

## Privilege Waiver Rule

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The Advisory Committee on the Federal Rules of Evidence is considering Proposed Fed.R.Evid. 502, which would address waiver of attorney-client privilege and work product protection. The Rules Enabling Act requires affirmative Congressional approval of any rule “creating, abolishing, or modifying an evidentiary privilege.” 28 U.S.C. § 2074(b). Therefore, Proposed Rule 502 will become effective only if enacted by Congress, and, in drafting it, the Advisory Committee acted at the request of the Chair of the House Judiciary Committee.

The Proposed Rule has four primary aspects:

- It articulates a test for determining the extent of subject matter waiver of privileged or work product material that is voluntarily disclosed. .
- It resolves a split in the Circuits as to whether inadvertent disclosure effects a waiver.
- It adopts the principle of selective waiver, under which disclosure to a governmental agency conducting an investigation does not effect a waiver as to third parties.
- It resolves a longstanding quandary by providing that a court order forgiving inadvertent waiver in the course of a litigation is binding on subsequent courts and third parties.

**Subdivision (a): Voluntary Waiver & Scope.** Subdivision (a) of Proposed Rule 502 addresses waiver through voluntary disclosure and the scope of the subject matter waiver that results:

**(a) Waiver by disclosure in general.** — A person waives an attorney-client privilege or work product protection if that person — or a predecessor

while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

The first sentence of subdivision (a) unobjectionably codifies current law. It raises one drafting issue, as applied to attorney-client privilege (not work product). As drafted, a privilege holder effects a waiver if he or she “voluntarily discloses ... any significant part of the privileged ... information.” But it is the communication, not the information, that is privileged. A complaint contains information communicated to the plaintiff’s lawyer by the plaintiff, but including that information in the complaint does not waive any privilege covering the underlying communications. It might be more felicitous if the phrase were not “the privileged or protected information” but, rather, “the privileged *communication* or protected information.”

The second sentence — dealing with the scope of subject matter waiver — merits greater attention.

*Rule 106 Provenance.* The “ought in fairness” language is borrowed from Fed.R.Evid. 106, which states the rule of completeness: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which *ought in fairness* to be considered contemporaneously with it.” This phrase has not proved problematic in Rule 106, and there is no reason to believe it will prove problematic as applied to matter covered by the attorney-client privilege (work product is another matter).

This is not to minimize the differences in the implications of the phrase as used in Rules 106 and 502(a). Under Rule 106, the court has before it a specific document or recording, and the contours of the fairness determination are cabined by four corners of that item. Under Proposed Rule 502(a), the scope of the waiver extends to all communications, written or oral, on

the subject. Subject matter waiver, however, is existing law. The “ought in fairness” language provides, if anything, a potential limitation on the extent of the waiver — confining it to something less than the entire universe of the subject matter. This effectively captures what most judges have historically done in exercising their discretion.

*Extrajudicial Waivers Limited.* The “ought in fairness” language also has the virtue of codifying a line of decisions holding that the waiver effected by an extrajudicial disclosure of privileged information is limited to the disclosure itself, and extends no further, provided that this does not work unfairness on the adversary. *See, e.g., In re Grand Jury Proceedings*, 350 F.3d 299 (2d Cir. 2003) (counsel for target of grand jury investigation sent letter to prosecutor asserting that target acted in good faith based on counsel’s prior conversations with regulators; prosecutor’s subpoena seeking counsel’s notes of conversations with regulators quashed: “The crucial issue is not merely some connection to a judicial process but rather the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion. No such unfairness was present here.”); *XYZ Corp. v. United States*, 348 F.3d 16 (1st Cir. 2003) (“the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter”).

*Work Product Issues.* The implications of the “ought in fairness” test for subject matter waivers of work product protection are potentially more troublesome. Assume an auto accident with three witnesses. Two witnesses say your client had the green light; one says the light was red. You take statements from all three. If you use the two statements that favor you, must you

“in fairness” disclose the third? That is not the law today, nor should it be. You may have taken the third solely for purposes of impeachment; you may highly distrust the accuracy of the third’s rendition; and your client did not retain you to prepare your adversary’s case. There is a strong argument that Rules 26(a)(1)(b), 26(a)(3) (first paragraph) and 26(b)(3) (second paragraph) contemplate that such statements are not subject to disclosure unless and until used for impeachment. A Congressionally-enacted Rule 502 may be deemed to supersede these provisions.

Or assume a Rule 30(b)(6) deposition. You represent the organization that is to be deposed. Assume that you practice in a jurisdiction that requires that you educate the deponents so that they can testify fully as to matters known or reasonably available to the organization about the noticed topics (*see* 7 MOORE’S FEDERAL PRACTICE § 30.25[3] (2005)). You prepare a thick binder of materials for the deponents to consult during the depositions. You know that the binder will be marked as an exhibit, and that nothing in it is protected. But what about everything else you know and have generated on the topics addressed in the binder? Is everything you have thought about these topics — including every email or assessment you have made of the strengths and weaknesses of your opponent’s case — to be disclosed, too, “in fairness?” Is it to be reviewed in camera by a judge to determine what the boundaries of “fairness” are? This could develop into a nightmare for purposes of judicial administration as well the adversary process. These are issues that the Advisory Committee should clarify.

Note that Proposed Rule 502(a) governs only waiver through voluntary disclosure. The Advisory Committee Note stresses that it is not intended to displace or modify federal common law concerning waiver of privilege or work product in other circumstances — *e.g.*, reliance on

advice of counsel, “at issue” waiver, or refreshing recollection while testifying (Fed.R.Evid. 612).

**Subdivision (b)(1): Non-Waiver.** Proposed Rule 502(b)(1) provides that “[a] voluntary disclosure does not operate as a waiver if...the disclosure is itself privileged or protected.” This would appear to be a truism, and its import is clear enough. As to privilege, it is simple to apply. The second communication (the disclosure) need only fall within the coverage of a privilege.

But what does it mean that the second disclosure is “protected” as work product? Work-product protection generally applies not to disclosures as such but to an activity — preparing for anticipated litigation or trial — and the documents and things produced by that activity. Does “protected” refer to any disclosure made in connection with preparation in anticipation of litigation or for trial? That is too broad — the exception would virtually consume the rule stated in subdivision (a).

Proposed Rule 502(b)(1) highlights an important difference between work product protection and the attorney-client privilege. Work product is not designed to preserve confidentiality — other than from an adversary. Disclosures that do not substantially increase the adversary’s opportunity to obtain the work product do not effect a waiver. 8 Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE § 2024 (Supp. 2005). Presumably subdivision (b)(1) refers to communications that are protected as work product — for example, a disclosure of work product to a person aligned in interest with a client. Subdivision (b)(1) presumably would not apply where the communication itself was protected — such as the taking of a witness statement — because that is not a “disclosure.” That instead falls within the definition of “work product” in subdivision (e)(2).

**Subdivision (b)(2): Inadvertent Waiver.** Subdivision (b)(2) settles the Circuit split concerning the effect of inadvertent disclosure, holding that no waiver is effected if:

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

This is a salutary provision that adopts the majority rule. Note the two-part test: the holder must have taken reasonable precautions to prevent disclosure and must take reasonably prompt measure to rectify the error after discovering the inadvertent production. This provision does not sanction intentional disclosure, such as the “quick peek” approach to electronic discovery under which data are turned over to the requesting party without review by the producing party; the requesting party then identifies the documents it is interested in; and the producing party will then conduct a privilege review. *See* ABA Civil Discovery Standard 32 (b) and (d)(ii). This approach could be covered under subdivision (c), discussed below.

**Subdivision (b)(3): Selective Waiver.** Subdivision (b)(3) adopts the doctrine of selective waiver, permitting a client who has disclosed privileged communications to the government to continue asserting the privilege against other parties. It provides that there is no waiver if:

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

This is highly controversial and politically charged. The selective waiver doctrine currently exists, in the federal system, primarily in the Eighth Circuit. *See Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). For years, corporate counsel have unsuccessfully urged other courts to adopt it, so that they could continue to protect from disclosure to civil plaintiffs

materials produced by businesses to regulators or prosecutors in the course of investigations.

Now on the verge of statutory success, many corporate counsel have reversed course and oppose it.

They voice a legitimate concern that subdivision (b)(3) may encourage and exacerbate an existing trend by regulators and prosecutors to demand that persons being investigated waive privilege and work product. Some critics also express concern that this provision will require *Miranda*-like warnings to clients about the risk that they may as a practical matter be forced to waive, putting their communications with counsel at risk. Plaintiffs' counsel also object that their clients should continue to have access to materials disclosed to regulators and prosecutors because it is unfair to permit defendants to selectively waive privilege when it suits their purposes but conceal damning information when it does not.

While these concerns are legitimate, on balance subdivision (b)(3) is desirable. To the extent that prosecutors are able, fairly or unfairly, to compel waiver of attorney-client privilege, it is in the best interests of those being investigated that the scope of the waiver be contained. To the extent that selective waiver facilitates exoneration as well as inculcation, permitting persons under investigation to disclose privileged material gives them a freer choice. To the extent that governmental investigations are expedited, the public interest is served. It is not unfair to require civil plaintiffs to conduct their own discovery, without the benefit of materials supplied to facilitate governmental investigations or effectively compelled by the government at risk of loss of liberty.

There are no limits imposed on the governmental recipient of the privileged information. Will the use of the selectively-disclosed material at trial by a regulator waive the privilege? Does it matter if the regulator has forwarded the privileged material to another regulator or

prosecutor, who introduces it at trial? Presumably there is no effect on the privilege as to third parties in either scenario, since these uses of selectively disclosed materials are reasonably within the contemplation of this rule. A selective waiver provision that evaporates on the foreseeable use of the disclosed material would be a trap, not a protection. Perhaps introduction at trial is itself “protected” (it would be difficult to characterize it as “privileged”) within the meaning of subdivision (b)(1).<sup>1</sup>

**Subdivision (c): Court-Ordered Non-Waiver.** Proposed Rule 502(c) provides that a court order concerning privilege waiver — *e.g.*, the typical agreed order that inadvertent production of privileged materials does not effect a waiver — binds not only the parties to the litigation but also third parties in subsequent litigations:

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

This is a very constructive provision that resolves a serious, pre-existing problem — namely, that the court-ordered return and protection of inadvertently produced material in Case 1 did not afford any protection from the discovery demands of litigants in Case 2. As to them, the privilege may have been waived, subject to the protections afforded by subdivision (b)(2).

Note the breadth of this provision. First, a prior state court order is binding in federal court, and vice versa. Second, this provision is not limited to inadvertently-produced material. The “quick peek” approach to electronic discovery (or, for that matter, massive paper discovery), discussed above, can easily be accommodated.

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<sup>1</sup> Note that privileged material that has been submitted to a regulator may be offered into evidence by the prosecution in a criminal case, even though it may otherwise be excludable as settlement materials, under the amendment to Fed.R.Evid. 408(a)(2) that is expected take effect on December 1, 2006.



At the same time, note the limits of this provision. The binding effect of the order is limited to “the preservation or waiver” of the privilege or work product — not the separate determination whether a particular document or thing is privileged. A court-ordered disclosure of a privileged communication in Case 1 would not be “voluntar[y]” within subdivision (a) and is not given binding effect in Case 2 by subdivision (C).

**Subdivision (d): Mere Party Agreements.** Under Proposed Rule 502(d), the parties’ agreement concerning privilege waiver must be “so ordered” by the court or it has no binding effect outside of the litigation in which it is entered:

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

This provision is a wake-up call to counsel to ensure that party agreements are incorporated in court orders. Or it is an invitation to the alert to lay a trap for the unwary.

**Subdivision (e): Definitions.** The definitional subdivision, Proposed Rule 502(e), provides:

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

- (1) “attorney-client privilege” means the protections provided for confidential attorney-client communications under either federal or state law; and
- (2) “work product” means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common-law and state-enacted provisions or common-law rules providing protection for attorney work product.

This provision is noteworthy in two respects. *First*, the definition of “attorney-client privilege” does not embrace “applicable” law but is limited to “federal or state law.” This omits, on its face, foreign law. It cannot be intended that a conversation that is privileged in Toronto or London is unprivileged in federal court. Assume a multinational corporation headquartered in London with two operating subsidiaries, one in Toronto and one in New York. An internal

investigation is undertaken. A Toronto law firm conducts the interviews and prepares a report for the board of the parent concerning the Canadian operation. A New York law firm does the same with respect to the New York subsidiary. Both reports are presented to the SEC, together with underlying witness statements. A securities class action is commenced in New York and the plaintiffs seek both reports. The New York firm's report remain protected under subdivision (e). What about the Toronto firm's? What law determines waiver? Does a common law of waiver survive? What choice of law governs? Does this complexity make any sense? The phrase "applicable law" should be substituted for "federal or state law."

*Second*, note that the definition of "work product" extends to "federal common-law and state-enacted provisions or common-law rules." This properly recognizes that Fed.R.Civ.P. 26(b)(3) covers only "documents and tangible things." A great deal of work product is neither. Conversations with non-testifying experts, for example.

**Conclusion.** Although a modest bit of tinkering is in order, Proposed Rule 502 is a valuable proposal that merits enactment.

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