the Note to explicate the factors found in the case law. We also add these factors to the text, in brackets, so the Committee can see what that would look like.

3. Burdens on the party receiving the mistakenly disclosed information.

One witness at the New York hearing stressed the burdens imposed on the party who receives mistakenly disclosed protected information. He noted that it could cost thousands of dollars to retrieve electronic information and send it back — by the time there is awareness of the mistake, the receiving party could have sent the information to experts, included it in spreadsheets, etc., all without knowing that it could be privileged. That public comment suggests that the burdens on the receiving party should be addressed as one of the factors in determining waiver — perhaps by allowing the court to find no waiver only on the condition that the expenses of the receiving party must be reimbursed.

Members of the Committee expressed sympathy with the witness's view that burdens on the receiving party should be taken into account. The question is how to do so. For reasons discussed above, it does not seem sensible to have a multi-factor test in the text of the Rule, and accordingly the drafting solution set forth below does not list "burdens on the receiving party" in the text. For one thing, an explication of burdens on the receiving party, in the text of the rule, would be contrary to the other public comments criticizing the text for not codifying the five-factor test. "Burdens on the receiving party" is not an explicit factor in the federal common law five-factor test.

It would seem that if the burdens on the receiving party are to be taken into account under the case law that the Rule purports to adopt (if not explicitly codify), the way to do that is under the "fairness" prong. The factor of burden on the receiving party does not focus on the producing party's efforts, and so does not fit comfortably with the other four factors in the predominant five-factor test. And it seems problematic to add a new factor to the test established by the courts. Moreover, the burden on the receiving party does really go to the overriding element of fairness in finding a waiver.

But as with the element of fairness itself, the burden on the receiving party probably should not be given extensive weight in the waiver analysis. That could lead to unpredictability — a party doing preproduction privilege review could not reliably predict whether there will be a waiver, because the burden on the receiving party is sometimes not a factor that the producing party can control. Consequently, in the drafting solution below, the burden on the defendant is referenced, but not emphasized, in the Note.

Drafting Solution for comments on "reasonable precautions" standard:

If the Committee decides that it wishes to address the comments suggesting change to the "reasonable precautions" standard, that might be done by a combination of a minor change to the text and an amplification of the Note.

> **(b) Inadvertent disclosure.** — In a federal or state proceeding, the disclosure does not operate as a waiver if:
>
> (1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;
>
> (2) the holder of the privilege or work-product protection took reasonable ~~precautions~~ steps to prevent disclosure[, in light of the scope of [and time constraints on] discovery, the extent of disclosure, and the overriding issue of fairness to the producing and receiving parties]; and
>
> (3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

Explanation: The bracketed material includes the remainder of the five-factor test, along with a reference to the burden on the receiving party. The bracket within the bracket includes another factor raised in the public comment, i.e., if the party is under a time-crunch, then this can be taken into account. But as stated above, the textual addition of factors could be seen as problematic and outside the ordinary construction of the Federal Rules of Evidence.

The pertinent part of the Committee Note could be amplified as follows (with or without the bracketed material in the text):

* * *

> The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding ~~constitutes~~ does not constitute a waiver ~~only~~ if the party ~~did not take~~ took reasonable ~~precautions~~ steps to prevent disclosure and ~~did not make~~ made ~~reasonable and prompt~~ reasonably 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.

As set forth in cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), the reasonableness of the steps taken to prevent disclosure of protected information should be considered in light of the scope and extent of the disclosure as well as general considerations of fairness to all parties, including the parties receiving the protected information. Relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected information. Efficient systems of records management implemented before litigation will also be relevant.

* * *

Explanation:

These changes to the Committee Note can operate with or without the additions bracketed in the text. The reference to software is a response to many public comments asking for such a reference. The reference to records management is also in response to a number of comments pointing out that preproduction privilege review becomes easier or harder depending on the efficiency of the client's records management system. Thus, if a client has a good system of records management, the use of software might be "reasonable steps" whereas if the client's system is in disarray, more aggressive methods of review may be required.

B. Suggestions for change to the requirement of "reasonably prompt measures" from the time that the holder "knew or should have known" about the mistaken disclosure.

1. Suggestions on "reasonably prompt measures".

The ABA and one other public comment express some concern that "reasonably prompt measures" does not give enough guidance and so will be the subject of litigation. Both comments suggest that the duty to seek return be expressed in terms of a specific time period, e.g., the producing party must ask for return within [14] days of the time the duty is triggered.

There are a number of problems with this suggestion. First, there will be a problem of counting days. Does it include weekends, holidays, snow days? Does the first day that you learn of

the disclosure count as a day, or is it 24 hours from the minute that you learn of the mistaken disclosure? The time-counting project has shown that day-counting is fraught with peril. And in the situation of mistaken disclosure, time-counting is even more perilous, because there will often not be a clear and specific time that the clock starts ticking. Second, the Evidence Rules usually stay away from day-based time periods. See Rule 404(b) and 807, providing for reasonable notice, as opposed to a day-based time period. Third, parties are likely to argue about whether any particular time period set forth in the rule is either too long or too short. Something that is just right for the producing party may well be too long for the receiving party, and vice versa. How can the Committee, or even Congress, determine the time period that will, in every case, provide a proper balance between the interests of the producing and receiving party?

For all these reasons, the Committee may wish to retain the term "reasonably prompt measures" in the Rule, without any reference to a day-based standard. At most there might be some day-based presumption that might be added to the Note. For the Committee's review, we provide a drafting alternative that includes references to a day-based time period in both the Rule and the Note.

Drafting Alternative, Change to text:

> **(b) Inadvertent disclosure.** — In a federal or state proceeding, the disclosure does not operate as a waiver if:
>
> * * *
>
> (3) the holder ~~took reasonably prompt measures, once~~ sought return of the protected communication or information within [14] days of the time when the holder knew or should have known of the disclosure~~, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B)~~.

Addition to Note if text is not changed:

> In determining whether a party took reasonably prompt measures to seek return of the protected communication or information, the court must consider all the circumstances. But generally any attempt to seek return within [14] days of the time that the holder knew or should have known of the error should be considered "reasonably prompt".

2. Comments on the "should have known" standard

At its last meeting, held before receipt of any public comments, the Committee decided to retain the "should have known" language in Rule 502(b) — as issued for public comment, the

producing party must take reasonably prompt measures from the time it knew or should have known of the mistaken disclosure. The Committee considered the argument, expressed by a member of the Standing Committee, that the "should have known" language was subjective and malleable, and could lead to a finding that a party in an electronic discovery case should have known about the mistaken disclosure at the time it was made, given the likelihood that mistakes will occur during electronic discovery. The Committee decided that the "should have known" standard is probably less subjective and less malleable than a standard based on the producing party's actual knowledge.

In public comment and at the New York hearing, a different argument was made against the "should have known" requirement. Commenters noted that the term "should have known" implies that the producing party must take reasonable steps *after production,* to determine whether a mistaken disclosure has been made. If the language could be construed to impose that kind of duty on the producing party, that party may be required to do another privilege review for all information *that it has already produced.* As the Federal Bar Council put it, the "should have known" standard "would invite arguments that parties should make a post-production review to determine whether any privileged information was inadvertently produced." And if that is the case, then the goal of the Rule — to reduce the costs of discovery — would be undermined, because post-production review would clearly add to discovery costs.

All would agree that the rule should be amended if it could be read to mandate an additional review for privilege after a production has been made. And all would agree that the time clock for getting the information back should not automatically start ticking at the time of production on the reasoning that the producing party would have to know that some mistakes will inevitably be made. These arguments and concerns may warrant a reconsideration of the "should have known" standard.

But this does not mean that an attempt at reasonable notice should be totally scrapped in favor of a subjective "actual knowledge" test. Another alternative is to substitute "reasonably placed on notice" for "should have known." The term "placed on notice" does not create the inference that the producing party must actively engage in post-production review to determine whether any protected material was mistakenly disclosed. And it does not imply that the time starts ticking from the point of every production of electronic information. In essence, "placed on notice" is more passive than "should have known."

Drafting Solution re "should have known":

If the Committee decides to replace the "should have known" standard with a "placed on notice" standard, its decision can be implemented by the draft below. (Note also that the draft below contains the draft change possibilities previously discussed concerning the "reasonable precautions" language, so the Committee is able to see what the whole thing would look like).

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

(2) the holder of the privilege or work-product protection took reasonable ~~precautions~~ steps to prevent disclosure[, in light of the scope of [and time constraints on] discovery, the extent of disclosure, and the overriding issue of fairness to the producing and receiving parties]; and

(3) the holder took reasonably prompt measures, once the holder knew or ~~should have known~~ was reasonably placed on notice of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

The Note would be altered as follows (also including the changes on reasonable precautions).

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding ~~constitutes~~ does not constitute a waiver ~~only~~ if the party ~~did not take~~ took reasonable ~~precautions~~ steps to prevent disclosure and ~~did not make~~ made ~~reasonable and prompt~~ reasonably 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.

As set forth in cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), the reasonableness of the steps taken to prevent disclosure of protected information should be considered in light of the scope of the discover and extent of the disclosure as well as general considerations of fairness to all parties, including the parties receiving the protected information. Relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected information. Efficient systems of records management implemented before litigation will also be relevant.

Whether the producing party took "reasonably prompt" measures to retrieve protected information is evaluated from the time at which the party knew or was reasonably placed on

notice of the mistaken disclosure. The rule does not require the holder to engage in a post-production review of information to determine whether any of it has been produced by mistake. But the rule does require the holder to follow up on any obvious indications that protected material has been mistakenly produced. [In determining whether a party took reasonably prompt measures to seek return of the protected communication or information, the court must consider all the circumstances. But generally any attempt to seek return within [14] days of the time that the holder knew or was reasonably placed on notice of the error should be considered "reasonably prompt".]

C. Extending Rule 502(b) to productions made to federal government agencies.

At its last meeting, the Committee tentatively rejected the suggestion to extend the mistaken disclosure provision of Rule 502(b) to disclosures made to federal government offices or agencies. The rationale was that a mistaken disclosure provision could be applied in a number of contexts, but if it was not limited to federal court proceedings, it might go beyond the interest in limiting the costs of discovery that animates the Rule. It was also noted that if selective waiver were enacted, the concerns of mistaken disclosure to regulators would be substantially diminished, because the producing party at least would know that the mistakenly disclosed information could not be used by private parties.

In the public comment period, there were renewed calls for extending the mistaken disclosure provision to production of information to federal government offices or agencies. Notably, the powerpoint presentation prepared by Verizon on the costs of privilege review involved a production in response to a DOJ investigation. If Rule 502(b) is not extended to productions to federal offices and agencies, Rule 502 would do nothing to limit the substantial costs of privilege review that were so dramatically presented in that demonstration.

If the selective waiver provision is taken out of the Rule (a matter discussed in the next section of this memorandum), it might seem all the more necessary to extend the protections against mistaken disclosure to the production of information to federal offices and agencies. The costs of preproduction privilege review may be just as dramatic in regulatory investigations as they are in litigation — as the Verizon presentation indicated.

The Committee's concern about having a sufficient federal interest at stake in regulating mistaken disclosure can be addressed by amending Subdivision (b) to cover mistaken disclosures

in federal proceedings *and in response to investigations by federal regulators*. Extending the protection for mistaken disclosures to those made to federal offices or agencies, outside a court proceeding, might be justified on the ground that mistaken disclosures of privileged information are likely to occur much more frequently in response to investigations by regulators than in other non-litigation contexts.

Drafting Solution:

If the Committee wishes to extend the protections of Rule 502(b) to disclosures to federal offices and agencies, this might usefully be done by importing some of the language of Rule 502(c), which itself takes the language from the 2006 amendment to Rule 408. To give the Committee a view of what all the colorable changes might look like, the draft below also contains the changes to the "reasonable precautions" and "should have known" standards discussed above:

Text of Rule:

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation, ~~or~~ federal administrative proceedings, or to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority ;

(2) the holder of the privilege or work-product protection took reasonable ~~precautions~~ steps to prevent disclosure[, in light of the scope of [and time constraints on] discovery, the extent of disclosure, and the overriding issue of fairness to the producing and receiving parties]; and

(3) the holder took reasonably prompt measures, once the holder knew or ~~should have known~~ was reasonably placed on notice of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

Full Committee Note on Subdivision (b) with draft changes:

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~~ does not constitute a waiver ~~only~~ if the holder ~~party did not take~~ took reasonable ~~precautions~~ steps to prevent disclosure and ~~did not make~~ made ~~reasonable and prompt~~ reasonably 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 also applies to inadvertent disclosures made to a federal public office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of preproduction privilege review, can be as great in such investigations as they are in litigation.

As set forth in cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), the reasonableness of the steps taken to prevent disclosure of protected information should be considered in light of the scope of the discovery and extent of the disclosure as well as general considerations of fairness to all parties, including the parties receiving the protected information. Relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected information. Efficient systems of records management implemented before litigation will also be relevant.

Whether the producing party took "reasonably prompt" measures to retrieve protected information is evaluated from the time at which the party knew or was reasonably placed on notice of the mistaken disclosure. The rule does not require the producing party to engage in a post-production review of information to determine whether any of it has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that protected material has been mistakenly produced.[In determining whether a party took reasonably prompt measures to seek return of the protected communication or information, the court must consider all the circumstances. But generally any attempt to seek

return within [14] days of the time that the holder knew or was reasonably placed on notice of the error should be considered "reasonably prompt".]

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

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.").

VI. Suggestions for change to Rule 502(c)

The text of Rule 502(c) is as follows:

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the effect of disclosure to a state or local-government agency; with respect to non-governmental persons or entities. This rule does not limit or expand a government office or agency's authority to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

The Note to Rule 502(c) is as follows:

[**Subdivision (c)**: Courts are in conflict over whether disclosure of privileged or protected information to a government office or 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 office or 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 office or 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 office or 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 office or 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 office or 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.]

The brackets around the rule and note indicate that the Committee has not voted in favor of selective waiver; it was included in the Rule in order to get public comment to assist the Committee's determination on the merits. And not surprisingly, subdivision (c) did engender a significant amount of public comment.

Most of the public comment concerned whether Rule 502(c) should be included or not in the rule that is sent to Congress; i.e., most of the public discussion was on the "up or down" merits of selective waiver. A few comments offered suggestions to the text or the note.

A. Should a selective waiver provision be included in, or dropped from, Rule 502?

Almost all of the public comment on rule 502(c) from lawyers and lawyers' groups was negative, most of it passionately so. In contrast, the comment received from public agencies, such as the SEC and CFTC, was positive.

The negative comments can be boiled down to the following points:

1. Selective waiver is inappropriate in the current environment of the "culture of waiver", because it will encourage the DOJ and SEC to demand more waivers, and corporations will no longer have the excuse that they are concerned about use by private parties.

2. Selective waiver means more waivers, and more waivers means less privilege.

3. Corporate personnel will not communicate with the corporation's lawyer, for fear that, given the protections of selective waiver, corporations will be more likely to sell them down the river by giving confidential information to the government.

4. Selective waiver would deprive individual plaintiffs and private attorneys general from access to important information.

5. Selective waiver allows corporations to game the system by disclosing when it is to their advantage, and yet remain protected from negative collateral consequences.

6. The public policy supporting selective waiver — to encourage cooperation and decrease the costs of government investigations — has nothing to do with the attorney-client privilege.

7. Selective waiver raises serious federalism problems, because in order to be effective it would have to bind state courts, and as such it would change the law of privilege in virtually every state (unlike Rule 502(b), which is consistent with the laws of most states).

8. Selective waiver is contrary to the federal common law in all circuits but one — that means that it must overcome a heavy burden of justification, which it does not do.

9. Selective waiver does not prevent the government agency from wide disclosure of the privileged information.

There is another possible argument against including selective waiver in Rule 502 that was not raised in the public comment. Whether it is good policy or bad policy, selective waiver is unrelated to the most important reason for Rule 502, which is to limit the costs of electronic discovery. Put another way, the addition of selective waiver means that Rule 502 has two different goals rather than one, i.e., reducing the costs of discovery and reducing the costs of government investigations. If Rule 502(c) is deleted, the Rule has a single focus. This arguably makes the Committee Note more focused, it arguably makes the rule flow better, going from mistaken disclosure to court orders that are designed to protect the parties from mistaken disclosure, etc. Moreover, most of the federalism problems raised by the Rule, and emphasized by the Federal-State Committee, are due to selective waiver. So there is something to be said for dropping Rule 502(c) and giving Congress the option of enacting it as separate legislation.

The positive comments on selective waiver can be summarized as follows:

1. The protections of selective waiver are necessary because corporations are otherwise deterred from cooperating, and cooperation substantially reduces the cost of government investigations.

2. Selective waiver can help private parties because they will benefit from more timely and

efficient public investigations.

3. Private parties cannot complain about lack of access to information that would not even be produced in the absence of selective waiver.

4. The argument that the government can disclose the information widely misses the point; under selective waiver, private parties could not use the information in court, no matter how widely it is distributed in public, if the only justification for admission is that it was voluntarily disclosed to the government.

5. The argument that case law does not recognize selective waiver also misses the point; that case law was developed in the absence of legislation on the subject. None of the case law indicates that legislation of selective waiver would be improper or unjustified.

Committee resolution on including selective waiver in Rule 502(b):

It is of course for the Committee to determine whether a selective waiver provision should be included in the rule that gets sent to the Standing Committee and, hopefully, the Judicial Conference. If the Committee decides that it is not in favor of selective waiver, then later subdivisions will be moved up accordingly (as shown in one drafting model at the end of this memo).

Assuming arguendo that the Committee decides not to include a selective waiver provision in the final version of Rule 502, the question then is whether and how the Committee should report to Congress on the selective waiver provision. A strong argument can be made that the Committee should provide some report to Congress on selective waiver, most obviously because the letter from Congressman Sensenbrenner specifically asks the Committee "proceed with a rule that would . . . allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation." If the Rule submitted to Congress has no selective waiver provision, and the accompanying report fails even to mention selective waiver, then it can be argued that the Committee did not fully respond to the congressional request. Moreover, it is clear that at least the previous Congress had an interest in selective waiver, having enacted the Bank Regulatory Act, which provides for selective waiver protection for disclosure of privileged information to banking regulators. So it would seem to make sense to file some report to Congress on the subject, as it is Congress that must enact the rules on privilege.

Draft language for possible report to Congress on selective waiver:

Let's assume that the Committee decides it does not want to include selective waiver in Rule 502, but that it wants to report to Congress on the subject. If all that is so, then the report to Congress might contain the following passage:

At the suggestion of Congressman Sensenbrenner, the Committee proceeded with a rule that would "allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation." Such a rule is known as a "selective waiver" rule, meaning that disclosure of protected information to the government waives the protection only selectively, to the government, and not to private parties. The policy supporting a selective waiver rule is that without it corporations will be less likely to cooperate with government investigations; thus, selective waiver is argued to be a necessary means of encouraging cooperation and limiting the costs of government investigations. The Advisory Committee prepared a selective waiver provision and it was submitted for public comment as proposed Rule 502(c).

The selective waiver provision proved to be very controversial. The public comment from the legal community (including lawyer groups such as the American Bar Association, Lawyers for Civil Justice, and the American College of Trial Lawyers) was almost uniformly negative. The negative comments can be summarized as follows: 1) Selective waiver was criticized as inappropriate in the alleged current environment of the "culture of waiver." Lawyers expressed the belief that corporations are currently being pressured to turn over protected information; they contended that selective waiver could be expected to increase government demands to produce such information. 2) Lawyers expressed the concern that corporate personnel will not communicate confidentially with lawyers for the corporation, for fear that the corporation will, given the protections of selective waiver, produce the information to the government and place the individual agents at personal risk. 3) Public interest lawyers and lawyers for the plaintiffs' bar were concerned that selective waiver will deprive individual plaintiffs of the information necessary to bring meritorious private litigation. 4) Selective waiver was criticized as unfair, because it allows corporations to waive the privilege to their advantage, without suffering the risks that would ordinarily occur with such a waiver. 5) Lawyers emphasized that under the federal common law, every federal circuit court but one has rejected the notion of selective waiver, on the ground that corporations do not need any extra incentive to cooperate, and that selective waiver could allow the holder to use the privilege as a sword rather than a shield; they contend that a doctrine roundly rejected under federal common law should not be enacted by rule. 6) Judges of state courts objected that selective waiver raised serious federalism problems, because in order to be effective it would have to bind state courts, and as such it would change the law of privilege waiver in virtually every state, because most of the state reject selective waiver. 7) Lawyers argued that selective waiver does not really protect the privilege because nothing prohibits the government agency from publicly disclosing the privileged information.

In sharp contrast, federal agencies and authorities (including the Securities Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice) expressed strong support for selective waiver. These agencies made the following arguments:1) The protections of selective waiver were considered necessary because

corporations are otherwise deterred from cooperating with government investigations, and such cooperation serves the public interest by substantially reducing the cost of those investigations. 2) The agencies contended that private parties will in the end benefit from selective waiver, as it will lead to more timely and efficient public investigations. 3) The complaint from private parties about lack of access to information was dismissed on the ground that the information they sought would not even be produced in the absence of selective waiver. 4) The agencies noted that even if the government could disclose the information widely, this would not undermine the doctrine of selective waiver; under selective waiver, private parties could not use the information in court, no matter how widely it is distributed in public. 5) The agencies found nothing in the federal common law to indicate that legislation on selective waiver would be improper or unjustified.

The Committee carefully considered and discussed all of the favorable and unfavorable comments. The Committee finally determined that selective waiver raised questions that were essentially political in nature. Those questions included: 1) Do corporations need selective waiver to cooperate with government investigations? 2) Is there a "culture of waiver" and, if so, how would selective waiver affect that "culture"? These are questions that are difficult if not impossible to determine in the rulemaking process. The Committee also noted that as a rulemaking matter, selective waiver raised issues different from those addressed in the rest of Rule 502. The other provisions of Rule 502 are intended to limit the costs of electronic discovery, whereas selective waiver, if implemented, is intended to limit the costs of government investigations, independently of any litigation costs. Thus, the selective waiver provision was outside the central, discovery-related focus of the rest of the rule.

The Committee therefore determined that it would not include a selective waiver provision as part of proposed Rule 502. The Committee recognizes, however, that Congress may be interested in considering separate legislation to enact selective waiver, as evidenced by the Bank Regulatory Act of 2006, which provides that disclosure of privileged information to a banking regulator does not operate as a waiver to private parties.

The Committee prepared language for independent legislation on selective waiver, in the hope that it might assist Congress should it decide to proceed. This language is derived from the Bank Regulatory Act and also incorporates some drafting suggestions received during the public comment period on Rule 502(c).

[Include language here— see below for drafting suggestions.]

B. Suggestions for changes to the selective waiver provision:

Whether the selective waiver provision is included as Rule 502(c) or broken out as a possible independent statute, the Committee may wish to consider possible improvements to the language of the provision. A few suggestions for change were during the public comment period, and will be addressed in this section. More importantly, the language of the Bank Regulatory Act of 2006 (which was enacted after Rule 502 was issued for public comment) contains language and substantive application different in some respects from Rule 502(c) as issued for public comment. It would seem to make a good deal of sense for Rule 502(c) to track the language of the Bank Regulatory Act as closely as possible — any difference in language is likely to raise questions of supersession. Alternatively, or perhaps additionally, it will be necessary to clarify that nothing in Rule 502(c) is intended to alter the provisions of the Bank Regulatory Act.

1. Committee Determination: Disclosure to federal office or agency does not constitute waiver to state office or agency. Rule 502(c) currently provides that a disclosure to a federal investigator or regulator "does not waive the privilege or work-product protection in favor of non-governmental persons or entities." At its last meeting, the Committee considered a suggestion from Bill Taylor that the selective waiver protection should also apply against use by state regulators. The Committee agreed with this suggestion. The language of Rule 502(c) needs to be changed, of course, to accommodate this suggestion.

Drafting Solution:

> **(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of ~~non-governmental persons or entities~~ any person or entity other than a [the] federal public office or agency. State law governs the effect of disclosure to a state or local-government agency with respect to non-governmental persons or entities. This rule does not limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law.

Note: The added language is essentially taken from the Bank Regulatory Act. "The" is in brackets because the Committee may wish to consider whether waiver to one agency constitutes waiver to another (as seems to be the case under the last sentence of the rule). If that is the case, then "a" appears to be the right word. If the waiver is only applicable to the agency to which the information is disclosed, then "the" or "that" would seem to be the right word.

2. Deletion of "state law" language.

As discussed earlier in this memorandum, the language providing that state law governs the effect of disclosure to a state regulator needs to be deleted, as it makes the choice of law question different from other provisions in the rule. Again as discussed above, the best solution is for federal law to govern the effect of a state disclosure when the information is later offered in federal court; this change is effectuated by a new subdivision. Therefore the only change that needs to be made to Rule 502(c) on the state law question is to delete the sentence concerning state law.

Drafting Solution (Cumulative):

(c) Selective waiver. — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of ~~non-governmental persons or entities~~ any person or entity other than a [the] federal public office or agency. ~~State law governs the effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities.~~ This rule does not limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law.

3. "Culture of Waiver" proviso:

The ABA suggests that if Rule 502(c) is retained, it should say something to the effect that the rule should not be exploited by those who are implementing the "culture of waiver." It can be argued that it would be prudent for the Committee to stay out of the politics surrounding the "culture of waiver" controversy. (Indeed that seems a good reason to drop Rule 502(c) out of the rule entirely.) But if the Committee decides to include Rule 502(c), then it could be argued that it is indeed entering the "culture of waiver" fracas, and so should address it in the Rule.

Drafting Solution (cumulative):

If the Committee decides to address the effect of Rule 502(c) on the asserted practice that waivers are coerced, it might do so as follows (with previous changes included):

(c) Selective waiver. — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of ~~non-governmental persons or entities~~ any person or entity other than a [the] federal public office or agency. ~~State law governs the effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities.~~ This rule does not 1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law, or 2) authorize a government office or agency to require or request disclosure of a communication or information protected by an attorney-client privilege or as work product.

4. Provision on government use of information:

The SEC suggests that the Rule make clear that selective waiver remains in place even when the agency discloses the information after receiving it. Even if the information is disclosed widely, this would not mean that a private party or state regulator could use it in subsequent litigation. This point is already referenced by the language in Rule 502(c) that the selective waiver protection does not limit or expand a government agency's authority to disclose the information it receives. But the SEC argues that the Note should make it clear that "even if the communications or information are disclosed or become available to non-governmental persons or entities through the use of the material during an enforcement proceeding, the communications or information will continue to be protected." This seems to be a useful observation to make, in light of the fact that a number of public comments criticized Rule 502(c) as being insufficiently protective because the government agency could widely distribute the protected information. This criticism misses the point, because the privilege can apply no matter how widely disclosed the information may be. The question for the privilege is not whether the information is a matter of public record, but rather whether the information is to be admitted at trial. (For example, if a person communicates confidentially with a spouse, it would not matter if the spouse reported the information to CNN; it would still be privileged at trial).

Drafting Solution:

If the Committee decides to address the consequences of disclosure by the agency (or lack thereof) it might add to the Note as follows:

[**Subdivision (c)**: Courts are in conflict over whether disclosure of privileged or protected information to a government office or 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 office or 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 office or 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 office or agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection to ~~non-governmental~~ any other 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 offices and 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 rule does not purport to affect the disclosure of protected communications or information after receipt by the federal public office or agency. The rule does, however, provide protection from waiver in favor of anyone other than federal public offices or agencies, regardless of the extent of disclosure of the communications or information by any such office or agency. Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government office or 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 office or 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 offices and agencies that animates the rule.]

5. Congressional investigations:

Bill Taylor suggests that the Rule, or the Note, make clear that disclosure to the DOJ, SEC, etc. does not constitute a waiver in favor of Congress. It appears that the suggested amendment to the text set forth above, makes it reasonably clear that a party who discloses to a public office or agency can still the declare the privilege in a congressional investigation. If the change is implemented, the rule will provide that disclosure to a public office or agency "does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal public office or agency." A congressional committee is not an "office" or "agency." Nonetheless, if the Committee determines that some clarification is necessary, it might consider an addition to the Note.

Drafting Solution (cumulative changes to the Note):

* * *

The rule rectifies this conflict by providing that disclosure of protected information to a federal government office or agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to ~~non-governmental~~ any other 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 offices and 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 rule does not purport to affect the disclosure of protected communications or information after receipt by the federal public office or agency. The rule does, however, provide protection from waiver in favor of anyone other than federal public offices or agencies, regardless of the extent of disclosure of the communications or information by any such office or agency. Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.

The rule provides that when protected communications or information are disclosed to a "federal public office or agency" the disclosure does not operate as a waiver to any

person or entity other than a [the] federal public office or agency. As such, a disclosure covered by the rule does not operate as a waiver in any congressional investigation or hearing.

* * *

6. Bank Regulatory Act:

The Regulatory Relief Act of 2006 was signed into law in late 2006. It provides for selective waiver protection for disclosures of privileged information to a banking regulator. The effective language of the Act provides as follows:

> (1) In General – The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.
>
> (2) Rule of Construction – No provision of paragraph (1) may be construed as implying or establishing that –
>
> > (A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply; or
> >
> > (B) any person would waive any privilege applicable to any information by submitting the information to any Federal banking agency, State bank supervisor, or foreign banking authority, but for this subsection.

The Regulatory Relief Bill is different from the Rule 502 provision on selective waiver in some important respects. Most importantly, the Bill provides the protection of selective waiver to disclosures made to *state* regulators; in contrast, Rule 502 does not govern state disclosures unless the information is later offered in a federal proceeding.

Second, the Regulatory Bill provides selective waiver protection to disclosures "in the course of any supervisory or regulatory process." The language of Rule 502(c) is somewhat different. It protects disclosures "when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." The coverage of the two provisions seems substantially the same, even though somewhat different language is used. And there is reason to retain the language of Rule 502(c) as it tracks the language found in the 2006 amendment to Rule 408. But thought must be given to whether Rule 502(c) should replicate the language of the Regulatory Relief Bill, at least as closely as possible. Failure to do so might lead to litigation about whether the different language was intended to mean a difference in coverage.

It must be recalled that if Rule 502(c) is enacted, either as part of the rule or as independent legislation, it runs the risk of superseding the Regulatory Relief Bill to the extent there is an inconsistency. For example, if Rule 502(c) were enacted in the form discussed in this memorandum, disclosures to state regulators would not be covered if the information is later offered in a state proceeding. This could mean that the Relief Bill's provision of selective waiver protection in the "state-to-state" circumstance will be abrogated. It could be argued that there is no abrogation because while Rule 502 would be later in time, the specific provisions of the Relief Bill—limited to banking—control the general. But at the very least the relationship between Rule 502 and the Relief Bill could give rise to litigation that should be avoided if possible.

Drafting Solution:

The possible drafting solution is to use as much of the language of the Relief Bill in Rule 502(c) as possible, and to address the difference in "state-to-state" coverage by a proviso that there is no intent to limit the protection against waiver provided by any other Act of Congress. What follows is such an attempt, together with the drafting solutions to the other problems previously addressed in this section:

> **(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made for any purpose to a federal public office or agency in the course of any ~~in the exercise of its~~ regulatory, investigative, or enforcement ~~authority~~ process — does not waive the privilege or work-product protection in favor of ~~non-governmental persons or entities~~ any person or entity other than a [the] federal public office or agency. ~~State law governs the effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities.~~ This rule does not:
>
> > 1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law;
> > 2) authorize a government office or agency to require or request disclosure of a

communication or information protected by an attorney-client privilege or as work product; or
3) limit any protection against waiver provided in any other Act of Congress.

Drafting Solution for separate legislation:

Let's assume that the Committee 1) recommends that Rule 502(c) be dropped from the Rule; 2) recommends in a report to Congress that selective waiver should or could be considered by Congress as a subject of separate legislation; and 3) wishes to provide suggested language for Congress to use should it decide to proceed.. If all this comes to pass, then the language of Rule 502(c), as amended above, may provide the basis for the Committee's suggestion to Congress of language for legislation on selective waiver.

But the language must be modified if it is to be suggested as independent legislation. This is because Rule 502(c) interacts with other provisions of Rule 502 (most notably the introductory sentence). If Rule 502(c) were to be enacted as freestanding legislation, a number of provisions from Rule 502, outside of subdivision (c), would have to be incorporated.

What follows is an attempt to set out the selective waiver provision of Rule 502(c) as independent legislation – together with the possible amendments from the public comment and with a proper interface with the Regulatory Relief Bill.

(a) Selective waiver. — In a federal or state proceeding, the disclosure of a communication or information protected by the attorney client privilege or as work product — when made for any purpose to a federal [or state or local] public office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal [state or local] public office or agency.

(b) Rule of construction. — This rule does not:

1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law;
2) authorize a government office or agency to require or request disclosure of a communication or information protected by an attorney-client privilege or as work product; or
3) limit any protection against waiver provided in any other Act of Congress.

[**(c) Disclosures made to a state or local-government office or agency.** — When a disclosure of a communication or information protected by the attorney client privilege or as work product is made to a state or local-government office or agency, is not the subject of a state court order, and the disclosed information is offered in a federal proceeding, the disclosure does not operate as a waiver if:

(A) it would not be a waiver under this rule if it had been made to a federal public office or agency; or

(B) it is not a waiver under the law of the state where the disclosure occurred.]

(d)[c] Definitions. — In this Act:

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

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

Note: The brackets are alternatives that can be implemented by Congress if it wants to govern disclosures made to state offices or agencies, as it did in the Bank Relief Act. If Congress does want to cover state disclosures, then 1) the brackets in (a) would be taken off, 2) the bracketed subdivision (c) would be deleted, and 3) subdivision (d) would move up to (c).

Note: Subdivision (d) is changed to accord with a proposed suggestion in the public comment about the definition of work product. See Section VIII, below.

Note: The Committee may wish to suggest in its report to Congress that the Committee Note to Rule 502(c) could be adopted as legislative history for an independent statute on selective waiver. See House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

VII. Suggestions for Change to Rule 502(d)

Rule 502(d) as issued for public comment (and restylized) provides as follows:

(d) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

The Committee Note to Rule 502(d) provides as follows:

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

Note: The Committee Note is revised to reflect the change in the text to which the Committee agreed. That change removed the last clause of Rule 502(d) which conditioned the enforceability of a confidentiality order on agreement of the parties.

Reciprocal Enforceability:

Other than the deletion of the requirement for party agreement (already made and referred to above) the only suggestion for change to Rule 502(d) was made by the Council of State Chief Justices and the Federal-State Committee of the Judicial Conference. They suggested that if state courts were going to have to enforce federal confidentiality orders, then federal courts should be required to return the favor.

This idea of reciprocal enforceability seems to make sense, but it does raise some difficult issues. First, reciprocality is probably required even without any rule change. *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)). So it is likely that there is no need to put reciprocality in the text — at best it is only worth a mention in the Note.

A complication arises, moreover, if the state court order applies a principle of waiver that is *less generous* than Rule 502. For example, what if a state court enters an order in an action that any disclosure of privileged information in the action constitutes a subject matter waiver, regardless of the circumstances (i.e., a strict liability view of mistaken disclosure). Should Rule 502 provide that such an order is enforceable in federal court even though it is antithetical to the goal of the Rule? The answer on the merits would seem to be no, which counsels against raising the matter in the text of the Rule. It could be argued that adding a reciprocality provision to the text should not be troubling for at least two reasons. First, the scenario set forth is unlikely. As shown in the attached memo, state laws on inadvertent disclosure are at least as protective as Rule 502, and many states are even more protective; so the chances of a state court entering an order enforcing strict liability/subject matter waiver order are remote. (Though a somewhat more likely problem could be that a state court enters an order that a particular mistaken disclosure was a waiver under a Rule 502-type test, and a federal court might disagree with the state court's application of fact to law.) Second is that federal courts may be bound by the Full Faith and Credit Act to enforce a state court confidentiality order, even if it is less protective than the federal law on waiver, so arguably there is no harm done in raising the issue in the text of the Rule. Though on the other hand there is some authority that even under the Full Faith and Credit Act, federal courts are not bound to follow a state determination to the extent that it substantially conflicts with federal policy. See, e.g., *Hooks v. Hooks*, 771 F.2d 935, 950 (6th Cir. 1985) (noting that under § 1738 "full faith and credit will not be accorded state court judgments regular on their face, where to do so would defeat a vital or overriding federal interest."); *American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) ("Other well-defined federal policies, statutory or constitutional, may compete with those policies underlying section 1738.") The end result of this back and forth is that mentioning less protective state orders is likely to raise confusion

and difficulties and confusions that are better left to the principles of comity and federalism and the Full Faith and Credit statute. Little seems to be gained by raising the issue of less protective state orders in either the text or the note to Rule 502(d).

Another troubling complication, in terms of rule-drafting, is that Rule 502(d) talks only about court orders that a disclosure is *not* a waiver. This makes sense because the rule is trying to provide protections *against* waiver, and court orders that do so must be enforceable. But when dealing with reciprocality of state court orders, the Full Faith and Credit Act may require enforcement of *both* an order that a disclosure is not a waiver and an order that a disclosure is a waiver. It would raise a number of complications if the reciprocality provision were placed in the text of the Rule and provided only for enforcement of orders that a disclosure is not a waiver— that would be taking only part of the Full Faith and Credit Act and adding it to the Rule. There could be issues of supersession that would be well beyond the scope of the Rule. And at the very least that textual addition would give rise to confusion. On the other hand, a reference to reciprocality for all state confidentiality orders — both finding a waiver and finding no waiver — threatens to throw the Rule's treatment of federal court orders out of joint. These complications lead to the possible conclusion that reciprocal enforcement of state court orders should be left to a simple reference in the Note to the Full Faith and Credit Act — with no explicit reference to state court orders finding a waiver.

It is for the Committee to determine whether the text of Rule 502(d) should provide for reciprocal enforcement of a state confidentiality order. It should be noted that the Committee does not appear to have the option of providing (as suggested above with respect to state court disclosures that were not the subject of a confidentiality order) that the state court order governs only if it is more protective than the federal rule. The Full Faith and Credit Act would ordinarily mandate enforcement of less protective state court orders.

Drafting Possibility on reciprocal enforcement: Text of Rule

One option is to amend the text of Rule 502(d) to provide for enforcement of state court confidentiality orders. If that option is chosen, subdivision (d) might look like this:

> **(d) Controlling effect of court orders.** — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation. A state court order on waiver of attorney-client privilege or work-product protection governs all persons or entities in federal court proceedings, whether or not they were parties to the litigation.

Note: As stated above, the state order cannot be lumped together with the federal order because the federal orders covered are those providing for no waiver. But under the Full Faith and Credit Act, state court orders are ordinarily enforceable whether they find a waiver or no waiver. It would be misleading to incorporate the terms of the Full Faith and Credit Act only in part. All of this complexity probably indicates that the prudent choice is to leave the question of enforceability of state confidential orders to the Note.

Drafting suggestion on reciprocal enforcement: Committee Note

Note: the draft changes are cumulative, including changes necessary to take account of the deletion of text conditioning enforceability on party agreement.

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

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of

federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable in subsequent federal proceedings.

VIII. Suggestion for Change to Rule 502(f)

The text of Rule 502(f) (restylized) provides as follows:

(f) Definitions. — In this rule:

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

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial.

The Committee Note to Rule 502(f) provides as follows:

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.

There was one suggestion for change to this definitional section. Two public commenters argued that the definition given for work product was too limited because that protection extends to intangibles under federal common law. Thus, a definition limited to "materials" may be construed as not protecting intangible work product.

The law on this subject indicates that while Rule 26 protects only tangible "materials," the federal common law extends equivalent protection to intangibles such as facts learned from work product, and electronic data not in hardcopy. See 6 Moore's Federal Practice § 26.70[2][c] ("[T]he work product doctrine as articulated in *Hickman* is only partially codified in Rule 26(b)(3) and continues to have vitality outside the parameters of the Rule."); 8 Wright, Miller & Marcus, Federal Practice & Procedure at § 2024 ("Rule 26(b)(3) itself provides protection only for documents and tangible things and ... does not bar discovery of facts a party may have learned from documents that are not themselves discoverable. Nonetheless, Hickman v. Taylor continues to furnish protection for work product within its definition that is not embodied in tangible form."); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product").

The Committee may wish to consider broadening slightly the work product definition in Rule 502(f). It is possible (though not absolutely clear) that the term "materials" might be construed not to cover intangibles.

Drafting suggestion: Text of Rule

(f) Definitions. — In this rule:

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

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

Note: The change in the text would not appear to require any change to the Committee Note.

Drafting possibility: Change to Note

The Committee may decide that it is sufficient to cover intangible work product in the Note. If so, the Note may be changed as follows:

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.

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

It is of course for the Committee to decide whether a change is necessary and, if so, whether it should be in the text or the note. It appears that the text, as is, raises uncertainty about the

coverage of intangibles, and, if that is so, it would seem to make sense that the clarification should be placed in the text.

IX. ABA Suggestion Concerning Implied Waiver

The ABA (06-EV-068), proposes an extensive amendment to Rule 502 to cover a topic that is not addressed in the Rule: whether disclosure of underlying factual information constitutes a waiver of the privilege. We make no attempt to set forth the suggestion here, as it basically involves tacking on a completely new rule to the end (or the beginning, the ABA doesn't say where) of Rule 502. The suggested addition is more than 200 words of text, together with an extensive addition to the Committee Note. The language proposed by the ABA can be found in the public comment available to the Committee.

It seems impossible under the circumstances to treat the ABA proposal as a viable amendment to Rule 502 that could be considered at the Spring 2007 Committee meeting. The proposed change is on a topic of waiver that is not even addressed in the Rule as issued for public comment. The topic of implied waiver (and any need for a rule about it) was never raised in the original hearing at Fordham law School, nor in the hearings in Scottsdale or New York City. There is no public comment on the topic, other than the ABA comment, which was submitted after the time for public comments expired. The Committee, so far as we know, had no indication that the ABA was even considering the topic of implied waiver until it posted the public comment four days after the public comment period ended.

There is no way that the Committee could make a reasoned decision on the need for an amendment on implied waiver, in the context of Rule 502; this would require extensive research and careful consideration by the Reporter. Whatever the need for an amendment actually is, it doesn't come out in the ABA comment; that comment seems to indicate that the intent of the suggested rule change is to codify federal case law. Moreover, there is no way that the Committee could, in a few hours at a meeting, exercise its responsibility for writing effective rules. Past experience indicates that effective drafting of rules is a long-term process that requires careful discussion and consideration. The process for Rule 502 thus far indicates that several drafts and serious public comment is required. An effective rule doesn't simply spring out of the head of the Reporter – or the ABA.

Other considerations warrant tabling the ABA proposal. If it were implemented, it would constitute such a radical change to the Rule as issued for public comment that a new round of public comment would be required. This would set back the timetable for enactment of Rule 502 by about a year. It seems to make no sense to delay the important provisions of the current Rule 502 — provisions that the practicing bar want to see implemented as soon as possible— in order to review the merits of a tangentially related addition to the Rule. Moreover, the question of implied waiver

is essentially unrelated to the animating principle of Rule 502, which is to limit the cost of discovery; the letter from Congressman Sensenbrenner that started the rulemaking process does not mention protection against implied waiver as a reason for rulemaking.

For these reasons and others, it appears that it would be prudent to consider the ABA proposal separately from Rule 502, at the Fall 2007 Committee meeting. At that point, the Reporter will have had an opportunity to research the applicable law and to provide suggestions on whether the rule is needed, and will be able to suggest any improvements to the extensive language suggested by the ABA. The Committee will then be able to look at the proposal carefully, with a proper basis of information.

If the Committee does decide that it wants to add a provision on implied waiver to Rule 502, and to do so at the Spring 2007 meeting, then we would find a way to try to implement such a change, and work toward sending the Rule out again for a new wave of public comment.

X. Compendium of Suggested Changes — Two Models

In this section, we will try to assist the Committee's determinations by showing what Rule 502 as a whole would look like if the changes discussed in this memorandum are implemented. We present two models. Model One is what the Rule and Note might look like if the selective waiver provision were dropped, and the other changes implemented. Model Two includes the selective waiver provision and suggested changes to that provision.

Some of the changes discussed in this memorandum are overlapping or even conflicting. So we needed to make some editorial decisions. We emphasize that none of the illustrated changes are intended to persuade the Committee as to whether they should or should not be implemented. They are included here because there are colorable arguments for their inclusion, and we thought it would assist the Committee to illustrate what the Rule would look like if all of the changes were adopted.

The choices we made were as follows:

General Provisions:

1. We include a new subdivision to clarify that Rule 502 applies to diversity and pendent jurisdiction cases.

2. We include a new subdivision providing that Rule 502 applies to state proceedings — binding state courts with respect to disclosures made at the federal level — despite the limitations of Rules 101 and 1101. (So we do not implement the alternative, which is to make the rule applicable only to federal proceedings).

3. We include a new subdivision providing that where a disclosure is made at the state level and the information is offered in a subsequent federal proceeding, Rule 502 governs unless the state law provides more protection. (So we do not implement the alternatives, which are 1) to leave the question to federal common law, or 2) to provide that state law controls).

Rule 502(a):

4. We implement the suggestion for changing Rule 502(a) to clarify that a mistaken disclosure can never constitute a subject matter waiver.

5. We expand the Rule 502(a) Committee Note to emphasize the limitations on subject matter waiver.

6. We implement the change to Rule 502(a) providing that the federal law of subject matter

waiver governs in subsequent state court proceedings where the disclosure is initially made at the federal level. In combination with the change to Rule 502(b), below, the language in the model extends subject matter waiver protection to disclosures made to federal offices or agencies, as well as disclosures in federal proceedings.

Rule 502(b):

7. We include the suggestions for explication and amplification of the Rule 502(b) "reasonable precautions" standard in the text and the Note. The changes to the text are left in brackets because the Committee may wish to consider whether it is problematic to place a multi-factor test in the text of the Rule.

8. We add, in brackets to the Note, some reference to the day-based time standards for "reasonably prompt" measures. (So we did not include any change to the text that would impose a time period measured by days). The reference is in brackets because the need for and wisdom of such an explication is debatable.

9. We include the suggestion to change "should have known" to "reasonably placed on notice" in the text of Rule 502(b).

10. We include the suggestion to extend the protections against mistaken disclosure to those disclosures made in the course of regulatory or investigative proceedings.

Selective Waiver: Model Two Only

11. We include the suggestion that disclosure to a federal agency does not operate as a waiver to a state agency.

12. We include in brackets the ABA's suggested "culture of waiver" proviso. The brackets are intended to highlight the controversial/political underpinnings of the suggested change.

13. We include a reference in the Committee Note on selective waiver to the fact that disclosure by the receiving agency does not constitute a waiver.

14. We include a statement in the Committee Note that disclosure to an agency does not constitute a waiver to Congress.

15. We include a few word changes to the text of Rule 502(c) that track the language used by the Bank Regulatory Act.

"Rule 502(d)" — which is now Rule 502(c) in Model One.

16. We add a reference in the Committee Note about enforceability of state court confidentiality orders. (So we did not include a change to the text of the Rule).

"Rule 502(f) — Which is now Rule 502(e) in Model One.

17. We include a change to the text to cover intangible work product. (So we did not use the solution of putting a reference only in the Note, although this can of course be done if the Committee so decides).

Stylistic changes to the Committee Note:

We reviewed the Committee Note to make stylistic changes necessary to accord with the changes in the text. Here are some examples:

a. The text refers to "communication or information" and the Committee Note was revised as necessary to track that language.

b. The Note as published sometimes refers to protected "material" and this had to be changed to accord with the change to the definition of work product.

Model One— Cumulative Changes, No Selective Waiver:

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

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — ~~In a federal proceeding, when the~~ When the disclosure is made in a federal proceeding or to a federal public office or agency, and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if ~~it~~

(1) the waiver is intentional;

(2) the disclosed and undisclosed communication or information concerns the same subject matter; and ~~(2)~~

(3) they ought in fairness to be considered ~~with the disclosed communication or information~~ together.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent and is made in connection with federal litigation, ~~or~~ federal administrative proceedings, or to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority ;

(2) the holder of the privilege or work-product protection took reasonable ~~precautions~~ steps to prevent disclosure[, in light of the scope of [and time constraints on] discovery, the extent of disclosure, and the overriding issue of fairness to the producing and receiving parties]; and

(3) the holder took reasonably prompt measures, once the holder knew or ~~should have known~~ was reasonably placed on notice of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

~~(d)~~ (c) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

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

~~(f)~~ (e) Definitions. — In this rule:

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

2) "work-product protection" means the protection that applicable law provides for

tangible materials or its intangible equivalent, prepared in anticipation of litigation or for trial.

(f) Federal or state law as the rule of decision.— Notwithstanding Rule 501, this rule applies regardless of whether the court is applying federal or state law to the elements of a claim or defense.

(g) State proceedings. — Notwithstanding Rules 101 and 1101, this rule applies to state proceedings, under the circumstances set out in the rule.

(h) Disclosures made in a state proceeding. — When the disclosure is made in a state proceeding, is not the subject of an order of the state court, and the disclosed communication or information is offered in a federal proceeding, the disclosure is not a waiver if:

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

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

Committee Note to Model One (no selective waiver)

This new rule has two major purposes:

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

2) It responds to the widespread complaint that litigation costs for review ~~and protection of material~~ to prevent disclosure of a communication or information that is protected as 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 communications or 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 a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. 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 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure 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). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b).The rule rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. 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 (5th 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.~~

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

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

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding ~~constitutes~~ does not constitute a waiver ~~only~~ if the holder ~~party did not take~~ took reasonable ~~precautions~~ steps to prevent disclosure and ~~did not make~~ made ~~reasonable and prompt~~ reasonably 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 also applies to inadvertent disclosures made to a federal public office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of preproduction privilege review, can be as great in such investigations as they are in litigation.

As set forth in cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), the reasonableness of the steps taken to prevent disclosure of protected communications or information should be considered in light of the scope of the discovery and extent of the disclosure as well as general considerations of fairness to all parties, including the parties receiving the protected communication or information. Relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected communications or information. Efficient systems of records management implemented before litigation will also be relevant.

Whether the producing party took "reasonably prompt" measures to retrieve the protected communication or information is evaluated from the time at which the party knew or was reasonably placed on notice of the inadvertent disclosure. The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently. [In determining whether a party took reasonably prompt measures to seek return of the protected communication or information, the court must consider all the circumstances. But generally any attempt to seek return within [14] days of the time that the holder knew or was reasonably placed on notice of the error should be considered "reasonably prompt".]

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

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 communications or 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 ~~(d)~~ (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial 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 communications or information ~~can~~ could 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. Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire*

& Rubber Co., 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable in subsequent federal proceedings.

Subdivision ~~(e)~~ (d). Subdivision ~~(c)~~ (d) 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)~~ (e). The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the major goals of the rule, which ~~are 1)~~ is 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~~ This interest arises 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.

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

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

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

If the disclosure is the subject of a state court order, then this subdivision does not apply, as enforceability of state court orders is controlled by statute as well as principles of comity and federalism. See the Committee Note to subdivision (d), *supra*.

Model Two ---- Cumulative Changes, Selective Waiver Included:

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

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — ~~In a federal proceeding, when the~~ When the disclosure is made in a federal proceeding or to a federal public office or agency, and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if ~~it~~

(1) the waiver is intentional;

(2) the disclosed and undisclosed communication or information concerns the same subject matter; and ~~(2)~~

(3) they ought in fairness to be considered ~~with the disclosed communication or information~~ together.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation, ~~or~~ federal administrative proceedings, or to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority ;

(2) the holder of the privilege or work-product protection took reasonable ~~precautions~~ steps to prevent disclosure[, in light of the scope of [and time constraints on] discovery, the extent of disclosure, and the overriding issue of fairness to the producing and receiving parties]; and

(3) the holder took reasonably prompt measures, once the holder knew or ~~should have known~~ was reasonably placed on notice of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) Selective waiver. — In a federal or state proceeding, the disclosure — when made for any purpose to a federal public office or agency in the course of any ~~in the exercise of its~~ regulatory, investigative, or enforcement ~~authority~~ process — does not waive the privilege or work-product protection in favor of ~~non-governmental persons or entities~~ any person or entity other than a [the] federal public office or agency. ~~State law governs the effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities.~~ This rule does not:

1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law;

2) authorize a government office or agency to require or request disclosure of a

communication or information protected by an attorney-client privilege or as work product; or

3) limit any protection against waiver provided in any other Act of Congress.

(d) Controlling effect of court orders. — A federal court may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

(f) Definitions. — In this rule:

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

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

(g) Federal or state law as the rule of decision.— Notwithstanding Rule 501, this rule applies regardless of whether the court is applying federal or state law to the elements of a claim or defense.

(h) State proceedings. — Notwithstanding Rules 101 and 1101, this rule applies to state proceedings, under the circumstances set out in the rule.

(i) Disclosures made in a state proceeding or to a state or local-government office or agency. — When the disclosure is made in a state proceeding or to a state or local- government office or agency, is not the subject of an order of a state court, and the disclosed communication or information is offered in a federal proceeding, the disclosure does not operate as a waiver if:

(A) it would not be a waiver under this rule if it had been made in a federal proceeding or to a federal public office or agency; or

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

Committee Note to Model Two (with selective waiver)

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of ~~material~~ communications or information 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~~ to prevent disclosure of a communication or information that is protected as 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 communications or 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 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure 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). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. See Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. 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 (5th 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.~~

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

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

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding ~~constitutes~~ does not constitute a waiver ~~only~~ if the holder ~~party did not take~~ took reasonable ~~precautions~~ steps to prevent disclosure and ~~did not make~~ made ~~reasonable and prompt~~ reasonably 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 also applies to inadvertent disclosures made to a federal public office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of preproduction privilege review, can be as great in such investigations as they are in litigation.

As set forth in cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), the reasonableness of the steps taken to prevent disclosure of protected communications or information should be considered in light of the scope of the discovery and extent of the disclosure as well as general considerations of fairness to all parties, including the parties receiving the protected communication or information. Relevant considerations include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected communications or information. Efficient systems of records

management implemented before litigation will also be relevant.

Whether the producing party took "reasonably prompt" measures to retrieve the protected communication or information is evaluated from the time at which the party knew or was reasonably placed on notice of the inadvertent disclosure. The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently. [In determining whether a party took reasonably prompt measures to seek return of the protected communication or information, the court must consider all the circumstances. But generally any attempt to seek return within [14] days of the time that the holder knew or was reasonably placed on notice of the error should be considered "reasonably prompt".]

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

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 communications or 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 communications or information to a government office or agency conducting an investigation of the client constitutes a general waiver of the communications or information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected communications or information to a government office or 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 office or 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 privileged or protected communications or information to the government does not constitute a general waiver, so that ~~the information remains shielded from use by~~ the privilege or protection remains applicable against 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 communications or information to a federal ~~government~~ public office or 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~~, any person or entity other than a [the] federal public office or agency; that protection of selective waiver applies ~~whether~~ when the disclosed communication or information is subsequently offered in either 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 communications or information covered by the attorney-client privilege or work product protection does not constitute a general waiver ~~to private parties~~).

The rule does not purport to affect the disclosure of protected communications or information after receipt by the federal public office or agency. The rule does, however, provide protection from waiver in favor of anyone other than federal public offices or agencies, regardless of the extent of disclosure of the communications or information by any such office or agency. Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.

The rule provides that when protected communications or information are disclosed to a "federal public office or agency" the disclosure does not operate as a waiver to any person or entity other than a [the] federal public office or agency. As such, a disclosure covered by the rule does not operate as a waiver in any congressional investigation or hearing.

The rule is not intended to limit or affect any other Act of Congress that provides for selective waiver protection for disclosures made to government agencies or offices. *See, e.g.*, Financial Services Regulatory Relief Act of 2006, Pub.L.No. 109-351, § 607, 120 Stat. 1966, 1981 (2006).

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

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable in subsequent federal proceedings.

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 major 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.

Subdivision (g). The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings. Accordingly, the rule applies to state causes of action brought in federal court, as well as federal question cases.

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

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

If the disclosure is the subject of a state court order, then this subdivision does not apply, as enforceability of state court orders is controlled by statute as well as principles of

comity and federalism. See the Committee Note to subdivision (d), *supra.*