ADVISORY COMMITTEE
ON
EVIDENCE RULES

San Diego, CA
April 12-13, 2007

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

Rancho Santa Fe, California

April 12-13, 2007

I. Opening Business

Opening business includes approval of the minutes of the Fall 2006 meeting and a report on the January 2007 meeting of the Standing Committee.

II. Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

The Committee must determine whether to recommend proposed Rule 502, concerning waiver of attorney-client privilege and work product, to the Standing Committee for ultimate adoption by Congress.

The agenda book contains three memoranda on Rule 502, prepared by the Reporter and the consultant on privileges. The principal memorandum analyzes all the colorable suggestions for change to the rule as issued for public comment. Also included are: 1) a draft cover letter to Congress that might accompany the rule; 2) a memorandum on state law on inadvertent disclosure and 3) a summary of public comments on Rule 502.

III. Harm-to-Child Exception to the Marital Privileges

Congress has directed the Evidence Rules Committee to study "the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse or (2) a child under the custody or control of either spouse."

The agenda book contains a draft report to Congress, prepared by the Reporter and the consultant on privileges, which implements the previous determination by the Committee that 1) such an amendment is neither necessary nor desirable, and 2) draft language on such an exception should be prepared for Congress should it decide to proceed with such an exception.

IV. Time-Counting Project

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee has prepared a template and is seeking its adoption by the Advisory Committees.

The agenda book includes a memorandum prepared by the Reporter, which includes the time-counting template, background material, and a discussion of whether the Evidence Rules need to be amended either to change the few time periods set forth in those Rules, or to provide generally for a method of counting time.

V. Restylized Evidence Rules

The Committee has approved a pilot project to explore the possibility of restylizing the Evidence Rules. The possibility of restyling the Evidence Rules has been raised with the Chief Justice, and an oral report will be presented on the status of the project. The agenda book replicates a memorandum from the last meeting which shows proposed style suggestions for three existing Evidence Rules.

VI. Update on Case Law Development After *Crawford v. Washington.*

The agenda book contains a memorandum from the Reporter setting forth the federal case law applying the Supreme Court's decision in *Crawford v. Washington*, and discussing the implications of that case law on any future amendments of hearsay exceptions.

VII. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Joseph F. Anderson, Jr.
Chief Judge, United States District Court
Matthew J. Perry, Jr. United States Courthouse
901 Richland Street
Columbia, SC 29201

Honorable Robert L. Hinkle
Chief Judge, United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Honorable Joan N. Ericksen
United States District Judge
United States District Court
12W United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Honorable Andrew D. Hurwitz
Justice, Supreme Court of Arizona
1501 West Washington, Suite 431
Phoenix, AZ 85007

William W. Taylor, III, Esquire
Zuckerman Spaeder LLP
1800 M Street, N.W.
Washington, DC 20036-5802

William T. Hangley, Esquire
Hangley, Aronchick, Segal & Pudin, P.C.
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933

Marjorie A. Meyers
Federal Public Defender
310 The Lyric Center
440 Louisiana Street
Houston, TX 77002-1634

Ronald J. Tenpas
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4216
Washington, DC 20530

Elizabeth J. Shapiro
Assistant Director, Federal Programs Branch
Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Room 7152
Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Michael M. Baylson
United States District Judge
United States District Court
4001 James A. Byrne United States Courthouse
601 Market Street
Philadelphia, PA 19106

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Reporter:

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Advisors and Consultants:

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, NC 27599

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

March 14, 2007
Projects

ADVISORY COMMITTEE ON EVIDENCE RULES

			Start Date	End Date
Jerry E. Smith Chair	C	Fifth Circuit	Member: 2002 Chair: 2002	---- 2007
Joseph F. Anderson, Jr.	D	South Carolina	2005	2008
Michael M. Baylson**	D	Pennsylvania (Eastern)	2006	2007
Joan N. Ericksen	D	Minnesota	2005	2008
William T. Hangley	ESQ	Pennsylvania	2006	2009
Robert L. Hinkle	D	Florida (Northern)	2002	2008
Andrew D. Hurwitz	JUST	Arizona	2004	2007
Marjorie A. Meyers	FPD	Texas (Southern)	2006	2009
William W. Taylor III	ESQ	Washington, DC	2004	2007
Ronald J. Tenpas*	DOJ	Washington, DC	----	Open
David G. Trager**	D	New York (Eastern)	2000	2007
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs	Reporters
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Thomas S. Zilly United States District Judge United States District Court United States Courthouse 700 Stewart Street, Suite 15229 Seattle, WA 98101	Professor Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Susan C. Bucklew United States District Judge United States District Court United States Courthouse 801 North Florida Avenue, Suite 1430 Tampa, FL 33602	Professor Sara Sun Beale Duke University School of Law Science Drive and Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Jeffrey N. Barr
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Timothy K. Dole
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

FEDERAL JUDICIAL CENTER

Staff:

Joe Cecil (Committee on Rules of Practice and Procedure) Phone 202-502-4084
Senior Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <jcecil@fjc.gov>

Marie Leary (Appellate Rules Committee) Phone 202-502-4069
Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <mleary@fjc.gov>

Robert J. Niemic (Bankruptcy Rules Committee) Phone 202-502-4074
Senior Research Associate
Research Division Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <bniemic@fjc.gov>

Thomas E. Willging (Civil Rules Committee) Phone 202-502-4049
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <twillgin@fjc.gov>

Laural L. Hooper (Criminal Rules Committee) Phone 202-502-4093
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <lhooper@fjc.gov>

Tim Reagan (Evidence Rules Committee) Phone 202-502-4097
Senior Research Associate
Research Division Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 <treagan@fjc.gov>

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 16, 2006

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 16, 2006 at the Thurgood Marshall Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joan N. Ericksen.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
William W. Taylor, III, Esq.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Ronald J. Tenpas, Esq., Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Thomas W. Hillier II, Esq., outgoing member
Patricia L. Refo, Esq., outgoing member
Elizabeth Shapiro, Esq., Department of Justice
Timothy Reagan, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq. Rules Committee Support Office
Timothy Dole, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor Joseph Kimble, Consultant on Style

Opening Business

Judge Smith welcomed the two new members of the Committee, William Hangley and Marjorie Meyers. He reported on the June meeting of the Standing Committee, in which that Committee approved proposed Evidence Rule 502 for release for public comment. He also noted that the proposed amendments to Rules 404, 408, 606(b) and 609, are before Congress and are expected to become effective on December 1, 2006.

Judge Smith asked for approval of the minutes of the April 2006 Committee meeting. The minutes were approved.

Possible Restyling Project

At its last meeting the Committee directed the Reporter to prepare restyled versions of a few Evidence Rules, so that the Committee could consider the desirability of undertaking a project to restyle the Evidence Rules. That project would be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are "paper-based"; they refer to evidence in written and hardcopy form. A restyling project could be used to update the paper-based language used throughout the Evidence Rules, and more broadly it might be useful in making the Evidence Rules more user-friendly.

The Reporter asked Professor Joseph Kimble, the Standing Committee's consultant on Style, to restyle three rules of evidence — Rules 103, 404(b) and 612. Professor Kimble graciously agreed to do so. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. They raised questions such as: 1) whether updating certain language would be a substantive or stylistic change; 2) whether adding subdivisions within a rule would be unduly disruptive; and 3) whether certain substantive changes that would improve the rule could be proposed for amendment along with the style changes. After Professor Kimble restyled the three rules, the Reporter reviewed the changes and provided suggestions for change, on the ground that some of the proposed style changes would have substantive effect. Professor Kimble incorporated the Reporter's suggestions in a second draft, and it was that draft that was reviewed by the Committee.

The Committee engaged in an extensive discussion of the costs and benefits of restyling the Evidence Rules. Judge Thrash, who is a member of the Style Subcommittee of the Standing Committee, stated that restyling would require extensive time and effort from the Committee and the Reporter. He noted that when the Civil Rules were restyled, dozens of questions arose as to

whether a purported style change would change the substance of a rule. Judge Thrash remarked, however, that the end product of restyled Civil Rules was worth the effort, as those rules are now much more user-friendly, easier to read and apply.

Committee members noted that if the Evidence Rules were reviewed for style, there would inevitably be suggestions that those Rules could be improved substantively as well. Yet those at the meeting who were involved in previous style projects strongly recommended that substantive improvements be put to the side during restyling. Adding substantive changes would complicate and delay the restyling process, and would make it harder for the project to gain approval. The recommendation was that the substantive changes raised in the restyling process should be placed on a separate track and proposed after restyling was completed.

Some Committee members expressed reservations about restyling the Evidence Rules. One member noted that the Committee did not have its full complement of members, and therefore it might be difficult to complete the project in a timely fashion. Another member opined that any difficulty in using the Evidence Rules was not because of their wording and structure, but because of difficult evidentiary concepts such as the difference between hearsay and a statement not offered for its truth. Another member questioned whether the restyling of the Evidence Rules might be problematic because most states use the existing Federal Rules as a model for their own rules of evidence.

Despite these reservations, the general sense of the Committee was that the restyling project had merit and was worthy of further consideration. Members reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

The Committee recognized that before any more work was done on a restyling project, the Committee would need to determine whether the Chief Justice supported restyling of the Evidence Rules. The Reporter to the Standing Committee noted that the Chair of the Standing Committee would be meeting with the Chief Justice in the near future. The sense of the Committee was that it would be useful if the Chief Justice's views on restyling of the Evidence Rules could be addressed at that meeting.

Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, Section 214, provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse

spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

(1) a child of either spouse; or

(2) a child under the custody or control of either spouse.

* * *

The Reporter and the consultant on privileges prepared a memorandum to assist the Committee in assessing the necessity and desirability of amending the Evidence Rules to provide a harm to child exception to the marital privileges. That memo indicated that almost all courts considering the question had in fact refused to apply either the confidential communications privilege or the adverse testimonial privilege to cases in which the defendant is charged with harm to a child in the household. In other words, a harm to child exception to both marital privileges is already recognized in the federal case law. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege. The memorandum concluded that this recent case was dubious authority, because it provided no analysis; relied on a purported lack of case law on the subject, even though other federal cases apply the exception; and failed to cite a previous case in its own circuit that applied a harm to child exception to the adverse testimonial privilege (and accordingly the new case was not even controlling in its own circuit).

The Committee considered the necessity and desirability of an amendment to implement a harm to child exception to the marital privileges. Members generally agreed that if it were the Committee's decision, it would not and should not propose an amendment to implement the harm to child exception. This is because the Committee ordinarily does not propose an amendment unless one of three conditions is established: 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it; 2) the existing rule is simply unworkable for courts and litigants; or 3) the rule is subject to an unconstitutional application. With respect to the existence of a harm to child exception, there is no risk of unconstitutional application, and there is no problem of workability, because the exception either applies or it does not. With respect to a split in the circuits, the courts are in fact uniform about the existence of a harm to child exception to the privilege for confidential communications. It is true that there is a split of sorts on the application of the harm to child exception to the adverse testimonial privilege, but that split was only recently created, and by a single case — a case that ignores the fact that its own circuit had previously established the exception. Thus, the Evidence Rules Committee would not propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit.

Committee members also noted that an amendment to establish a harm to child exception would raise at least two other anomalies: 1) piecemeal codification of privilege law; and 2) codification of an exception to a rule of privilege that is not itself codified.

The Department of Justice representative noted, however, that the question for the Committee was not whether it would propose an amendment, but rather how to respond to Congress's request for input on the necessity and desirability of such an amendment. Because privilege rules must be enacted by Congress, the standard for proposing a rule of privilege might be different from that used by the Evidence Rules Committee for other rules.

The Committee unanimously agreed that it was important to consider the request from Congress seriously and that, even if the Committee would not propose an amendment to implement a harm to child exception, it should in its report to Congress suggest language for an amendment should Congress decide to proceed. The Committee also agreed that any language to be suggested to Congress should cover cases involving harm to any child within the custody or control of either spouse; it should not be limited to cases involving harm to biological children of one or both spouses.

The Committee directed the Reporter to prepare a draft report to Congress that would set forth: 1) the reasons why the costs of an amendment are not warranted when the only benefit is to address the results of an aberrational case; 2) concerns about piecemeal adoption of privilege rules; 3) concerns about drafting an amendment that would provide an exception to privileges that are not themselves codified; and 4) proposed language for Congress to consider should it decide to promulgate an amendment that would codify a harm to child exception to the marital privileges. The Committee will consider the draft report at its next meeting.

Time-Counting Project

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee has prepared a template and has solicited comments and suggestions from the Advisory Committees. That template takes a "days are days" approach to time-counting, meaning that weekend days and holidays are counted for all time periods measured in days or longer periods. It also provides for uniform treatment on when to begin and end counting, and a uniform method of counting when the end of the period is a weekend or holiday.

The Committee reviewed the Time-Counting template and unanimously approved of the approach taken by the Time Counting subcommittee. It had no suggestions for improvement to the template.

The Committee then discussed whether the Evidence Rules should be amended to implement the uniform time-counting rules provided in the Template. The Committee noted that there are only a handful of Evidence Rules that are subject to time-counting: 1) Under Rule 412, a defendant must

file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown; 3) Rule 609(b) provides a different balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 4) Rules 803(16) and 901(b)(8) provide for admissibility of documents over 20 years old.

The Committee reviewed a memorandum from the Reporter which indicated that 1) the day-based time periods in the Evidence Rules will not be shortened or otherwise affected by the time-counting template, because they are all 14 days or longer — the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods 14 days or longer; and 2) there appears to be no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. Perhaps this is because the day-based time periods are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. And as to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. For example, how likely is it that a document will be 20 years old, depending on how one counts the first or last day of the period? Any dispute on time-counting could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem that would be addressed by such an amendment. The Committee noted, however, that because the Civil and Criminal Rules are going to be amended to change the existing time-counting rules, it would be useful for those new rules to govern any time-counting questions that could possibly arise under the Evidence Rules in the future. The Committee voted unanimously to request the Time-Counting Subcommittee to consider adding language to the Template to provide that the Civil and Criminal time-counting rules would govern time-counting under the Evidence Rules.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not

testimonial. Subsequently the Court in *Davis v. Washington* held that statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause.

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. Federal courts have also held that certifications of a record or the non-existence of a record may be admitted despite *Crawford*, even if those certifications are prepared specifically for litigation.

The Committee discussed whether any amendment should be proposed in order to bring any of the hearsay exceptions into compliance with the Confrontation Clause after *Crawford* and its progeny. Some members were of the opinion that no amendment was necessary because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial, i.e., that the admissibility requirements of the Federal Rules hearsay exceptions screen out testimonial hearsay as that term has been construed in *Davis* and the lower courts. Others were less confident that the Federal Rules hearsay exceptions were coextensive with the Confrontation Clause, but these members nonetheless agreed that it would be unwise at this point to propose amendments that would attempt to codify *Crawford* and its progeny. These members concluded that the case law remained in flux, and noted that the Supreme Court's opinion in *Davis* was less than a year old and had yet been applied or construed by many of the lower courts.

The Committee unanimously resolved that it was not advisable to propose an amendment in response to *Crawford* at this time. It directed the Reporter to continue to monitor case law developments under *Crawford* and *Davis*.

Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made less expensive. Other concerns include the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This may be a problem if it deters corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b). In response to that letter, the Committee prepared a proposed Rule 502 that would protect against waiver of privilege or work product under certain circumstances. The first draft of that rule was the subject of a hearing conducted at Fordham Law School in April 2006. In response to comments at that hearing and discussion at the subsequent Committee meeting, the draft rule was substantially revised. The Committee unanimously approved the redrafted proposal for release for public comment, and the Standing Committee voted unanimously to issue the revised proposed Rule 502 for public comment.

For the Fall 2006 meeting, the Reporter prepared a discussion memorandum that highlighted some comments and suggestions concerning Rule 502 that were made outside the formal public comment process, which was still in an early stage. The Committee discussed these comments and suggestions at the meeting, with the recognition that no immediate action could or should be taken on any proposal for change to Rule 502 until the end of the formal comment period. The Committee did, however, reach some tentative conclusions on some issues raised by the informal comments.

The comments considered by the Committee, and the Committee's tentative position on each of the comments, was as follows:

1. Suggestion to delete the "should have known" language in the selective waiver provision:

Rule 502(b) conditions protection from inadvertent waiver on whether the holder of the privilege took reasonably prompt measures, "once the holder knew or should have known of the disclosure," to rectify the mistaken disclosure. The Reporter received an informal comment suggesting that the words "or should have known" be deleted. The stated ground for deletion is that the "should have known" language could give rise to litigation about when, exactly, the producing party should have known about the mistaken disclosure. It is also argued that the "should have known" language would be difficult to apply in electronic discovery cases, in which mistaken disclosures are all but inevitable and so one could argue that the holder "should have known" about mistaken disclosure at the very time that *any* production of electronic material was made.

The suggestion was discussed by the Committee. The sense of the Committee was that the "should have known" language had substantial merit. Committee members noted that an "actual knowledge" standard would also give rise to litigation. Questions would be raised on the exact point at which a producing party "knew" about a mistaken disclosure. One Committee member remarked that if litigation did arise, the "should have known" standard would be easier to apply than a standard based on the producing party's actual knowledge. Committee members also stated that the actual knowledge standard could give rise to gamesmanship. Producing parties might demand the return of the privileged material on the eve of trial, arguing that they did not "know" until then about the mistaken disclosure.

The Committee recognized that in many cases actual knowledge will be relatively easy to determine, because in most jurisdictions a lawyer who receives the information has an ethical obligation to notify the producing party of its receipt. But that ethical proscription would not apply, for example, where the recipient is a pro se litigant. And actual knowledge arguments might still be made for the period between the time of disclosure and the time that the recipient recognizes that the material is protected and notifies the producing party. For all these reasons, the Committee tentatively determined to retain the "should have known" language in Rule 502(b).

2. Suggestion to extend the inadvertent disclosure provision to regulatory investigations:

An informal comment suggested that Rule 502 contains an inconsistency when the inadvertent disclosure provision is compared to the selective waiver provision. The inadvertent disclosure provision (Rule 502(b)) provides protection from waiver when the disclosure is "inadvertent and is made *in connection with federal litigation or federal administrative proceedings*." In contrast, the selective waiver provision (Rule 502(c)) provides protection from waiver to third parties when the disclosure is "made *to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority*." The comment questioned whether there was a rationale for applying the protection of selective waiver to regulatory investigations, while not extending the protection of inadvertent disclosure to those same

investigations.

In discussion of this comment, most Committee members concluded that the difference in coverage in the two subdivisions is not anomalous at all. First, the Committee made a considered determination to limit the protections of subdivision (b) to mistaken disclosures made *during proceedings*. Of course, mistaken disclosures can occur in other contexts — such as a letter mistakenly sent from counsel to a potential adversary before litigation has even begun, or a privileged document mistakenly sent to a third party in the mail. But the Committee decided not to cover mistaken disclosures outside the context of a proceeding, for at least two reasons. First, a rule covering mistaken disclosures outside a proceeding risks overreaching, beyond the interest in limiting the costs of discovery that animates the rule. Second, a rule that would govern disclosures outside a federal proceeding could end up regulating disclosures that are not on a *federal* level, thus raising important concerns about federalism. Outside the context of a proceeding, how is it to be determined that a mistaken disclosure is made at the federal level? As Subdivision (b) is currently written, it applies only to disclosures raising a legitimate federal interest. Extending its protection would raise questions about whether a particular disclosure raised a sufficient federal interest to warrant protection under the Rule.

One Committee member argued in response that a federal interest could be retained 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 regulators outside a 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.

The Committee agreed to consider at its next meeting language that would amend subdivision (b) to cover mistaken disclosures made "to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

3. Selective waiver:

The comment received on the relationship between the inadvertent disclosure provision and the selective waiver provision led the Committee to a preliminary discussion of the merits of the selective waiver provision. The Committee has not decided whether to propose a selective waiver provision in Rule 502, i.e., a provision that disclosure of privileged information to a regulator does not constitute a waiver in favor of third parties. The selective waiver provision in the Rule released for public comment is bracketed, indicating that the Committee is undecided about the merits of a selective waiver provision and is seeking public comment (and especially empirical data) on the merits of such a provision before making a decision.

It is clear that the selective waiver provision is the most controversial part of proposed Rule 502. Selective waiver has raised objections from plaintiffs' counsel, from certain members of the

ABA, and from state court judges concerned that a state's waiver rules would be subsumed by a federal provision on selective waiver. Committee members at the Fall meeting suggested that given the controversy (both within and outside the Committee) it might be appropriate for the Committee to draft a rule in which the selective waiver provision remained in brackets if and when it went to Congress. Leaving the decision on the merits to Congress could be appropriate because rules of privilege must be directly enacted by Congress in any case. And including a selective waiver provision as a drafting option for Congress (without a suggestion on its merits) is probably appropriate given that in essence the Committee is drafting the rule for Congress and so should provide Congress with all sensible drafting alternatives. Moreover, Congress has shown interest in enacting a selective waiver provision, having done so in the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators.

Other than on the merits of the proposal per se, a number of comments at the Committee meeting suggested changes to the language of Rule 502(c). One member suggested that the Rule should set forth procedures by which the producing party could prevent a regulator from disclosing privileged information to third parties. That member was concerned that a regulator, once receiving privileged information, might distribute it widely. But most Committee members noted that the Evidence Rules are not the place for establishing procedures for preventing disclosure of privileged material outside the context of a proceeding. Procedures for retrieving, or preventing disclosure of, privileged material are already set forth in the Civil Rules.

A Committee member noted that under the Rule as issued for public comment, a disclosure to a federal regulator would operate as a waiver to a state regulator. This is because Rule 502(c) states that a disclosure to a federal regulator does not operate as a waiver "in favor of non-governmental persons or entities." The Committee tentatively agreed with the proposition that if a selective waiver rule were to be adopted, then a disclosure to a federal regulator should not constitute a waiver to a state regulator. The Reporter was directed to provide a drafting alternative, for consideration at the next meeting, providing that disclosure to a federal regulator does not operate as a waiver in favor of a state regulator.

4. Extending the inadvertent disclosure protection to disclosures made in arbitration proceedings:

Rule 502(b) provides that inadvertent disclosures "made in connection with federal litigation or federal administrative proceedings" are not waivers if the party took reasonable precautions to prevent disclosure and acted diligently in trying to get the material back. The Reporter received a private comment asking whether this rule would protect an inadvertent disclosure made in the context of a federal arbitration proceeding. The sense of the Committee was that arbitration proceedings generally should not be covered by the rule, because the rationale for Rule 502(b) is to decrease the cost of pre-production privilege review in federal litigation. In that sense, providing for more efficiency in arbitration proceedings is beyond the scope of the rule.

One Committee member noted, however, that parties are sometimes required by federal courts to go to arbitration. Committee members agreed that court-annexed or court-mandated arbitration should receive the protection of the rule, but noted that the protection was already *granted* in Rule 502(b) because it covered "federal litigation." The Committee tentatively agreed to add a sentence to the Committee Note to specify that the term "federal litigation" is intended to cover court-annexed or court-mandated arbitration proceedings.

5. Extending Rule 502(d) to confidentiality orders not based upon the agreement of the parties:

Subdivision (d) of Rule 502 currently provides that confidentiality orders bind non-parties "if the order incorporates the agreement of the parties before the court." The Reporter received an informal comment from a federal judge, suggesting that the protection of the Rule should be extended to *any* confidentiality order entered by the court. That judge pointed out that if a court finds, for example, that a disclosure of privileged information during discovery was not a waiver, then that order should be enforceable against third parties even though the parties before the court did not enter into a confidentiality agreement.

The Committee unanimously agreed with the comment. Members thought it anomalous that a court order memorializing an agreement between the parties would be entitled to more respect than other court orders on waiver generally. The Committee tentatively agreed to delete the language of Rule 502(d) that limited its protection to court orders based on agreements by the parties. That tentative amendment would provide as follows:

> (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~~.

6. Choice of law questions when disclosures are made at the state level and the disclosed information is sought to be used in federal court:

At its Spring 2006 meeting, the Committee unanimously determined that Rule 502 should not purport to regulate disclosures made at the state level, i.e., in state court proceedings or before state regulators. The only impact of the Rule on state courts is that those courts must adhere to the federal rule on waiver with respect to disclosures originally made in federal proceedings or before federal regulators. Choice of law questions are raised, however, when a disclosure of privileged information is made at the state level and then the information is offered in a subsequent federal

proceeding. If there is a conflict between the waiver rules of the state and those provided under Rule 502, which law of waiver controls?

The Reporter submitted a memorandum to the Committee on the complex choice of law questions raised by Rule 502. There are three possible outcomes when a state disclosure is offered in a subsequent federal proceeding, and the question is whether there has been a waiver: 1) waiver could be governed by the substantive standards of Rule 502; 2) waiver could be governed by the substantive standards of the state law in the state in which disclosure was made; or 3) waiver could be governed by federal common law that would be applicable under Rule 501 — which would mean that the state law of waiver would govern in diversity cases and the federal common law of waiver (and distinct from Rule 502) would govern in federal question cases.

After discussion, the Committee directed the Reporter to provide the Committee with three drafting alternatives to cover the three choice of law possibilities. The Committee will consider the drafting alternatives at its next meeting.

Closing Business

Judge Smith expressed the Committee's deep gratitude and appreciation to departing members Tom Hillier and Trish Refo. He noted that both had served with great distinction, and that each had been a tremendous help and resource to the Committee.

The meeting was adjourned on November 16, 2006, with the time and place of the Spring 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter

FORDHAM
University

School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

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

consequences of such an oversight. There is, then, much to be said for retaining the language in Rule 502 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 ~~(c)~~ (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*.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Professors Daniel Capra, Reporter and Kenneth Broun, Consultant
Re: **Proposed Rule 502: Draft of Cover Letter to Congress**
Date: March 15, 2007

Because Congress must enact Rule 502 directly, it may be useful to add a cover letter to proposed Rule 502, to explain the provenance of the Rule and the choices made in drafting it. The cover letter is referred to in various places in the principal memo on Rule 502 in this agenda book.

What follows is the draft of a cover letter to Congress. It is styled as a report from the Judicial Conference. This assumes that the rule, if approved by the Judicial Conference, will be sent to Congress directly. If instead the rule is sent through the usual rulemaking process, the cover letter might be styled as an explanatory memorandum from the Advisory Committee or the Standing Committee. The precise iteration is still to be determined, but the important task at this point is to come to some agreement on the language of the memo.

Draft of Cover Letter to Congress on Proposed Rule 502.

The Judicial Conference respectfully submits to the United States Congress a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress consider adopting this proposed rule as Federal Rule of Evidence 502.

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

an Act of Congress rather than adopted through the process prescribed by the Rules Enabling Act, 28 U.S.C. § 2072.

Description of the Process Leading to the Proposed Rule

The suggestion for the proposal of a rule dealing with waiver of attorney-client privilege and work product was presented in a January 23, 2006 letter from F. James Sensenbrenner, Jr., then-Chair of the House Committee on the Judiciary, to Leonidas Ralph Mecham, then-Director of the Administrative Office of the United States Courts. A copy of Congressman Sensenbrenner's letter is attached. In the letter, Congressman Sensenbrenner urged the Judicial Conference to proceed with rulemaking that would

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

Congressman Sensenbrenner noted the impact on litigation costs of reviewing for privilege and work product protection the enormous volume of materials in cases involving electronic discovery. He noted the concern that any disclosure could waive the privilege not only with regard to a particular document but for all other documents dealing with the same subject matter. He also observed that, while parties may make agreements limiting forfeiture of privilege, such agreements do not provide adequate assurance that the privilege against waiver in other proceedings. He added:

> A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants.

The task of drafting a proposed rule responding to Congressman Sensenbrenner's request was referred to the Advisory Committee on Evidence Rules (the "Advisory Committee"). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers and academics to testify before the Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts, and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502, that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure ("the Standing Committee"). The public comment period began in August and ended February 15, 2007. The Advisory Committee received more that 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing

Committee's Subcommittee on Style. In April, 2007, the Evidence Rules Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee of Style and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference and is attached to this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See* House Conference Report 103-711 (stating that the "Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section" of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee recognized the same concerns that had prompted Congressman Sensenbrenner's letter. Concern for waiver of privilege – especially when waiver as to one document may result in a waiver of the privilege with regard to all documents dealing with the same subject matter – dramatically increases the already high costs of litigation in voluminous document cases and particularly in cases involving electronic discovery. The existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. Agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them. [The Committee also noted the likely adverse effect on governmental investigations where parties withhold privileged documents – even after a promise of confidentiality – for fear that a disclosure of a privileged document to the agency will result in a total waiver of the privilege. The great majority of federal cases have held that a general waiver will result from disclosure of a privileged document to a government agency irrespective of an agreement between the parties with regard to confidentiality.]

The Proposed Rule does not attempt to deal comprehensively with either attorney-client privilege or work product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work product protection. Rather, it deals primarily with issues involved in the disclosure of documents in a federal court [or court annexed or order arbitrations] proceedings [or to a federal public office or agency] [or to a federal public office or agency in the course of any regulatory, investigative, or enforcement process]. It binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, [selective waiver by disclosure to a federal office or agency], and the controlling effect of court orders and agreements.

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

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

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

- [*Protection When Disclosure is Made to a Federal Office or Agency*: Subdivision (c) provides that if a privileged or protected communication or information is disclosed to a federal office or agency acting in the course of a regulatory, investigative or enforcement process, then the disclosure does not operate as a waiver to anyone other than a federal office or agency. This protection is knows as "selective waiver."]

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

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

- *Disclosures Made in State Proceedings of Communications or Information Subsequently Offered in a Federal Proceeding:* Subdivision (g) provides that if privileged or protected communications or information are disclosed in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

Drafting Choices Made by the Advisory Committee

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

section explains those choices and notes the options that Congress might have in implementing those choices either in Rule 502 or in independent legislation to complement Rule 502.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to disclosures made in state proceedings when the disclosed communications or information are subsequently offered in other 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 Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even where the disclosed material is then offered in a state proceeding (the so-called "state to state" problem). In response to these objections, the Evidence Rules Committee voted unanimously to cut back the Rule, so that it would not cover the "state-to-state" problem . While states would be bound by the Federal Rule, that would only be the case for disclosures initially made at the federal level, when the communications or information were later offered in a state proceeding (the so-called "federal to state" problem). The Conference of Chief Justices thereupon withdrew its objection to Rule 502.

During the public comment period on the scaled-back rule, the Advisory Committee received many comments from lawyers and lawyer groups 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 might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

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

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

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

While the Advisory Committee determined that Rule 502 should not be extended to disclosures initially made in state proceedings, when the protected communication or information is then offered in a state proceeding, the Judicial Conference 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.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding. State courts in such circumstances would be bound by federal confidentiality orders, and could not find a waiver after a mistaken disclosure if the holder took reasonable precautions and reasonably prompt measures to retrieve the material. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the rule. See Rule 502(g).

Nevertheless, it may also be useful for Congress to consider additional legislation that would provide for the binding effect of Rule 502 in state courts for disclosures made in federal proceedings. A statute worded as follows might be appropriate: "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, such legislation could serve to protect state litigants who might not look to a Federal Rule of Evidence for guidance.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of Proposed Rule 502 did not determine the question of what rule would apply when a disclosure is made in state court and the waiver determination is made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to protect the attorney-client privilege and work product immunity. This provision is properly placed in the rule even if Congress adopts legislation providing a uniform law of waiver. If Congress enacts independent legislation to govern state disclosures, then it is recommended that the legislation specify that the uniform rule is intended to provide a floor, not a ceiling, and that states retain the option to provide greater protection against waiver if they wish. If Congress takes that approach, then the language in Proposed Rule 502 applying state law when it is more protective will remain valid.

4) Selective waiver. 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 communications or information to

the government waives the protection only selectively — to the government -- and not to any other person or entity. 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). It provided for protection for disclosures made to federal offices or agencies only — but it bound state courts to selective waiver when a disclosure to a federal office or agency was offered in a subsequent state proceeding.

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:

- 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 indicted unless they turn over privileged or protected information; they contended that selective waiver could be expected to increase government demands to produce such information.

- Lawyers expressed the concern that if selective waiver is enacted, corporate personnel will not communicate confidentially with lawyers for the corporation, for fear that the corporation will be more likely to produce the information to the government and thereby place the individual agents at personal risk.

- 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.

- 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.

- Lawyers emphasized that under the federal common law, every federal circuit court but one has rejected the notion of selective waiver, those courts reasoning 1) that corporations do not need any extra incentive to cooperate, and 2) that selective waiver protection could allow the holder to use the privilege as a sword rather than a shield. Lawyers contended that a doctrine roundly rejected under federal common law should not be enacted by rule.

- 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 in virtually every state, because most of the

states do not recognize selective waiver.

- 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.

- The protection of selective waiver was asserted to be 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.

- 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.

- 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.

- The agencies noted that even if the government can disclose the information widely, this did 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.

- The agencies found nothing in the federal common law to indicate that legislation on selective waiver would be improper or unjustified.

[If selective waiver is included in the Rule:

The Advisory Committee carefully considered and discussed all of the favorable and unfavorable comments on the selective waiver provision. Recognizing the strength of the arguments on both sides of the issue, the Judicial Conference has elected to include a selective waiver section in the rule it is presenting, Rule 502(c), and to leave the ultimate decision on its adoption to Congress. Rule 502(c) has been revised somewhat from the rule submitted for public comment. The rule now provides that disclosure to a federal agency does not operate as a waiver to a state agency. The Rule specifies that is not intended to foster the alleged "culture of waiver." References are also

made to the fact that disclosure by the receiving agency does not constitute a waiver and that disclosure to an agency does not constitute a waiver to Congress. In addition, the language of the section was amended to track the language of the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators.]

[If selective waiver is not included in the Rule:

The Advisory Committee carefully considered and discussed all of the favorable and unfavorable comments on the selective waiver provision. The Advisory 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 Advisory Committee also noted that as a rulemaking matter, selective waiver raised issues different from those addressed in the rest of Rule 502. The rest of Rule 502 is intended to limit the costs of discovery (especially 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 Advisory Committee therefore determined that it would not include a selective waiver provision as part of proposed Rule 502. The Judicial Conference approves that decision. The Conference 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 Advisory Committee prepared language to assist Congress should it decide to proceed with independent legislation on selective waiver. This suggested language is derived from the Bank Regulatory Act and also incorporates some drafting suggestions received during the public comment period on Rule 502(c).

***Possible language for separate legislation could provide as follows*:**

> **(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 [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] 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.][1]

(d) 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 intangible equivalent, prepared in anticipation of litigation or for trial.

In addition, the Committee's Note for its proposed draft of a selective waiver provision follows, in the event that it may assist Congress should it decide to consider separate legislation on selective waiver

Draft of Committee Note on Selective Waiver.

Courts are in conflict over whether disclosure of privileged or protected information

[1] This provision is necessary if Congress does not extend selective waiver protection to disclosures made to state and local agencies in the first instance.

to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal [or state or local] 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 rule does not purport to affect the disclosure of protected information after it has been received by the public office or agency. The rule does, however, provide protection from waiver in favor of anyone other than public offices or agencies, regardless of the extent of disclosure of that information by any such office or agency. 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 as against other persons or entities.

The rule provides that when protected information is disclosed to a public office or agency the disclosure does not operate as a waiver to any person or entity other than a [the] 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).]

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress. Members of the Standing Committee, the Advisory Committee on Federal Rules, as well as their reporters and consultants, are ready to assist Congress in any way its sees fit.

Respectfully submitted,

FORDHAM
University

School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Summary of Public Comments Received on the Proposed Rule 502
Date: March 15, 2007

Below is a summary of all public comments received on the proposed Rule 502. The summaries of public comment will be placed after the proposed rule change if the Committee decides to recommend it to the Standing Committee for final approval. Many of these comments receive detailed consideration and analysis in the memo on Rule 502, found in this agenda book.

It should be noted that the summary of public comments will have to be changed if the Committee changes the Rule itself. For example, a criticism of language in the Rule that the Committee subsequently changes will have to refer to criticism of the Rule as it was issued for public comment.

Summary of Public Comment on the Proposed Rule 502

Matthew R. Gemello and Steven B. Stokdyk on behalf of the Corporations Committee Business Law Section of the State Bar of California (06-EV-001) "applaud and support the Advisory Committee's efforts to advance proposed Rule 502 and the Advisory Committee's objectives of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to a discovery request." They oppose, however, the selective waiver provision of Rule 502(c) "because, among other things, we believe that (1) it will not fully protect the confidentiality of the attorney-client relationship, and (2) it will not advance the Advisory Committee's objective of reducing the burden and expense of litigation." Among other arguments, they contend that the language of Rule 502(c) covering an "investigation" is unclear because it may or may not extend to an inspection of a facility; and that it is unclear whether the holder of the protected information must be the target of the investigation.

Susan Hackett, Esq., (06-EV-002 and 06-EV-045), on behalf of the Association of Corporate Counsel, opposes the selective waiver provision, Rule 502(c). The Association concludes that it may have a "negative impact" in light of a "culture of waiver" that has been "created by government enforcement officials and prosecutors who have abused their discretion by routinely coercing companies to waive their privileges." The Association argues that selective waiver protection "might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances . . . given that the government can now offer protection against third party disclosures." It states that the selective waiver provision "addresses the collateral impact of the government's inappropriate waiver practices, but does nothing to encourage the necessary abstention from engaging in the underlying practice in the first place."

Gregory P. Joseph, Esq., (06-EV-003) argues that Rule 502(a), which limits subject matter waiver, provides a "problematic conflation of attorney-client privilege and work product protection." He states that under Rule 502(a), the use of a witness statement may result in a waiver of a memorandum of the lawyer's evaluation of the witness statement, on the ground that the memorandum "ought in fairness to be considered" with the statement. Mr. Joseph agrees that the "ought in fairness" language accurately captures the better law on subject matter waiver of attorney-client privilege. But he concludes that the "ought in fairness" language may lead to more and not less subject matter waivers as applied to disclosure of work product. Mr. Joseph generally supports other aspects of the Rule, including the provisions on inadvertent disclosure (Rule 502(b)), selective waiver (Rule 502(c)) and the enforceability of court orders (Rule 502(d)). He argues, however, that if subdivision (c) is not enacted, then the inadvertent disclosure provision of subdivision (b) should be extended to disclosures made in the course of investigations by public offices or agencies. He argues further that state law should not govern the effect of disclosure to a state office or agency, because this will create conflict of law questions when a disclosure is made to a number of regulators in different states. Finally, he argues that the definition of work product in subdivision (e) is too confining because it applies to "materials", whereas "a great deal of work product is oral or

otherwise intangible, and it is protected."

Robert E. Leake, Jr., Esq. (06-EV-004) endorses proposed Rule 502, concluding that "Got ya" is "a game that should be discouraged."

Douglas G. House, Esq. (06-EV-005) supports proposed Rule 502 and favors rules permitting "the selective/potential waiver of the attorney-client privilege."

Phillip R. Sellinger, Esq., (06-EV-006) endorses proposed Rule 502 but urges that its provisions be extended to govern disclosures made in state proceedings. He argues that complete uniformity of privilege law is necessary to assure predictability and to avoid conflicting outcomes in essentially identical matters.

Paul R. Rice, Esq. (06-EV-007) opposes proposed Rule 502 for the reasons stated in his publications that he cites throughout his comment. In his view, Rule 502 is evidence that the Committee has sold out to corporate interests.

George L. Paul, Esq., (06-EV-008 and 06-EV-052) generally supports proposed Rule 502, because the costs of discovery have "strangled" the process of commercial litigation and privilege reviews impose "phenomenal" expense. He recommends, however, that the Rule be extended to cover disclosures made in state proceedings, because the vast majority of litigation occurs in state courts. He is also concerned that the standard for avoiding waiver by inadvertent disclosure — that the party took "reasonable precautions" to avoid disclosure — may be difficult to apply without more guidance in the Rule or Committee Note. Mr. Paul concludes that "reasonable precaution does not necessarily mean eyes on review" and that "search and retrieval technology might be a reasonable alternative."

Thomas Y. Allman, Esq., (06-EV-009) supports Rule 502 as issued for public comment, but opposes a proposal considered by the Advisory Committee that would provide for enforceability of court confidentiality orders that are not based on agreement between the parties. He argues that parties should not be "compelled to surrender the right to conduct privilege reviews on realistic schedules so that a case management order can provide expedited and inexpensive review." Mr. Allman suggests that the Committee Note contain an "admonition to the effect that it is not essential to the validity of the court order on non-waiver that an accelerated discovery schedule be agreed to or ordered by the court in the initial proceeding and that courts should refrain from measures designed to coerce or require accelerated privilege review absent agreement of the parties."

Richard A. Baker, Jr., Esq. (06-EV-010) suggests that the selective waiver provision, Rule 502(c), be expanded to provide protection for disclosures to foreign regulators.

Michael R. Nelson, Esq. (06-EV-011) states that the inadvertent disclosure provision, Rule

502(b), "effectively addresses the challenges that the growth of electronic discovery has placed upon the ability of litigants to perform a thorough and accurate privilege review." He contends, however, that the rule would more effectively address the problem of discovery costs if it were extended to cover state proceedings. He further suggests that the language in the Rule conditioning protections on having taken "reasonable precautions" against disclosure is "somewhat vague." He states that the term "reasonable steps" is preferable because it "serves to better express the idea that a litigant must implement procedures to limit the disclosure of privileged material." Mr. Nelson recommends that the Committee Note explain that the determination of whether reasonable steps have been taken "should focus on the volume of material to be reviewed and the time frame in which the review must be performed. Mr. Nelson opposes the selective waiver provision, Rule 502(c), arguing that it "will only serve to encourage the recent tendency of such agencies to demand the production of privileged documents in order to avoid prosecution or enhanced administrative penalties." Finally, Mr. Nelson states that the subject matter waiver provision, Rule 502(a), should specify that a subject matter waiver is limited to intentional efforts to mislead the opposing party by introducing incomplete information." Mr. Nelson supports the provisions concerning court orders and party agreements (Rule 502(d) and (e)) but states that "the Committee Note to Rule 502(d) should clarify that the provision does not authorize selective waiver agreements."

012 is Frank Verderame, did not testify in Arizona and no witness statement provided.

John Vail, Esq., on behalf of the Center for Constitutional Litigation, (06-EV-013) states that "[n]o compelling circumstances justify the proposed rule on inadvertent disclosure, which pre-empts state privilege law" and that a rule requiring a party to take reasonable precautions to prevent disclosure of privileged information is unlikely to reduce the costs of discovery. The Center supports the proposal on enforceability of court confidentiality orders (Rule 502(d)), as it "addresses concerns voiced by both the plaintiffs' and defendants' bars" and "has the potential to yield benefits to civil litigants and their counsel who choose to waive certain rights in return for quicker, easier access to information." The Center opposes the selective waiver provision (Rule 502(c) as the "wrong solution to the problem of prosecutorial overreaching."

Carol Cure, Esq., (06-EV-014) "strongly" supports the inadvertent disclosure provision (Rule 502(b)) because the burdens of protecting against inadvertent disclosure in electronic discovery cases are all but insurmountable. She argues, however, that the "reasonable precautions" standard that must be met to protect against waiver "may well be too high for most companies." She would substitute "reasonable steps" for "reasonable precautions" and contends that the change "would allow the court to consider each case on its own facts and to take into account whether the organization has taken appropriate steps to implement an effective compliance program such as writing an effective policy, providing training to employees, providing sufficient resources, and monitoring the program to remediate any deficiencies." She also suggests that the inadvertent disclosure provision should be extended to disclosures made to regulators and to disclosures made in arbitration proceedings. Ms. Cure recommends that the provision on court orders (Rule 502(d)) be expanded to cover all court orders on confidentiality, whether or not they incorporate an

agreement of the parties. As to selective waiver (Rule 502(c), Ms. Cure states that if it is to be adopted, it should be made clear that it applies only if the waiver to the regulator is "completely voluntary and not coerced", and it should apply to disclosures made to state regulators where the information is proffered in a subsequent federal proceeding.

015 is Patrick J. Paul, did not testify in Arizona and no witness statement provided.

016 is the Defense Research Institute (No witness testimony, no statement provided).

Paul J. Neale, Esq., on behalf of Doar Litigation Consulting (06-EV-017) supports Rule 502, stressing the importance of amending the rules to address the mounting costs of pre-production privilege review, especially in electronic discovery cases. He recommends that the selective waiver provision (Rule 502(c)) include "privilege protection at the state and federal levels." He also suggests that the Committee should "clarify" the term "reasonable precautions to prevent disclosure" as used in the inadvertent disclosure provision (Rule 502(b)). In his view, the Committee should address "the use of advanced analytical software applications and related methodologies to assist in the determination of privilege and to facilitate a more efficient production of relevant documents. . . . Given the increasing use of these applications even in their relative infancy and the inevitable wide-scale use of them in the future, the Committee should specifically include their use and litigants' reliance on them as reasonable precautions."

018 is Kenneth Mann, didn't testify in Arizona and didn't provide a witness statement.

Thomas P. Burke, Esq., (06-EV-019) makes the following suggestions: 1) the "should have known" language of Rule 502(b) should be deleted; the promptness of a party's efforts to retrieve mistakenly disclosed information should be determined from when the party actually knew of the disclosure; 2) the Rule should clarify that if a mistaken disclosure is found to be a waiver, it can never be found to be a subject matter waiver; 3) the selective waiver provision (Rule 502(c)) should specify that only voluntary waivers will receive the protection afforded against private parties; and 4) the Committee should add language to the Note indicating that there is no intent to encourage waiver of privilege or work-product to public agencies.

Michael J. O'Connor, Esq. (06-EV-020) supports proposed Rule 502 as it will help to limit the "staggering costs" of pre-production privilege review. He notes that privilege review can even be costly in a case with relatively small stakes, because without the protection of Rule 502, counsel will have to worry that a mistaken disclosure in a small litigation might later be used in major litigation.

Daniel J. McAuliffe, Esq., (06-EV-021), on behalf of the State Bar of Arizona, "commends the Advisory Committee on Evidence Rules for coming forward with a proposed solution for what has become a vexing and costly problem in the conduct of civil litigation in the federal courts – the efforts required to protect attorney-client and work product privileges in the course of honoring discovery obligations in the production of requested and relevant documents." He recommends that the relationship between the scope of waiver provision (Rule 502(a)) and the inadvertent disclosure provision (Rule 502(b)) be clarified, to indicate that if a court finds that a mistaken disclosure is in fact a waiver, it will not be a subject matter waiver. He argues that if a waiver for failure to take "unspecified 'reasonable precautions'is to result in the wholesale waiver of the privilege in question, then little will be accomplished by subpart (b). Corporate parties will continue to expend exorbitant amounts, and engage in extraordinary efforts, to avoid inadvertent disclosure of privileged materials, for fear that a subsequent determination that it did not take 'reasonable precautions' will result in a blanket privilege waiver." On selective waiver (Rule 502(c)), Mr. McAuliffe states that the Arizona State Bar "would be in favor of the adoption of a selective waiver provision if it could be crafted in a fashion that makes clear that the decision whether or not to engage in a selective waiver must remain a wholly voluntary one on the part of the holder of the privilege."

Patrick A. Long, Esq. (06-EV-022) believes that Rule 502 "should apply to both Federal and State proceedings as this would be the most effective way to protect both attorney-client privilege and work product." He also states that a waiver of undisclosed materials "should only occur in those situations where it is necessary to explain privileged materials which the disclosing party seeks to introduce into evidence." Mr. Long is opposed to the selective waiver provision (Rule 502c)) because it does not provide "sufficient protection to allow full and frank communications between client and counsel."

Steven K. Hazen, on behalf of the Executive Committee of the Business Law Section of the State Bar of California (06-EV-023) and (06-EV-071), "applaud[s] the activities of the Committee in seeking to establish clarity and uniformity as to inadvertent disclosure of confidential information and the impact that has on the vitality of the attorney-client privilege." The Executive Committee opposes the selective waiver provision (Rule 502(c)). It notes that selective waiver is not recognized by most courts under Federal common law; it will chill candid discussions between corporate counsel and corporate agents, because the agents will be concerned that their statements will be turned over to a regulator and used against them individually; it will allow corporations to use the privilege as a sword and not a shield; it will lead to confidentiality becoming "nothing more than a commodity"; and its application to subsequent state proceedings will serve to undermine federalism.

024, Melissa Smith, did not testify in Arizona and did not file a statement.

Bruce R. Parker, Esq., on behalf of the International Association of Defense Counsel (06-EV-025), "commends the efforts of the Advisory Committee on Evidence Rules and generally supports Rule 502", but opposes the selective waiver provision (Rule 502(c)) and recommends some textual revisions to other parts of the Rule. The Association suggests that the scope of waiver provision (Rule 502(a)) should specify that it covers only waiver by "voluntary" disclosures; it states that the text of the rule as issued for public comment "leaves open the possibility that a court could order subject matter waiver where a party inadvertently disclosed privileged information by failing to take reasonable precautions to prevent disclosure." It further suggests that the "reasonable precautions" language in the inadvertent disclosure provision (Rule 502(b)) should be changed to state that a party who takes "reasonable steps considering the circumstances of the document production" will be protected from a finding of waiver. The Association further suggests that the Committee Note "should discuss specific factors that may bear on a determination as to whether a party acted reasonably under the circumstances of a particular review. The most obvious circumstance is the volume of documents or electronically stored information involved in the review. Another significant circumstance is the amount of time that a party has to conduct the review." The Association also asserts that the standard for protecting against inadvertent disclosure in Rule 502(b) sets forth two factors (reasonable precautions and reasonably prompt efforts to retrieve) while the predominant Federal case law also mentions the scope of discovery, the extent of disclosure, and the overriding issue of fairness. The Association suggests that "the Committee should state with specificity that all five factors are to be given equal consideration when a court assesses the question of waiver through inadvertent disclosure." Finally, the Association objects to the language in the Rule assessing the disclosing party's attempt to retrieve mistakenly disclosed information from the time when the party "should have known" of the disclosure. It states that "some courts may determine that if a party had taken reasonable steps under the circumstances of the particular review, then it should have known about the inadvertent disclosure as soon as it occurred." It concludes that steps taken to rectify the error should be evaluated from when the party had "actual knowledge, or with reasonable diligence after production should have discovered" the inadvertent disclosure.

06-EV-026, Edward Hochuli, did not testify in Arizona and did not submit a statement.

Douglas L. Christian, Esq. (06-EV-027), in testimony, enthusiastically supports proposed Rule 502. He suggests that the term "reasonable precautions" in Rule 502(b) be changed to "reasonably prompt measures." He further suggests adding language to the Committee Note to state that the rule does not affect the lawyer's ethical obligations with respect to receipt of inadvertently disclosed information.

06-EV-028, Christopher D'Angelo, did not testify in New York and did not submit a witness statement.

Linda Chatman Thompson, Esq., Director, Division of Enforcement, U.S. Securities and Exchange Commission, (06-EV-029), states that the selective waiver provision (Rule 502(c)), "is important to the Commission's enforcement program." If adopted, "the selective waiver provision would help the Commission gather evidence in a more efficient manner by eliminating a strong disincentive to parties under investigation who might otherwise be inclined to produce important information voluntarily." Ms. Thompson states that any concern that adopting the selective waiver provision would lead to demands for waiver "is unfounded" because "the Commission does not view a company's waiver as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff." She also notes that providing protected information to the Commission can result in "significant resource savings for the companies by limiting the number of executives and other employees whose testimony has been sought by the Commission staff and reducing the length of the investigation." Ms. Thompson concludes that the selective waiver provision "would be helpful to the Commission in carrying out its mission because the Commission is currently not receiving all of the relevant privileged and protected information that parties want to provide due to their concerns about waiver. The Enforcement Division's experience has been that entities and their counsel consider carefully whether to produce privileged materials to us and a significant consideration for them is the risk that they run in waiving the privilege as to private parties if they do so." She reports that corporate counsel and executives state "that they would be more willing to provide privileged information to us if they could have greater assurance that the information would remain privileged." Ms. Thompson argues that concerns of private parties that selective waiver will deprive them of information is unfounded because "a rule of evidence establishing that producing privileged or protected documents to the Commission does not waive privilege or protections as to private parties would leave private litigants in the same position that they would have been if the Commission had not obtained the privileged or protected materials." Thus, "the Proposed Rule would benefit the Commission significantly without harming private litigants. Also, private litigants may benefit from the Commission's ability to conduct more expeditious and thorough investigations." Ms. Thompson concludes as follows;

> Current law has created a substantial disincentive for anyone who might otherwise consider providing privileged or protected information to the Commission. The selective waiver provision in Proposed Rule 502 would eliminate this disincentive. It would enable parties to make the decision to provide privileged or protected information to the Commission without fear that, by virtue of such a production alone, they will be deemed to have waived the privilege or protection as to anyone else.
>
> Proposed Rule 502's selective waiver provision is in the public interest because it would enable the Commission to conduct its investigations more expeditiously and would promote the Commission's interest in protecting investors.

Cyril V. Smith, Esq., (06-EV-030), opposes the selective waiver provision (Rule 502(c)), arguing that the Rule is not needed to encourage corporations to cooperate with government investigations. He states: "Having represented targets, subjects and witnesses in federal white-collar

investigations, I can tell you that the risk of broader subsequent waiver for non-government parties has never been a factor in the ultimate decision whether or not to disclose information to a prosecutor or regulator. . . . The reason is simple: the threat of prosecution or regulatory action (including debarment proceedings and similar actions) to a public company or a company in a regulated industry, or indeed most business entities, is so great that the business' first priority is always to attempt resolution of the criminal investigation or regulatory proceeding. No further incentive is necessary to promote cooperation with government regulators; the business is already fully incentivized to cooperate." Mr. Smith contends that selective waiver protection "would provide a windfall to companies who are the targets of regulatory proceedings. Such businesses would be permitted to resolve their regulatory or criminal matters while fending off claims and subsequent civil proceedings — including claims such as those advance by *qui tam* plaintiffs, who provide direct benefit to the government."

Mr. Smith supports all of the other provisions of Rule 502, noting that it "performs several valuable functions in dealing with truly inadvertent disclosures of privilege or protected material, and brings the Federal Rules of Evidence into conformity with modern electronic discovery."

Patrick Oot, Esq., (06-EV-031) and Anne Kershaw, Esq. (06-EV-049), made a powerpoint presentation to the Advisory Committee at the public hearing in New York City. The presentation illustrated the expenditures that were made for preproduction privilege review in one particular production. The expenses included review of each email by as many as three sets of attorneys; the total expenditure was more than $5,000,000.00. They estimated that if the review had been for relevance only, the expenditure would have been reduced by 80%. They suggest that Rule 502 could be used to permit less stringent review for privilege, for example by allowing searches for domain names of law firms as an initial cut, disclosing the remaining information subject to a clawback agreement, and reviewing the material that went to law firms on an individual basis for privilege. They state that for Rule 502 to be truly effective in limiting the costs of electronic discovery, it must apply to disclosures in both federal and state proceedings.

Henry M. Sneath, Esq., (06-EV-032), in testimony before the Committee, recommends that the court order provision (Rule 502(d)) be expanded to cover confidentiality orders that are not the product of party agreements. He notes that in some cases the parties may disagree about certain provisions in a confidentiality order, and in others one of the parties might not want any confidentiality agreement — yet any resulting order protecting against waiver must be enforceable against third parties in order for litigants to be able to rely upon it and reduce the costs of discovery.

Charles W. Cohen, Esq. (06-EV-033), supports Rule 502 as necessary to limit the costs of preproduction privilege review — costs that have skyrocketed with the advent of electronic discovery. He suggests that the Rule should apply to state as well as federal disclosures, because "[n]o matter how strong the rules are in one forum, if the rule is not in place in all forums, then the

protection is illusory." With respect to subject matter waiver (Rule 502(a)), Mr. Cohen approves of the "ought in fairness" test taken from Rule 106, but suggests that the Committee Note specify that "it is only the rare case where there would be any waiver beyond the specific documents, and even the waiver would be of the narrowest scope that is fair." He also states that "the text of the Rule should state that it is only a voluntary waiver that could result in the waiver being extended beyond the specific materials disclosed." With respect to the inadvertent disclosure provision (Rule 502(b)) Mr. Cohen states that "the Committee Notes should reflect that a document review policy not wholly inappropriate for the scope and volume of the document production meets the 'reasonable precautions' standard. Similarly, the Notes should reflect that a party is not under a duty to re-review its document productions, and therefore it could be long after the production is made when a party first learns or should have learned of an inadvertent disclosure, possibly even just before trial. No matter when the disclosure is discovered, the protection against waiver should be enforced." Mr. Cohen objects to the selective waiver provision (Rule 502(c)), because it "does not further the purposes of the attorney-client privilege and it erodes the ability of the parties to rely on their privilege protections." Finally, he suggests that the court order provision (Rule 502(d)) be extended to situations in which the court enters a confidentiality order even though the parties are not in agreement. He notes that in "asymmetrical cases, in which side has substantially more material to produce in discovery than the other, there may be little incentive for one side to agree to a non-waiver provision. If a court grants a party's request for a non-waiver order to govern its production, the court order should have the same effect as if the parties agreed to it."

Keith L. Altman, Esq. (06-EV-034), argues that the Rule should take account of the obligations of, and the costs to, the party who receives privileged information that has been mistakenly disclosed during discovery. He argues that the Rule should specify that in order to obtain a finding of no waiver, the producing party should bear the reasonable costs incurred by the receiving party in retrieving all copies of the mistakenly produced material.

Taysen Van Itallie, Jr., Esq. (06-EV-035), supports Rule 502, with the exception of the selective waiver provision (Rule 502(c)), which he believes "will further erode the attorney-client privilege." He is also concerned that the concept of "reasonable precaution" in the inadvertent disclosure provision (Rule 502(b)) is an invitation to "satellite litigation that could swallow the benefits of the rule." He would "substitute a standard which would be less of an invitation to litigation, such as providing that if the holder of the privilege 'took reasonable steps in light of the extent and schedule for the review' there would be no waiver." He would also "eliminate the 'should have known' component of reasonable promptness, limiting the start of the clock to when the holder of the privilege 'knew' of the inadvertent disclosure." Mr. Van Itallie expresses his "strong support" for the court order provision (Rule 502(d)), because "the utility of a confidentiality order in reducing discovery costs is unquestionably diminished if it provides no protection outside the particular litigation in which the order is entered."

Russel Myles, Esq., (06-EV-036), in testimony before the Committee, supported Rule 502. He suggested three changes: 1) The Rule should extend to disclosures made in state proceedings, because the benefits of the rule, in limiting the costs of discovery, will be "substantially reduced" if state disclosures are not covered; 2) Subject matter waiver (Rule 502(a)) should be limited to situations in which a party intentionally offers privileged material in a litigation in an attempt to make a misleading presentation of the evidence; and 3) The "should have known" language of Rule502(b) should be deleted.

Howard A. Merton, Esq., (06-EV-037), in testimony before the Committee, supported the efforts of the Evidence Rules Committee to limit the costs of electronic discovery. He argued that Rule 502 should extend to state disclosures, because "attorneys are driven by the uncertainties and have to look to the lowest common denominator." He also noted that if Rule 502 does not cover disclosures initially made in state proceedings, the parties could end up in a "race to the Federal courthouse to get the benefits of 502." Mr. Merton concludes that the court order provision (Rule 502(d)) is "exactly right." He opposes the selective waiver provision (Rule 502(c)) on the ground that it will lead to more waivers of privilege.

Dabney J. Carr, IV, Esq., (06-EV-038), expresses concerns about the rising costs of electronic discovery, and supports the Committee's efforts to address this critical problem. He states that the Rule must be extended to disclosures initially made in state proceedings, otherwise the goal of reducing costs will be undermined: "If there is a substantial possibility that the client will be sued in a jurisdiction that applies a broad subject matter waiver rule or holds that any inadvertent disclosure constitutes a waiver, a client has no choice but to comply with those standards, and so Rule 502 will be of no benefit." With respect to the inadvertent disclosure provision (Rule 502(b)), Mr. Carr does not disagree with the "should have known" language, but suggests that the Committee Note provide "that the time period for the holder of the privilege to rectify an inadvertent disclosure does not begin to run until the holder discovered, or with reasonable diligence should have discovered, the inadvertent disclosure." He explains that in most cases, "a party will not learn of an inadvertent disclosure until the receiving party brings the disclosure to the holder's attention, and the holder should not be penalized if the receiving party does not promptly notify the holder of the inadvertent disclosure."

Desmond T. Barry, Jr., Esq., (06-EV-039), states that the inadvertent disclosure provision (Rule 502(b)), should be included in the Rule "to protect important privileges." He also states the the Rule should be extended to disclosures initially made in state proceedings, in order "to achieve uniform treatment of privileged materials."

John J. McDonough, (06-EV-040), did not testify as scheduled and did not submit a written statement.

Dan D. Kohane, Esq., (06-EV-041), on behalf of the Federation of Defense and Corporate Counsel, recommends that Rule 502 be extended to govern disclosures initially made in state proceedings, because treating parties differently in state and federal forums puts the privilege and work product protections "in jeopardy and provides inconsistent guidance to attorneys and clients alike." The Federation strongly supports the Rule insofar as it protects parties who mistakenly disclose privileged material: "Corporations and their counsel, struggling to comply with short deadlines, are compelled to locate, secure and produce thousands of documents, many of which have not yet been screened for privilege or have been given only cursory review. Using document filters and 'people on the ground,' fair attempts are made to identify documents which are privileged so as to produce a privilege log. However a document or a number of document or a classification of documents slip through despite best efforts, under the time constraints provided, to prevent that disclosure. Once discovered, the corporation and its counsel immediately notify the opposing side of the error and seek to retrieve those documents. Are the interests of justice served by not allowing the error to be corrected? We think not and support Rules changes that would protect the privilege here." The Federation suggests that the term "reasonable precautions" in the inadvertent disclosure provision (Rule 502(b)) "is unclear" and recommends "other, less pejorative words" to describe the efforts that must be made to try to protect against a mistaken disclosure. Finally, the Federation opposes the selective waiver provision (Rule 502(c)), because it would "encourage waiver and underscore the protocols which lead to a *forced* sacrifice of protected materials and communication." (emphasis in original).

Anthony Tagliagambe, Esq. (06-EV-042), states that Rule 502 should be amended "to apply in federal and state court, and in diversity and federal question cases, to ensure that the Rule is effective." He supports the provisions on subject matter waiver, mistaken disclosures, and court orders (Rule 502(a)(b) and (d)), but he opposes the selective waiver provision (Rule 502(c)). He argues that selective waiver "does not enhance and protect the attorney-client privilege or work product protection."

Lawrence S. Goldman, Esq., (06-EV-043), on behalf of the National Association of Criminal Defense Lawyers, opposes the selective waiver provision (Rule 502(c)). The Association contends that selective waiver "would not solve, but rather would exacerbate, what most observers and practitioners agree are real and undeniable problems caused by privilege waivers that are made during the course of government investigations." The Association states that "selective waiver will not operate in a vacuum but must be inserted into a legal environment already tainted by the culture of waiver." It argues that selective waiver "purports to alleviate a symptom (third party lawsuits made possible by privilege waiver in government investigations) while leaving the actual problem (frequent and coercive demands for confidential material) untreated." The Association further argues that 1) selective waiver allows a party to use the privilege as a sword and a shield, which is improper; 2) selective waiver creates an "unlevel playing field" because it benefits corporations and leaves individuals without protection and without access to confidential material disclosed to the

government; and 3) applying selective waiver to state courts runs afoul of federalism principles.

Richard J. Wolf, Esq., (06-EV-044), supports the mistaken disclosure provision (Rule 502(b)), noting that it is a "complex and expensive undertaking" to isolate privileged and work product materials from "the mass of electronic information corporations amass and store." He notes, however, surveys indicating that many corporations have not yet implemented effective records management programs, and that to do so "could take eighteen months and up to three years in a large company." He concludes that the "reasonable precautions" standard in Rule 502(b) "is likely too high for most corporations to meet." He concludes that the test of reasonableness "should take into account whether an organization has followed the steps necessary to have an effective compliance program for records management, which should include an enforceable policy, adequate resources, training and awareness, regular monitoring, and proper remediation." On the selective waiver provision (Rule 502(c)), Mr. Wolf states that "any blanket opposition to proposed new Rule 502(c) is not representative of or consistent with corporate interests in general. Organizations have always wanted the type of protections envisioned under the proposed rule." He suggests that the Rule take account of "the prospect for prosecutorial abuses and coerced waivers by adding the word 'proper' before the phrase 'exercise of its regulatory, investigative or enforcement authority." He also suggests that the Committee Note address "the importance of considering the totality of circumstances, including the effectiveness of an ethics and compliance program, before parties resort to extreme measures such as requesting waiver of attorney-client privilege or attorney work product."

Susan Hackett (06-EV-045) already submitted a statement. Both statements are summarized above at 06-EV-002.

Gregory M. Lederer, Esq., (06-EV-046), did not testify as scheduled. The report of the Lawyers for Civil Justice was appended to his request to testify. That report was independently submitted and is discussed below.

Alfred W. Cortese, Esq., (06-EV-047), states that the Committee "is to be commended for recommending a rule that on the whole should help save significant amounts of time and effort spent in litigation to avoid waiver of the attorney-client privilege, and that will help make the discovery process more efficient and less costly." Mr. Cortese recommends that either the Rule be extended to cover disclosures initially made in state proceedings, or that separate legislation be recommended to extend such coverage. Mr. Cortese opposes selective waiver, stating that "the Committee's and judiciary's priority should be strengthening and protecting privilege and work product, not elevating the interest in efficient government investigations and prosecutions over the rights of individuals and companies to confidential communications with their attorneys." He hopes that the Committee "will report to Congress that public comment has demonstrated that selective waiver is not a viable or workable concept and should be withdrawn from consideration."

Steven Cuyler, (06-EV-048), did not appear to testify and did not submit a statement.

Anne Kershaw, (06-EV-049), testified with Patrick Oot (06-EV-031) and is summarized above.

Lawyers for Civil Justice (06-EV-047), submitted a lengthy comment on proposed Rule 502. LCJ generally supports the Rule, with the exception of the selective waiver provision (Rule 502(c)). LCJ "applauds the Committee's attempts to safeguard and more clearly define the scope of the attorney-client privilege and work product protection through proposed Federal Rule of Evidence 502." LCJ provides the following suggestions for change to the Rule:

1. The waiver standards embodied in Rule 502 should be applicable to both state and federal proceedings. Otherwise, "the Advisory Committee's goal of increasing efficiency and lowering the costs of discovery will be substantially lost" because "parties would not be able to predict in advance the consequences of a decision to disclose privileged information." LCJ concludes that "[s]ince Congress has the authority to enact federal legislation governing the substantive scope of attorney-client privilege and work product materials [under its Commerce Clause powers], it has the power to take the lesser step of creating a uniform federal law governing waivers by disclosure." LCJ recommends as an alternative to amending the rule that separate legislation be recommended to extend identical provisions on waiver to disclosures initially made in state proceedings.

2. The Committee should clarify in the Note that Rule 502 applies to both diversity and federal question cases. "Because under Rule 501 a federal district court sitting in diversity must apply state law to determine issues of privilege waiver, practitioners might question whether a court should apply Rule 502 in a diversity case, even though new Rule 502 would supersede 501 on such matters."

3. The Committee Note on the subject matter waiver provision (Rule 502(a)) should be strengthened "to make sure that subject matter waiver is limited to truly rare situations and to define more clearly the scope of undisclosed communications that 'ought in fairness' to be produced." LCJ asserts that "a subject matter waiver should not occur unless and until a party discloses privileged materials in an attempt to mislead the court or other litigants."

4. The mistaken disclosure provision (Rule 502(b)) should be amended to require "reasonable steps" to prevent disclosures rather than "reasonable precautions", and "the Committee Note should clarify that a party must only act with reasonable promptness upon learning of a disclosure." LCJ contends that a requirement of "reasonable steps" is "less subjective and adequately accomplishes the Committee's goal of ensuring that parties establish reasonable procedures to protect against the disclosure of privileged information." LCJ further suggests that the Note specify that "the reasonableness of steps taken to prevent disclosure of privileged information will vary according to the circumstances presented, such as the number of documents involved and the time constraints for

production. Where a large number of documents must be reviewed within a relatively short period of time, a party should be permitted to employ procedures that otherwise would not satisfy the producing party's burden. Conversely, where a party is not burdened by time constraints, more comprehensive measures might be required to reduce the possibility of inadvertent disclosures."

5. The Committee should withdraw the selective waiver provision, as it will "encourage a growing and questionable presumption amongst government investigators and prosecutors that it is appropriate and 'harmless' for corporations to waive the attorney-client privilege and work product protection." LCJ asserts that selective waiver "would make it difficult for a company to assert the right not to waive the privilege in any government investigation" and "might incorrectly be viewed as ratification by [the] Committee of government policies that even now are coming under increased attack."

6. LCJ "believes that there is an urgent need for the real, substantive protection afforded by proposed Rule 502(d)" because without that provision "parties will be forced to conduct the type of burdensome and expensive review of disclosed documents for privilege to ensure that sensitive information does not become freely available to other litigants." LCJ suggests that the Note to Rule 502(d) "make clear that parties cannot use the rule to enter into selective waiver agreements."

The Federal Magistrate Judges Association (06-EV-051), supports the provisions of Rule 502 that the Advisory Committee has proposed for adoption. The Association takes no position of the bracketed provision, Rule 502(c), on selective waiver. The Association notes that "[a]n important goal of recent amendments to the Federal Rules of Civil Procedure is the reduction of the cost and delay to discovery arising from the need to screen voluminous electronic information, and these amendments specifically encourage parties to enter into non-waiver and clawback agreements." The Association "believes that new Rule 502 will support this goal by providing predictable and uniform standards under which parties can determine the consequences of disclosure of information." The Association states that the rule, "to be fully effective, must regulate the consequences of disclosure at both the state and federal levels" and "supports the effort of the Advisory Committee to encourage Congress to enact the rule directly so that it would be binding on the states."

William McGuinness, Esq., and Michael Russ, Esq., (06-EV-052), on behalf of the Committees on Attorney-Client Relations and Federal Rules of Evidence of the American College of Trial Lawyers, unanimously support the provisions of proposed Rule 502, with the exception of the provision on selective waiver (Rule 502(c)). The Committees acknowledge the benefits that selective waiver would provide to some parties, but they are concerned that "the mounting pressure to waive, encouraged by Rule 502(c), unduly pits the interests of the corporate entity against the interests of the individual employee." The Committees conclude that in an environment of a "culture of waiver," "the imperative of protecting and preserving the attorney-client privilege should take precedence over the ancillary benefits of selective waiver embodied in proposed Rule 502(c)."

Russell J. Wood, Esq. And Bruce R. Deming, Esq. (06-EV-053), on behalf of the Corporations Committee, Business Law Section of the State Bar of California, "support and applaud the Advisory Committee's efforts to advance most of the provisions of Rule 502 and the Advisory Committee's objective of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to discovery requests." The Committee opposes the selective waiver provision (Rule 502(c)), however, because it "1) will not encourage cooperation with government investigations; 2) improperly interferes with the attorney-client relationship; 3) will lead to unintended disputes between government agencies and private corporations; and 4) will not be applied uniformly in all jurisdictions."

Matthew J. Walko, Esq., (06-EV-054), has the following suggestions for change to Proposed Rule 502 as it was issued for public comment: 1) the definition of work product in Rule 502(f) should be expanded to cover "tangible as well as intangible information of parties— whether pro se or represented by counsel"; 2) the court order provision (Rule 502(d)) "should not hinge on whether parties can reach an agreement" because the "primacy of the court's order should not be undermined by making its wider applicability hinge on whether parties embroiled in litigation decide to be agreeable"; 3) Rule 502(d) should be rephrased to incorporate language from the full faith and credit statute; and 4) the Rule must clarify that it applies to diversity actions and therefore supersedes Rule 501 on that point.

Jinjian Huang, Esq. (06-EV-055), argues that proposed Rule 502 gives the parties to a litigation too much authority to determine whether a waiver will be found. He suggests that the Rule be amended to specify that court orders are not enforceable unless they are fair, and that agreements should not be enforceable between the parties unless they are fair.

Perry Goldberg, Esq., (06-EV-056), on behalf of himself and a number of partners at Irell & Manella who frequently litigate in federal court, commends the Advisory Committee's efforts "to make litigation more efficient and less costly." He suggests that the Rule could be improved by the following:

1) The standard for avoiding waiver by mistaken disclosure — "reasonable precautions" — "likely would spawn significant litigation" and "would not change how discovery is actually conducted". "To give the proposed Rule greater clarity, and to give producing parties greater comfort," the Note should include examples of precautions that are considered reasonable. "For instance, with respect to electronic discovery, it would be helpful to specify that searching for key words — such as attorney names and 'privilege' — is a reasonable precaution against disclosure."

2) The requirement of "reasonably prompt" measures to retrieve mistakenly disclosed should be explained in the Note. Specifically the Note should state that "action within a 14-day window generally would be considered prompt" and the Note should further state that the "should have known" standard "should be construed narrowly so that the 14-day clock would not start running until a party is on actual notice of the problem."

3) The "ought in fairness" standard for subject matter waiver (Rule 502(a)) should be limited to inadvertent disclosures, and the current jurisprudence for determining the scope of waiver for intentional disclosures "should not be disturbed."

4) The definitions section (Rule 502(f)) is "unnecessary and may become an unintentional source of confusion."

Bernstein Litowitz Berger & Grossman (06-EV-057), opposes the provision on selective waiver, Rule 502(c). The firm states that "the majority view under the existing case law in this area is correct and should not be reversed through rulemaking. The proposed Rule 502(c) does not serve the legitimate purposes of the attorney-client privilege and work product doctrine and should not be adopted." The firm argues that the existing law properly bars defendants "from picking and choosing among their adversaries when waiving privilege." The firm notes its experience in representing shareholders who did not benefit from a regulatory activity in which a corporation turned over privileged information, but did benefit from the use of that information in a subsequent private lawsuit. The firm concludes that "reversal of the law on selective waiver is a question best left to Congress without the implied judicial endorsement that would be perceived if it was proposed by the Advisory Committee" and that "adoption of the proposed Rule 502(c) would be a controversial, value-laden political decision."

Kim J. Askew, Esq. (06-EV-058) on behalf of herself and nine other members in the leadership of the ABA Section of Litigation, supports the court order provision (Rule 502(d)) as "a valuable addition that would help fill the gap created by Rules 16(b)(6) and 26(f)(4) of the Federal Rules of Civil Procedure" as it would "solve the problem of the order not binding non-parties in other actions and/or jurisdictions." They also "support the Committee's efforts to limit the scope of waiver" in Rule 502(a). Ms. Askew and the other lawyers oppose the selective waiver provision (Rule 502(c)). They are concerned that support for Rule 502(c) "would be construed as tacit approval of the governmental practice of demanding waiver." They suggest that if selective waiver is to be proposed, language should be added to specify that "[n]othing in this rule authorizes a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product protection."

Professor Liesa L. Richter, (06-EV-059), states that the selective waiver provision (Rule 502(c)) "represents a salutary change to waiver doctrine: one that will simultaneously protect corporations cooperating with the federal government from the damaging effect of third party waivers *and* serve the public interest in the effective oversight of business entities." (emphasis in original). She argues that a system of voluntary cooperation with the protection of selective waiver is vastly preferable to "the continuation of federal policies that generate privileged disclosures to the government with no selective waiver protection to provide cover for corporations faced with massive civil exposure." She notes that "a doctrine of selective waiver to federal entities can fit comfortably within the evolving flexible view of privilege and waiver recognized in the case law and academic

commentary." For example, under the provisions of Rule 502(d), waiver doctrine "is being adjusted to permit greater flexibility and less rigid adherence to common law confidentiality requirements" by permitting claw-back and quick peek agreements. Accordingly, "it would be both counterintuitive and counterproductive to tell private litigants that they may share with their allies, they may share with their private adversaries, but they will be punished for sharing with the federal government in pursuit of its law enforcement responsibility. Such a disfavored status for cooperation with government investigations does not serve the public interest any more than the needless waste of private resources to review millions of documents for privileged communications."

The New York County Lawyers' Association, (06-EV-060), makes the following recommendations:

1) Rule 502(a) should be adopted as a reasonable limitation on subject matter waiver. The Association notes that most disclosure of privileged material is "probably inadvertent" and the disclosing party "usually has no plans to make unfair adversarial use of the privileged matter so produced and, in the absence of such contemplated unfair use, requiring that other materials be produced is an excessive sanction for what is generally nothing more than carelessness.."

2) Rule 502(b) should be adopted because it is important to have one uniform rule on waiver with respect to mistaken disclosures; Rule 502(b) proposes the majority rule under existing law, and so is the rule to which most practitioners are already accustomed.

3) The Association makes no recommendation on the selective waiver provision, Rule 502(c), as it has not yet had the opportunity to consider the arguments of those who might be expected to oppose the provision. It notes, however, that "[t]o the extent that a culture of waiver exists and is undesirable, it exists under the present rule forbidding selective waiver, and government and regulatory officials have not seemed sympathetic to pleas that revelation of privileged matter to them could result in disclosures to private plaintiffs." The Association concludes that if selective waiver is desirable on its own merits, "it should be adopted regardless of the 'culture of waiver.'"

The State Bar of California Committee on Federal Courts (06-EV-061) opposes the subject matter waiver provision (Rule 502(a)), concluding that the "ought in fairness" test in the Rule will give rise to litigation and will allow gamesmanship. The Committee concludes that "the current subject matter waiver rules operate fairly for both producing and receiving parties" and "there is no need to change the current standard."

The United States Securities and Exchange Commission (06-EV-062) supports the selective waiver provision, Rule 502(c). It states that selective waiver "significantly enhances the Commission's ability to conduct expeditious investigations and, where appropriate, to obtain prompt relief for defrauded investors." The Commission cites as examples five complex, fact-intensive corporate investigations in which the corporations turned over privileged material, which "saved the Commission months of work, as well as large amounts of money."The Commission also notes that "the companies themselves can benefit from providing privileged and protected materials" because

it "can reduce overall disruption for the companies by limiting the number of executives and other employees whose testimony will be sought by the Commission staff and by reducing the length of the investigation." The Commission states that Rule 502(c) is necessary because many corporations are deterred from cooperating by the concern that disclosure to the Commission will result in use of the information in private litigation. The Commission suggests the following improvements to Rule 502(c) as issued for public comment: 1) the Rule or Committee Note should provide "that a receiving government agency may use the privileged or protected materials without waiving the privilege or allowing third parties to use the materials"; 2) "The Advisory Committee should state expressly in the Notes 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."; 3) the Committee Note should provide that a government agency is not required to disclose Rule 502(c) material under the Freedom of Information Act; 4) the Committee Note should emphasize that selective waiver under Rule 502(c) preempts any conflicting state rule of privilege.

The Federal Bar Council, (06-EV-063), "supports the policy decisions made by the Advisory Committee . . . to ease the burden of discovery and to make uniform the law concerning the waiver of privilege." The Council makes the following suggestions:

1) Rule 502 should be amended to add a new subsection "to clarify that it governs state courts and to overcome the potential ambiguities arising from the scope provisions of Rules 101 and 1101." The Council suggests a subsection stating: "Notwithstanding Rules 101 and 1101, and unless otherwise provided in this Rule, this Rule shall be binding in state court proceedings."

2) The scope of the subject matter waiver provision (Rule 502(a)) "should be broadened to create a federal one-rule analysis to use when determining the scope of privilege waivers." Specifically, the subdivision should be amended to clarify that it applies to federal and state proceedings, and a separate subdivision should be added to cover disclosures initially made in state proceedings when the question of subject matter waiver arises in subsequent federal court proceedings.

3) The "knew or should have known" test of Rule 502(b) "should be replaced with a totality of circumstances approach." The Council states that a "should have known" standard "would invite arguments that parties should make a post-production review to determine whether any privileged information was inadvertently produced."

4) The mistaken disclosure provision should be extended to apply to regulatory investigations, because "disclosures made to federal agencies in connection with their investigations are as onerous — if not moreso — than discovery in litigation."

5) The selective waiver provision (Rule 502(c)) should be deleted "as it is very controversial and might bog down enactment of the remainder of the Rule."

The United States Commodity Futures Trading Commission, (06-EV-064), supports the selective waiver provision (Rule 502(c)), because it "would serve the public interest by enhancing the Commission's ability to conduct expeditious investigations resulting in more timely enforcement,

at a reduced cost to taxpayers as well as witnesses." The Commission "agrees with other commenters that, if the provision is adopted, private litigants will not be harmed. Indeed, they will be in precisely the same position under the proposed rule as they would be if the government had not obtained the privileged or protected documents. That is, if the privileged or protected documents were not produced to the government, private third-party litigants would not be able to argue that the individual or entity had waived attorney-client privilege or work product protection; similarly, they would not be able to make those arguments under the proposed rule." The Commission urges that "the rule prevent waiver under both federal and state law."

David Booth Alden, Esq. an Ted S. Hiser, Esq, (06-EV-065), suggest that Rule 502(a) is not clear on whether the proposed rule on subject matter waiver applies to disclosures of privileged or protected communications in state court proceedings. 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(d), which binds state courts to respect federal court confidentiality orders. They also suggest that the Committee make clear that "notwithstanding the language of Rule 101 and 1101, proposed Fed.R.Evid. 502(b) may apply in state court proceedings under some circumstances." Finally, they state that "the interplay" between Rules 501 and 502 in diversity actions "may create uncertainty" and that the Rule should be changed to state expressly that Rule 502 governs in diversity actions.

Kenneth L. Mann, Esq., (06-EV-066), is opposed to the selective waiver provision (Rule 502(c) and recommends that the Committee "should abstain" from recommending adoption of the selective waiver provision by Congress.

The American Bar Association (06-EV-067), suggests that the two-part test of the mistaken disclosure provision (Rule 502(b)) be changed to add two extra factors: the scope of discovery and the extent of inadvertent disclosure. The ABA recognizes that those two factors "could be construed" as falling within the standard in Rule 502(b)— reasonable precautions. But the ABA states that the best way to assure that these factors are considered by the courts is to include them in the text of the Rule. The ABA also suggests that an "interest of justice" standard be added because it is important for courts to consider other relevant facts that are not encompassed within "reasonable precautions", the scope of discovery, and the extent of inadvertent disclosure. The ABA recognizes that an open-ended "interests of justice" factor could add a level of unpredictability to the question of whether a mistaken disclosure constitutes a waiver — but that this risk is "outweighed by the benefit gained by giving judges flexibility to adapt the rule to each set of unique circumstances presented." The ABA also opposes the "should have known" standard for recovery of the privileged material as "subjective" and likely to lead to litigation. Its policy is that the duty to seek return of the information is triggered only when the disclosing party "actually discovers that a mistake has been made." Finally, the ABA is opposed to the requirement that the holder take "reasonably prompt" measures to seek return of the mistakenly disclosed information. It states that this standard is subjective and

suggests that "within a specified period of days after learning of the inadvertent production, the producing party should be required to raise the privileged status of the documents by simply giving notice to the opposing party that the materials are protected and amending its discovery responses to identify the materials and the privileges."

The American Bar Association (06-EV-068), in a comment submitted after the public comment period ended, proposes an extensive amendment to Rule 502 to cover a topic that is not addressed in the Rule; was never intended to be part of the Rule; was not the subject of any other public comment; and was not one of the issues on which Congress sought rulemaking. The ABA's proposed addition to the Rule would codify federal cases determining whether disclosure of underlying factual information constitutes a waiver of the attorney-client privilege. The ABA also prepared an elaborate Committee Note on the implied waiver provision.

The Commercial and Federal Litigation Section of the New York State Bar Association (06-EV-069), provided the following comments on Proposed Rule 502:

1. The Section does not support the subject matter waiver provision (Rule 502(a)). It argues that different standards for subject matter waiver should apply to privilege and work product. It also states that the "ought in fairness" standard will spawn litigation.

2. The Section supports the adoption of the mistaken disclosure provision (Rule 502(b)), noting that "parties spend large, perhaps inordinate, amounts of time" reviewing discovery materials prior to production to determine whether they are privileged, "which can substantially delay access for the party seeking discovery."

3. The Section opposes the selective waiver provision (Rule 502(c)), "given the lack of evidence as to whether it will actually have the desired impact." The Section states that caution is required because those "who would presumably stand to gain from the potential decrease in cost referenced by the Committee . . . have expressed serious concerns that the proposal will be harmful to the very corporate parties it ostensibly is designed to protect." The Section is "unaware of any situation where concern over privilege waiver vis-a-vis third parties resulted in diminished cooperation with the government. Moreover, this possibility seems unlikely to occur with any significant frequency given the weight of the incentives motivating parties to cooperate with government investigations."

4. The Section supports Proposed Rules 502(d) and (e), "as necessary adjuncts to the limitations on inadvertent disclosure contained in proposed Rule 502(b)."

5. The Section concludes that "if enacted by Congress under its Commerce Clause powers, the proposed Rule will quite likely withstand constitutional scrutiny."

Jeffrey J. Greenbaum, Esq., (06-EV-070), submitted a column from the *New Jersey Lawyer* entitled "Proposed Rule 502: An Important Step Forward."

06-EV-071 is another statement from Steven Hazen once again stating that he is really

opposed to selective waiver. See 06-EV-023

Mark Jordan (06-EV-072) argues that the focus of Rule 502 is too narrow and that it will have a negative impact on small-scale civil litigation and non-corporate criminal prosecutions. He also argues that inadvertent waiver should never be found where the mistake is made by counsel, because the privilege is held by the client.

Kevin N. Ainsworth, Esq. (06-EV-073) states that Rule 502(d) "should explicitly state a good-cause requirement and should give federal courts the power, even in the absence of agreement of the parties, to enter 'privilege protection' orders based on a showing of good cause."

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@mail.lawnet.fordham.edu
Fax: 212-636-6899

Memorandum To: Justice Hurwitz, Judge McKibben, and Federal-State Jurisdiction Committee
From: Daniel Capra, Reporter, Advisory Committee on Evidence Rules
Re: Research on State Laws on Inadvertent Disclosure of Privileged Material
Date: December 24, 2006

Proposed Evidence Rule 502 provides that certain disclosures of attorney-client privilege and work product made in federal proceedings are not waivers, either in state or federal court. The Advisory Committee is aware of the concern expressed by members of both the state and federal judiciary about the possibility that the rule may encroach on some state prerogatives in determining privilege waiver. In November, representatives of the Advisory Committee met with representatives of the Conference of State Chief Justices to discuss Rule 502. At that meeting, the representatives expressed interest in determining what the actual impact of the proposed Rule might be on existing state laws on waiver of privilege.

This memorandum is in response to some of the questions raised at that November meeting. It sets forth some research that was conducted to determine whether the federal rule on waiver that would be enacted under Rule 502 would in fact conflict with state law in a subsequent state proceeding.

Please consider the following points and provisos in reviewing this research:

1. Rule 502 does not cover state disclosures in the first instance. It only treats disclosures made at the federal level. State laws are implicated only when a federal disclosure protected by Rule 502 is subsequently raised in a state proceeding, and the argument is that the holder waived the privilege by having disclosed the information in the federal proceeding. The question then is, which law is used to determine waiver, state or federal? Rule 502 provides that federal law applies, the reasoning being that there is a federal interest in regulating disclosures that were made initially at the federal level.

It follows that Rule 502 has no impact on state court actions in at least two situations: a) where the disclosure is initially made at the state level; and b) where the disclosure is made at the federal level, but there is no conflict (or a false conflict) between the state and federal rules on waiver. It is in this latter situation that research is needed to determine the

likelihood of conflict.

2. The research presented is on state laws on *inadvertent waiver only.* Rule 502 might also provide a federal rule on *selective* waiver, but research on state laws of selective waiver has not been conducted. There are at least two reasons for this limitation. First, selective waiver is extremely controversial on the merits. The Advisory Committee has not voted in favor of selective waiver. The provision concerning selective waiver in Rule 502 (Rule 502(c)) remains in brackets, pending a public comment period. So it may be the case that a state conflict with a federal selective waiver rule will never arise with respect to selective waiver, because the federal rule simply will not provide for it. Second, a quick review of case law indicates that while at least one state has adopted selective waiver, most have not. See, e.g., *McKesson HBOC, Inc. v. Superior Court of San Francisco,* 9 Cal.Reptr.3d 812 (Cal.Ct. App. 2004), and *McKesson Corp. v. Green,* 610 S.E.2d 54 (Ga. 2005) (both denying selective waiver); *Saito v. McKesson HBOC, Inc.,* No. Civ. A. 18553, 2002 WL 31657622 (Del. Ch. 2002) (adopting selective waiver). *See also* Mitchell, *Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts,* 86 B.U. L.Rev. 691 (2006) (noting that most states have rejected selective waiver, but concluding that Congress has the power to enforce selective waiver on state courts for disclosures made to federal regulators). The general absence of selective waiver protection in the states is not a surprise, as almost all the federal courts have rejected selective waiver. The fact that a selective waiver provision is likely to conflict with both existing federal common law and the privilege laws of the states is something that will, of course, be taken into account in any decision on the merits of that provision.

3. Rule 502(b) essentially proposes a negligence test in determining whether mistaken disclosures are waivers. The only conflict with state law that should give rise to concern is with a state rule providing that mistaken disclosures are *always* waivers. This conclusion is based on the following reasoning:

> a) If a state uses the negligence test that is used in the majority of federal and state courts, then there would be no conflict with the federal rule in a subsequent state proceeding; there might be cases in which the factors employed to determine negligence may differ between the state and Rule 502, but any difference would undoubtedly be at the margins and would not seem to create substantial concerns for state prerogatives.
>
> b) If a state has a rule that inadvertent disclosures are *never* waivers, then there is no conflict with the federal rule, *as the state rule of waiver can apply in a subsequent state proceeding.* This is because the federal rule establishes a *floor* of protection against waiver, it does not establish a *ceiling.* Rule 502 states what kind of inadvertent disclosure is *not* a waiver; it leaves federal common law to determine what is a waiver. Under Rule 502, then, the states are free to hold that conduct found to be a waiver in a federal proceeding does not constitute a waiver in a subsequent

state proceeding. What they would not be permitted to do under the rule is to find conduct that is not a waiver under the Federal Rule to be a waiver in the subsequent state proceeding.

c) If a state has *no law* on the consequences of mistaken disclosure, then the federal rule would not be in conflict with state law, as there is none — though it could be argued to the contrary that application of the federal law would preempt the state prerogative to determine the law on its own. (I leave that one to the Committee).

Assuming that the above reasoning is accepted, then the research set forth below shows that there is no substantial conflict between Rule 502(b) and the law of any state. The research did not find any state with a rule that mistaken disclosure is always a waiver, no matter how innocent the disclosure.

This memorandum now proceeds to set forth the state laws on inadvertent waiver.

Alabama

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver.

Alaska

1. Alaska R Evid § 510- privilege is waived whenever the holder voluntarily discloses or consents to disclose any significant part of the matter.

2. Alaska R Evid §511-Evidence of a statement or any other disclosure of privilege is not admissible against privilege's holder if disclosure was compelled erroneously or made without opportunity to claim the privilege.

Section 510 may be read to mean that any voluntary disclosure is a waiver, meaning no protection for mistaken disclosures — though it seems unlikely that a court would reach such a drastic result under the language of the rule. On the other hand, Section 511 may mean that mistaken disclosures are not waivers because they are made without the opportunity to claim the privilege, at least at the time of disclosure. In can also be argued, as is the case in California (see below) that a mistaken disclosure made in the context of discovery is "compelled erroneously" by the discovery demand and therefore no such disclosure can be a waiver. There is no case law in Alaska that is helpful in determining the law on mistaken disclosures.

Arizona

I asked Justice Hurwitz to report on Arizona law on mistaken disclosure, and he graciously filed this report:

> My research and that of my clerk indicate that there is no Arizona case law directly addressing the issue. The closest case is *State v.Sucharew*, 66 P.3d 59 (Ariz. Ct. App. 2003), which involved the State's contention that the attorney-client privilege had been waived by the presence of the juvenile defendant's parents during a conference between the minor and counsel. The court of appeals rejected that argument on the merits, citing out-of-state and federal cases for the proposition that the presence of parents who had hired counsel and were acting as the child's advisors is not a waiver. Before doing so, in describing the general rule that the presence of third parties will usually defeat the privilege, the court noted that "[t]his general rule does not apply, however, where the third party's presence does not indicate a lack of intent to keep the communication confidential." Id. at 65. This language would support an argument that inadvertent disclosure should not waive the privilege, as it is not indicative of intent to waive.

Arkansas

Arkansas courts seem to hold that an inadvertent disclosure never amounts to waiver. The Supreme Court of Arkansas, in *Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (Ark. 1999), reviewed a disclosure made inadvertently by a non-party's attorney to appellant's attorney. The appellant sought to introduce this medical report at his own trial by arguing that the inadvertent disclosure waived the privilege. The court held that "the claim of privilege is not defeated by a disclosure which was inadvertently made." (Again, this means no conflict with Rule 502(b), as the states are free to give more protection against waiver than is provided by the federal rule.)

California

The California courts seem to be split upon the issue. Waiver of privilege is governed by Rule 912 of the California Evidence Code which provides:

> . . . the right of any person to claim a privilege . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure . . . .

The rule if read broadly could mean that mistaken disclosure is always a waiver.

Yet in *O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal. App. 4th 563, 69 Cal.Rptr 2d 389 (Cal. Ct. App. 1997), the court held that inadvertent production during discovery did not waive the privilege. At the outset of its discussion the court noted that as soon as the inadvertent production of documents was discovered, counsel for Mitsubishi demanded their return from opposing counsel and also filed an in limine motion to preclude their introduction into evidence. O'Mary argued that any disclosure, whether inadvertent or not, that occurs without coercion waives the privilege. The court disagreed, holding that discovery demands constituted "coercion" under Rule 912 and that:

> Inadvertent disclosure during discovery by no stretch of the imagination shows consent to the disclosure: It merely demonstrates that the poor paralegal or junior associate who was lumbered with the tedious job of going through voluminous files and records in preparation for a document production may have missed something. O'Mary invites us to adopt a "gotcha" theory of waiver, in which an underling's slipup in a document production becomes the equivalent of actual consent. . . . The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.

Id. at 577.

Thus, although it noted at the outset of its analysis the prompt notification of the disclosure, the court did not seem to consider this fact in its analysis. The court seemed to hold that an inadvertent disclosure never amounts to a waiver of the attorney-client privilege.

In *State Compensation Insurance Fund v. Telanoff*, 70 Cal App. 4th 644, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999), however, the court employed a multi-factor test, considering 1. The subjective intent of the holder; 2. Procedures utilized by counsel to prevent the production of privileged documents; and 3. The promptness with which counsel moved to secure return of the documents.

Based on the California case law, there is no conflict with Rule 502, as the law is either a multi-factor test or a rule that mistaken disclosure is never a waiver.

Colorado

Colorado courts apply a multi-factor (negligence-based) test. An example is *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. Ct. App. 1997), where the Court of Appeals set forth the following factors 1. The extent to which reasonable precautions were taken to prevent the disclosure of privileged information; 2. The number of inadvertent disclosures made in relation to the total number of documents produced; 3. The extent to which the disclosure, albeit inadvertent, has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; 4. The extent to which the disclosing party has sought remedial measures in a timely fashion; and 5. Considerations of fairness to both parties under the circumstances.

Connecticut

Connecticut courts use a multi-factor test. See *Harp v. King*, 266 Conn. 747, 835 A.2d 953 (Conn. 2002), where the Supreme Court of Connecticut listed the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; and 5. Whether the overriding interest

of justice would be served by relieving the party of its error.

Delaware

Delaware follows the multi-factor approach. An example is *Monsanto Co. v. Aetna,* 88C-JA-118, 1994 Del. Super. LEXIS 261 (Del. Super. Ct. May 31, 1994), where the court set forth the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of discovery and extent of disclosure; and 4. Overall fairness, judged against the care or negligence with which the privilege is guarded.

Florida

Florida has adopted a multi-factor test. An example is *GMC v. McGee*, 837 So. 2d 1010 (Fla. Dist. Ct. App. 2002), where the court listed the following factors as relevant to whether the mistaken disclosure is a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosures; and 5. Whether the overriding interests of justice would be served by relieving a party of its error.

Georgia

Georgia courts seem to follow the rule that inadvertent production by an attorney never amounts to waiver of privilege. For example, in *Revera v. State*, 223 Ga. App. 450, 477 S.E.2d 849 (Ga. Ct. App. 1996), the court held that "[t]he privileged nature of a confidential communication is not lost or waived even if the attorney should voluntarily or inadvertently produce a transcript of the communication."

Hawaii

Hawaii courts follow a multi-factor analysis. In *Save Sunset Beach Coalition v. Honolulu*, 102 Haw. 465, 78 P.3d 1 (Haw. 2003), the Supreme Court of Hawaii listed the following factors as relevant: 1. The reasonableness of precautions taken to prevent disclosure; 2. The amount of time

taken to remedy the error; 3. The scope of discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

Idaho

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver. In *Farr. v. Mischler*, 129 Idaho 201, 923 P.2d 446 (Idaho 1996), the Idaho Supreme Court refused to address the merits of whether an inadvertent production of privileged communications constituted a waiver of the privilege. The disclosure in that case was made intentionally as part of the transfer of assets of a corporation, and so any law on inadvertent waiver was irrelevant.

Illinois

The Illinois courts have adopted two different tests; there is essentially a split in the lower appellate courts that has not yet been rectified by the State Supreme Court. In *People v. Murry*, 305 Ill. App.3d 311, 711 N.E.2d 1230 (Ill. App. Ct. 1999), the court held that "inadvertent disclosure can never result in a waiver of the privilege because the client had no intention of waiving the privilege, and a client must knowingly waive the privilege." In *Dalen v. Ozite Corp.*, 230 Ill. App. 3d 18, 594 N.E.2d 1365 (Ill. App. Ct. 1992), however, the court adopted a multi-factor test similar to that of proposed Rule 502. The factors listed as relevant are: 1. The reasonableness of the precautions taken to prevent the disclosure; 2. The time taken to rectify the error; 3. The scope of the discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

For reasons discussed above, neither of these approaches to waiver raises any substantial conflict with Rule 502.

Indiana

The Indiana courts use a multi-factor test to determine the consequences of mistaken disclosure. In *Buntin v. Becker*, 727 N.E.2d 734 (Ind. Ct. App. 2000), the Court of Appeals for the Fifth Circuit considered 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.

Iowa

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver. In *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004), the Iowa Supreme Court refused to decide the issue. The court noted: "We have not previously considered how the work-product doctrine is affected by the inadvertent disclosure of documents or materials." Id. at 42. The court proceeded to list the three lines of authority generally followed, but failed to reach the issue because it held that the documents were not protected in the first place.

Kansas

The Kansas state courts do not appear to have reached the issue of mistaken disclosures. But a Federal District Court, in *Steele v. First Nat'l Bank*, CV No. 90-1592-B, 1992 U.S. Dist. LEXIS 8501 (D. Kan. May 26, 1992), purporting to apply Kansas law, adopted a multi-factor test, listing the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of discovery; 4. The extent of disclosure; and 5. The overriding issue of fairness.

Kentucky

The research conducted did not reveal a statute or any reported case directly addressing the question of inadvertent waiver.

Louisiana

Louisiana courts appear to hold that an inadvertent disclosure never amounts to waiver. In *Hebert v. Anderson,* 681 So. 2d 29 (La. Ct. App. 1996), the court declared that "the inadvertent disclosure of . . . communication[s] by defendants' counsel does not constitute a waiver of that privilege." The court cited *Succession of Smith v. Kavanaugh*, 513 So. 2d 1138 (La. 1987), which was not an inadvertent waiver case, but which did state that the client is the holder of the privilege, and only he or his attorney or agent acting with his authority, can waive it. (Which the *Hebert* court took to mean that a mistaken disclosure can never be a waiver because the client by definition does not authorize it.).

Maine

Maine follows the rule that a mistaken disclosure is never a waiver. See *Corey v. Norman*, 1999 Me. 196, 742 A.2d 933 (Me. 1999), where the court stated:

> A truly inadvertent disclosure cannot and does not constitute a waiver of the attorney-client privilege. The issue for counsel and the court upon a claim of inadvertent disclosure must be whether the disclosure was actually inadvertent, that is, whether there was intent and authority for the disclosure. . . . If receiving counsel understands the disclosure to have been inadvertent, no waiver will have occurred. Unless receiving counsel has a reasonable belief that the disclosure was authorized by the client and intended by the attorney, the receiving attorney should return the document and make no further use of it.

Maryland

Maryland follows the multi-factor test. For example, in *Elkton v. Quality Care*, 145 Md. App. 532, 805 A.2d 1177 (Md. Ct. Spec. App. 2002), the court listed the following factors as relevant to whether a mistaken disclosure constitutes a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosure; and 5. Whether the overriding interests of justice would or would not be served by relieving a party of its error.

Massachusetts

Massachusetts courts follow the multi-factor approach. For example, in *McMahon v. Universal Golf*, 20 Mass. L. Rep. 59 (Mass. Super. Ct. 2005), the court declared that "the inadvertent disclosure of a privileged document is not a waiver of the attorney-client privilege as to that document when the client establishes that adequate precautions were taken to ensure the document's confidentiality." The court went on to note the following factors to be considered when making that determination: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The amount of time it took the producing party to recognize its error; 3. The scope of the production; 4. The extent of the inadvertent disclosure; and 5. The overriding interest of fairness and justice.

Michigan

Michigan courts seem to hold that an inadvertent disclosure never amounts to waiver. Thus, in *Leibel v. GMC Corp.*, 250 Mich. App. 229, 646 N.W.2d 179 (Mich. Ct. App. 2002), the court considered the disclosure of a memo inadvertently disclosed in other litigation. The court held that "a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected."

Minnesota

Minnesota courts appear to hold that an inadvertent disclosure never amounts to a waiver of the attorney-client privilege. In *Lundman v. McKown*, 530 N.W.2d 807 (Ct. App. Minn. 1995), the court reviewed a trial court's refusal to allow the introduction of certain evidence that had been disclosed to the appellants. The court, without considering any factors, held that the trial court "properly excluded [the] evidence on the ground that its admission would violate respondent's attorney-client privilege and that it had been inadvertently disclosed to appellants."

Missouri

Missouri courts seem to be employing a multi-factor test. In *State ex rel. v. Dandurand*, 30 S.W.3d 831 (Mo. 2000), the Supreme Court of Missouri rejected the rule that a mistaken disclosure is always a waiver. It stated that it did "not mean to suggest that a trial court in other contexts lacks discretion to order the return of inadvertently-disclosed attorney-client communications. Missouri does provide strong protection for attorney-client communications." The court went on to cite favorably a federal case, *Gray v. Bicknell*, 86 F.3d 1472 (8th Cir. 1996), and noted that the *Gray* court, while "inferring Missouri law, used a balancing test to measure the trial judge's discretion to order return of privileged documents inadvertently disclosed." The court in *Gray* adopted the multi-factor test, relying on the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; and 5. Whether the overriding interest of justice would be served by relieving the party of its error.

Montana

Montana courts employ a multi-factor test. In *Pacificorp v. Dept. of Revenue*, 254 Mont. 387 (Mont. 1992), the Supreme Court of Montana considered: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The extent of the disclosures; and 3. The promptness of measures taken to rectify the disclosure. The test is somewhat different from the five-factor test employed by most federal courts, as it drops two factors: the number of disclosures and the overriding issue of fairness. But the practical difference is likely minimal, because the "number of disclosures" factor overlaps with the "extent of disclosures" factor, and the overriding "fairness" fact is probably implicit in any review to determine waiver of the privilege.

Nebraska

Nebraska state courts have not weighed in on mistaken disclosures. Rule 512 of the Nebraska Rules of Evidence provides that disclosure is not a waiver if it was (1) compelled erroneously or (2) made without opportunity to claim the privilege. If read broadly, the rule could mean that mistaken disclosures are never waivers. But it could also mean the opposite, if the court were to rule that mistaken disclosures in discovery are "erroneously compelled" by the discovery demand, as is the case in California.

The Federal District Court of Nebraska has interpreted the state privilege law to embody a multi-factor test to determine whether a mistaken disclosure constitutes a waiver. In *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12 (D. Neb. 1985), the court declared that under Nebraska privilege law, "mere inadvertent production does not waive the privilege" and that waiver is determined by the following factors: 1. The number of documents produced; and 2. Procedures utilized for screening the discovery requests for privileged information.

Nevada

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver. In *Premiere Digital v. Central Telephone*, 360 F. Supp.2d 1168 (D. Nev. 2005), however, the Federal District Court, applying Nevada privilege law, declared that mistaken disclosures are never waivers. In *Premiere*, the inadvertent disclosure at issue occurred because of the misstep of a new paralegal. The court held that:

> As the Nevada statutes and the precedent of the Nevada Supreme Court establish that waiver of the privilege may only occur due to a voluntary disclosure, and that disclosure must be

made by the client, the Court finds that under Nevada law the privilege has attached and has not been waived.

Id. at 1174-75 (citing Nev. Rev. Stat. 49.105; *Manley v. State*, 115 Nev. 114, 121 n.1, (Nev. 1999).).

New Hampshire

Inadvertent disclosure in New Hampshire is governed by New Hampshire Rule of Evidence 511, which provides:

> A claim of privilege is not defeated by a disclosure that was compelled erroneously or by a disclosure that was made inadvertently during the course of discovery.

The Reporter's Notes accompanying Rule 511 state as follows:

> This Rule is intended to cover instances of disclosure of otherwise privileged material, where the disclosure was made through compulsion later found by a Court to be improper, or where the material was disclosed during the course of discovery, and the disclosure was made through mistake and inadvertence, rather than through carelessness or neglect.

This note seems to suggest that New Hampshire courts should consider the factors commonly utilized in the multi-factor analysis of proposed Rule 502 to determine whether the disclosure will amount to a waiver. But the note seems inconsistent with the text of the rule, which states that inadvertent disclosures are never waivers. The research conducted did not uncover any New Hampshire case law interpreting Rule 511. For purposes of this memorandum, it is not important whether the text of the rule or the note controls. Under either, there is no conflict with Rule 502.

New Jersey

In New Jersey, a mistaken disclosure never amounts to a waiver. An example is *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273 (N.J. Sup. Ct. Law Div. 1994), where the court held that "mere inadvertent production of a privileged document by the attorney does not waive the client's privilege." The court reasoned that the privilege was held by the client and so could not be waived by a disclosure that the client never authorized.

New Mexico

New Mexico follows a multi-factor test. In *Hartman v. El Paso Natural Gas,* 107 N.M. 679 763 P.2d 1144 (N.M. 1988), the Supreme Court of New Mexico found the following factors were relevant in determining whether a mistaken disclosure constitutes a waiver: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosure; 4. Any delay and measures taken to rectify the disclosures; and 5. Whether the overriding interests of justice would be served by relieving a party of its error.

New York

New York courts use a multi-factor test. For example, in *Baliva v. State Farm Mutual*, 275 A.D.2d 1030, 713 N.Y.S.2d 376 (4th Dep't 2000), the court considered the following factors: 1. Whether the client intended to retain the confidentiality of the document; 2. Whether the client took reasonable steps to prevent its disclosure; 3. Whether there was a prompt objection to the disclosure after discovering it; and 4. Whether the party claiming waiver will suffer prejudice if a protective order is granted.

North Carolina

The research conducted did not reveal a statute or any reported case directly addressing the question of inadvertent waiver.

North Dakota

North Dakota uses a multi-factor test. The Supreme Court of North Dakota, in *Farm Credit Bank v. Huether*, 454 N.W.2d 710 (N.D. 1990), held that courts should analyze the following factors when determining whether an inadvertent disclosure constitutes waiver of privilege:1. The reasonableness of the precautions taken to prevent the inadvertent disclosure in view of the extent of the document production; 2. The number of inadvertent disclosures; 3. The extent of disclosure; 4. The delay and measures taken to rectify the disclosure; and 5. Whether the overriding interests of justice would or would not be served by relieving a part of its error.

Ohio

The Ohio courts have adopted a multi-factor test. An example is *Miles-McClellan Constr. Co. v. Bd. of Educ. Westerville,* 2006 Ohio 3439 (Ohio Ct. App. 2006), where the court relied on the following factors to determine whether mistaken disclosure constituted a waiver: 1. The reasonableness of the precautions taken by the party asserting privilege to prevent the disclosure; 2. The time taken to rectify the inadvertent error; 3. The scope and nature of the discovery proceedings; 4. The extent of the disclosure in relation to a role in discovery proceedings; and 5. The overriding issue of fairness.

Oklahoma

Oklahoma seems to follow a multi-factor test. In *Browning v. State*, 2006 Okla. Crim. 8, 134 P.2d 816 (Okla. Crim. App. 2006), the Court of Criminal Appeals of Oklahoma held that an inadvertent disclosure by an attorney could not have resulted in a waiver of the physician-patient privilege because the attorney "did not exercise the privilege . . . ." In reviewing the trial court's determination, the court discussed the following: 1. Whether the disclosure was inadvertent; 2. Whether the opposing party asked for the documents; 3. The actions taken after discovery of the disclosure; and 4. The privilege holder's intent.

Though the court was deciding the issue in the context of physician-client privilege, the mistaken disclosure was by the attorney and so the reasoning would seem equally applicable to mistaken disclosure of material protected by the attorney-client privilege.

Oregon

Oregon follows a multi-factor approach. In *Goldsborough v. Eagle Crest*, 314 Or. 336, 838 P.2d 1069 (Or. 1992), the Supreme Court of Oregon held that "[a] court need not necessarily conclude that the lawyer-client privilege has been waived when a document has been produced during discovery." The court went on to list the following factors to be considered by a court in determining waiver: 1. Whether the disclosure was inadvertent; 2. Whether any attempt was made to remedy any error promptly; and 3. Whether preservation of the privilege will occasion unfairness to the opponent.

Pennsylvania

Pennsylvania appears to use a multi-factor test, though there is not complete agreement on the relevant factors. In *Minatronics Corp. v. Buchanan Ingersol, P.C.*, 23 Pa. D. & C.4th 1, 14 (C.P. Ct. Alleg. 1995), the court held that the disclosure of documents protected by the attorney-client privilege does not waive the privilege where: 1. The disclosure was inadvertent; 2. It is still possible to afford the party that produced the documents many of the protections provided by the attorney-client privilege; 3. Counsel took reasonable steps after learning of the inadvertent production; and 4. The party receiving the documents will not be prejudiced by a court order prohibiting or restricting that party's use of the documents. In *Herman Goldner Co. Inc. v. Cimco Lewis Indus.*, 58 Pa. D. & C.4th 173, 182-83 (C.P. Ct. Phil. 2002), the court, while noting the four factors utilized in *Minatronics*, came up with a somewhat different list: 1. The reasonableness of the precautions taken to prevent disclosure; 2. The inadvertence, extent and number of the disclosures; 3. The steps taken after learning of the disclosure and the time frame in which those steps were taken; 4. Issues of fairness and justice, including the utility of extending the attorney-client privilege and the prejudice the receiving party would suffer. While these tests are articulated differently, the various factors are flexible enough that results are unlikely to differ — and are unlikely to differ from the five-factor federal common law test.

Rhode Island

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver.

South Carolina

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver in connection with litigation. In *Marshall v. Marshall*, 282 S.C. 534, 320 S.E.2d 44 (Ct. App. 1984), however, the court held that a wife's inadvertent disclosure of a letter from her attorney did not waive the privilege. The court reasoned as follows:

> Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject. . . . She obviously left the letter in the truck through oversight and inadvertence and certainly did not intend for Mr. Marshall to see it. Under these circumstances, it can hardly be claimed Mrs. Marshall voluntarily disclosed the contents of this letter to her husband.

The court seems to confuse the term "voluntary" with the term "intentional." Nobody coerced the wife to leave the letter in the truck, so the act was voluntary. But in any case, the court seems to state

that a mistaken disclosure can never be a waiver.

South Dakota

The research conducted did not reveal a statute or any reported case directly addressing inadvertent waiver.

Tennessee

The Tennessee state courts have not reached the issue of mistaken disclosure. But in *Fleet Bus. Credit Corp. v. Hill City Oil Co.*, No. 01-02417, 2002 U.S. Dist. LEXIS 23896 (W.D. Tenn. Dec. 5, 2002), the Federal District Court applied Tennessee privilege law and held that the following factors should be analyzed in determining whether the privilege is waived: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure; 2. The time taken to rectify the error; 3. The scope of the production; 4. The extent of the disclosure; and 5. The overriding issues of fairness.

Texas

Mistaken disclosures in Texas are governed by Rule 193.3(d) of the Texas Rules of Civil Procedure which provides that:

> A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if-within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made-the producing party amends the response, identifying the material or information produced and stating the privilege asserted.

In *In re Living Centers of Texas, Inc.*, 175 S.W.3d 253, 260 (Tex. 2005), the Supreme Court of Texas held that "inadvertent disclosure does not automatically waive a claim of privilege" under Rule 193.3(d). The court also held that "a party's inadvertent failure to utilize its own internal procedure for identifying privileged documents does not automatically waive the privilege" either.

The Texas rule does not provide absolute protection against mistaken disclosures. Rather, it provides a kind of safe harbor that is temporally limited, because diligent efforts are needed to get the materials returned. However the rule is characterized, it does not conflict with Rule 502 because it is more protective against waiver than is the Federal Rule, and Rule 502 does not affect state

attempts to provide greater protection than that provided by federal law.

Utah

The waiver of privilege in Utah is governed by Utah Rule of Evidence 507 which provides in pertinent part:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

The Utah rule provides a negligence-based test, similar though not identical to Federal Rule 502, which considers not only reasonable precautions against disclosure but also reasonable attempts to retrieve the information. But because the Utah rule has fewer requirements, it provides a more protective rule against waiver and as such does not conflict with Rule 502.

In *Gold Standard, Inc. v. American Barrick*, 805 P.2d 164 (Utah 1990), the Supreme Court of Utah considered both the more detailed multi-factor test employed by most courts as well as a the narrower test of the Utah Rule that focuses on the intent of, and precautions taken by, the holder. The court found it unnecessary to decide between the tests because both of them resulted in the same finding of no waiver under the circumstances of the case. The multi-factor test considered by the court set forth 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 the discovery; 4. The extent of the disclosure; and 5. The overriding issue of fairness.

Vermont

Vermont courts appear to hold that an inadvertent disclosure never amounts to a waiver. In *Hartnett v. Medical Center Hospital of Vermont*, 146 Vt. 297, 503 A.2d 1134 (Vt. 1985), the Supreme Court of Vermont upheld a lower court's ruling that an attorney had not waived work product privilege after a document was inadvertently disclosed to opposing counsel. The lower court held that "there was no credible showing that [the attorney] handled the memorandum in such a way as to know it would be disclosed to plaintiffs' attorney." The Supreme Court, in reviewing the lower courts ruling, seemed to focus on the intent and actions of the producing attorney:

> The . . . attorney never authorized or knew that [the document] was included in the . . . file. In fact, the . . . attorney believed that the only copy of [the document] was in his file. He had never provided a copy of [the document] to a third person, and did not know how the document got into the . . . file. Under these facts, we are unable to say that the court erred in finding that no waiver occurred.

Virginia

It appears that in Virginia inadvertent disclosure never amounts to a waiver. An example is *Stupp Bros. Bridge v. Comm'r. of Dep't of Highways*, 6 Va. Cir. 240 (Cir. Ct. Rich. 1985), in which the court held that inadvertent disclosure does not constitute a waiver of work product. The court did not analyze any of the multiple factors commonly considered, therefore suggesting that the privilege is never waived by inadvertent disclosure.

Washington

Research did not find any case law or statute that directly addresses the issue of inadvertent disclosure. In *Harris v. Drake*, 152 Wn.2d 480, 99 P.2d 872 (Wash. 2004), however, a dissenting opinion written by Chief Judge Alexander adopts the multi-factor test. Chief Judge Alexander dissented because the majority, after finding documents to be covered under the attorney work product privilege, ignored the fact that an attorney voluntarily but mistakenly provided a copy of the document to his adversaries. He noted that there was no law on the subject of mistaken disclosures in Washington, but that in the absence of any such precedent, Washington case law indicates that "we look to the federal courts' interpretation of similar rules of civil procedure." Chief Judge Alexander noted that most federal courts have adopted a multi-factor test considering: 1. The reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; 2. The volume of discovery versus the extent of the specific disclosure at issue; 3. The length of time taken by the producing party to rectify the disclosure; and 4. The overarching issue of fairness. His opinion was that the multi-factor test was the law in the State of Washington as well, at least until Washington courts ruled otherwise.

West Virginia

West Virginia applies a multi-factor test. In *State ex. rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (W. Va. 1998), the Supreme Court of Appeals of West Virginia relied

on the following factors: 1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production; 2. The number of inadvertent disclosures; 3. The extent of the disclosures; 4. The promptness of measures taken to rectify the disclosure; 5. Whether the overriding interest of justice would be served by relieving the party of its error; and 6. Any other factors found to be relevant.

Wisconsin

Wisconsin cases appear to indicate that a mistaken disclosure can never be a waiver. The leading treatment is in *Harold Sampson Childrens Trust v. Linda Gale Sampson 1979 Trust*, 2004 Wi. 57, 679 N.W.2d 794 (2004), in which the court declared that "the policies undergirding the attorney-client privilege support [the] conclusion that a lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request." The court based its opinion upon the fact that "the client holds and controls the attorney-client privilege and only the client can waive it." The court noted that its holding was "similar to the lenient rule adopted by several courts in inadvertent disclosure cases."

Wyoming

The research conducted did not reveal a statute or any reported case directly addressing the issue of inadvertent waiver.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Report to Congress on "harm-to-child" exception to the marital privileges
Date: March 15, 2007

Attached is the draft of a report to Congress on the necessity and desirability of codifying the "harm-to-child" exception to the marital privileges. This report is in response to the Congressional directive in the Adam Walsh Child Protection Act. At its last meeting the Committee discussed the merits of amending the Evidence Rules to provide for a harm to child exception to the marital privileges. The Committee decided that such an amendment was not needed, but that a report to Congress should contain suggested language for an amendment should Congress decide to proceed.

The attached report explains the Committee's determinations and recommends against an amendment; and in accordance with the Committee's directive, the report also includes suggested language for amendment should Congress decide to proceed. It is styled as a report by the Standing Committee, because the Adam Walsh Act directs the Standing Committee to study the matter. At the Advisory Committee meeting, the Committee will be asked to approve the report, together with any additions or deletions that the Committee deems appropriate. If the Advisory Committee approves the report, it will be sent to the Standing Committee with a recommendation that the Standing Committee adopt it and send it to Congress.

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

April 27, 2007

Introduction

Public Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

> The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--
>
> (1) a child of either spouse; or
>
> (2) a child under the custody or control of either spouse.
>
> * * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure ("the Rules Committee") is in response to the Section 214 directive. The Advisory Committee on Evidence Rules ("the Advisory Committee") has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the "harm to child" exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against such exceptions; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee's work on this subject and agrees with the Advisory Committee's conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the

Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. *See Trammel v. United States,* 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. *See United States v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. *See* Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether an amendment should codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege

There is only one case in which a Federal court has upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison,* 409 F.3d 1221 (10th Cir. 2005), the accused was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting a witness from having to

testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

> The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe,* 128 F.3d 1440 (10th Cir.1997). In *Bahe,* we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. *See Trammel,* 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe,* 128 F.3d at 1442; *see also Jaffee v. Redmond,* 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception--not currently recognized by any federal court--allowing a court to compel adverse spousal testimony.

409 F.3d at 1231.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe,* 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The *Jarvison* court made no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial privilege – the precise privilege involved in *Jarvison.* In *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no such privilege existed, because the defendant was charged with harm to a child of the marriage. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See,*

e.g., United States v. Clark, 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

Cases Recognizing Harm to Child Exception

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse marital testimony and the marital communications privilege.

Marital Communications Privilege

In *United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply. The court stated:

> The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See Untied States v. Roberson,* 859 F.2d 1376, 1370 (9th Cir. 1988). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138.

In *Bahe, supra,* the court relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

> Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez,* 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

> Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. *See also* 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.
>
> The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. * * *
>
> The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

Adverse Testimonial Privilege

In *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

> We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well.

> Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 Geo. L. J. 257, 258 (1974).

526 F.2d at 1366.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison,* is dubious on a number of grounds:

1. Its analysis is perfunctory.

2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).

3. It is contrary to a prior case in its own circuit that applied the harm to child exception to the adverse testimonial privilege.

4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no Federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery.*

5. Its assertion that no Federal court had compelled a witness to testify against a spouse is incorrect.

II. The "Necessity and Desirability" of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.

A. General Criteria for Proposing an Amendment to the Evidence Rules

The Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment's notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria are found:

1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;

2) the existing rule is simply unworkable for courts and litigants; or

3) the rule is subject to an unconstitutional application.

B. Application of Amendment Criteria to Proposed Harm to Child Exception

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application, because the privilege would not apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But the split in the courts over the harm to child exception, discussed above, is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split, and ten circuits had weighed in; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the question was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question. Again, the disputed question is one that arises frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises infrequently in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications.* All of the reported federal court cases have agreed with and applied this exception. So there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

As to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privilege does not rise to the level of necessity that traditionally has justified an amendment to the Evidence Rules.

C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, fosterchildren, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term "custody or control" may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant's custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature; but, of course, that dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, much less on the questions of its scope. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. There is a risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony against him. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm-to-child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm-to-child exception to the adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to

codify such an exception would create an anomaly: that very specific, and rarely applicable, exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope, and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.[1]

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there are significant policy arguments supporting such an exception. The Committee is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

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[1] The situation can be usefully contrasted with the proposed Rule 502 that is currently being considered by the Advisory Committee and the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of preproduction privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute on when waiver is to be found and on the scope of waiver.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges established under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term "minor" in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.,* Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.,* Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster child); *Stevens v. State,* 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State,* 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in "custody or control" covered children spending the night with defendant's daughters); *State v. Waleczek,* 585 P.2d 797 (Wash. 1978) (term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether "custody or control" might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. See, e.g., Colo. Rev. Stat. § 13-90-107 (exception to adverse

testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis. Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which "one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either"). *See also United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence,* 28 Hous. L.Rev. 1095 (1991). .

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Standing Committee Time-Counting Project; Possible Amendment to the Evidence Rules.
Date: March 15, 2007

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee is chaired by Judge Kravitz; the Evidence Rules Committee is represented by Trish Refo.

The Subcommittee has prepared a template for the Advisory Committees to consider, as the basis for amendments to the national rules. It is expected that the Committees on Civil, Criminal, Appellate and Bankruptcy Rules will approve the template (with the possibility of some variations) for public comment, and that the Standing Committee will consider these proposals at its June meeting.

The impact of the time-counting project on the Evidence Rules appears to be minimal. There are only a few time periods in the Evidence Rules that are measured by a day-based time period. They are: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial. All of these four Rules allow for flexibility — the time periods are excused upon a showing of good cause.

There are other time periods in the Evidence Rules that provide no specific time limit, e.g., Rule 404(b) and 807, which require reasonable notice in advance of trial of the intent to use evidence of covered by the respective Rules. The time-counting project will have no effect on those open-ended time periods.

Finally, there are a few year-based time periods in the Evidence Rules: Rule 609(b) (10 year-old convictions) and ancient document rules (Rules 803(16) and 901(b)(8), documents in existence 20 years or more). These could potentially be affected by a time-counting rule, but only in cases where the argument is that the year-based period ended on a particular day rather than a day before

or after. As discussed below, there appears to be little need for a time-counting rule for such periods.

At its Spring meeting the Evidence Rules Committee is being asked to consider whether a version of the time-counting template should be proposed as an amendment to the Evidence Rules. If such an amendment is to be proposed, it should probably be placed at the end of the Rules, as a new Rule 1104. The only other possibility for location would be in Article One of the Rules: but those Rules are actually important and oft-employed. A time-counting rule would rarely be employed under the Federal Rules of Evidence, so a strong argument can be made that if it is to be included, it should be placed in some out-of-the-way location.

This memorandum is in three parts. Part One sets forth the time-counting template as submitted to the Advisory Committees for their Spring 2007 meetings. Part Two discusses whether there is a need for an amendment to the Evidence Rules to cover time-counting questions. Part Three provides a blacklined version of the template, that might serve as proposed Rule 1104 should the Committee decide to propose a time-counting rule. The template to the Committee Note must be altered because it is written in terms of an addition to current Civil Rule 6; it obviously must be tweaked to apply to a new rule of evidence.

It must be emphasized that it is up to the Evidence Rules Committee to recommend whether a time-counting provision should be added to the Evidence Rules. There appears to be no presumption or expectation that a time-counting provision must be added to the Evidence Rules. And as seen below, there is no real case for adding a time-counting provision to the Evidence Rules.

I. Time-Counting Template

What follows is the time-counting template in its current form, together with a proposed Committee Note. The template would amend Civil Rule 6, which currently provides for different time-counting, depending on whether the specified amount of days is less or more than 11 days. Corresponding amendments would be made to the time-counting provisions in the other national rules, including Criminal Rule 45.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any statute, local rule, or court order.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day of a filing period computed under Rule 6(a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour of a filing period computed under Rule 6(a)(2), then the time for filing is extended to the same time on the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Template Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a statute, a local rule, or a court order. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods.

Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days

or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility; the concept of inaccessibility will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases), while many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(4)'s definition does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule

59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

III. Do the Evidence Rules Need To Be Amended to Address Time-Counting?

A. Is There a Problem in Time-counting Under the Evidence Rules?

At its last meeting, the Committee determined that the Evidence Rules did not need a time-counting amendment, because no time-counting problems have been raised with respect to any Evidence Rule. The Committee suggested that any doubts about time-counting in the Evidence Rules could be resolved by having the Civil and Criminal time-counting rules apply to the Evidence Rules. But in a conference call of the time-counting Subcommittee, this proposal was rejected. Apparently there were concerns that covering the Evidence Rules in both the Civil and Criminal Rules would be confusing. And there was even a suggestion that the Appellate Rules would have to be amended to cover all the many cases that are tried in the original jurisdiction of appellate courts — and in which time-counting problems for Evidence Rules would be raised with alarming frequency.

At the Spring 2007 meeting, the question for the Committee is whether there is a problem with time-counting that warrants an amendment to the Evidence Rules. The Committee's determination at its last meeting — that the Evidence Rules should not be amended — is not necessarily dispositive because the Committee chose the less onerous alternative of including a reference in the Civil and Criminal Rules. Now there is no alternative — the Evidence Rules need to be amended if time-counting is to be addressed. But the question is whether the costs of an amendment outweigh any perceived benefit in addressing time-counting in the handful of Evidence Rules that contain time periods.

The Evidence Rules Committee proposes amendments only if there is a substantial need to do so. There appears to be no substantial need to enact a provision on time-counting in the Evidence Rules. With respect to day-based time periods, the Reporter found no reported case involving any dispute about the meaning or application of any of those periods in Rules 412-415; no dispute over whether 14 days or 15 days means calendar days or business days; no dispute about when the counting begins; and no dispute about what happens when a backward-counted date falls on a weekend or holiday.[1] Given that Rules 412-415 are only rarely applicable in federal courts anyway, there seems to be absolutely no problem in practice that warrants an amendment to the Evidence Rules, along the lines of the template, to cover any day-based time period.

In the unlikely event that a problem in counting days under Rules 412-15 were ever to be encountered, a court would probably solve the problem in one of two ways: 1) use the counting methods in the Civil and Criminal Rules by analogy (or on the ground that those rules apply to

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[1] To the extent the Reporter's research skills may be questioned (and he questions them all the time), the absence of any reported case law on Evidence Rule time-counting has been confirmed by Cathie Struve, Reporter to the Appellate Rules Committee and lead reporter on the time-counting project, by all accounts a researcher of extraordinary skills.

"statutes" and Rules 412-415 are statutory in provenance); or 2) apply the good cause language in each of the Rules to excuse the counting problem. Because any time-counting problem is likely to be solved in practice by one of these methods, the case for amendment is that much weaker.

With respect to year-based time periods — the 20-year time period for ancient documents and the 10-year time period affecting convictions offered for impeachment — the template's "days are days" approach would appear to be inapplicable to counting by years. There is some possible confusion because the basic counting rule in subdivision (a) says that it applies "when the period is stated in days or a longer unit of time." That said, it seems impossible to count the days the way the template says to do (i.e., counting holidays, weekends, etc.) when the goal is to count how many years have passed. What would be the point of counting days when the time period is expressed in years? Are you supposed to count days up until 365, make that a year, and then starting counting again toward another year? If that is so, what about leap years?

The basic counting rule thus leads to odd problems as applied to years and so should probably not be consulted at all (raising one more reason to reject a time-counting provision in the Evidence Rules) Other aspects of the template could affect the counting of year-based time periods, however. Specifically, the template also provides that in counting, 1) you exclude the day of the triggering event, and 2) if the period ends on a holiday or weekend, you keep counting in the same direction to the first day that is not a holiday or weekend. So an argument could be made that the template could be placed in the Evidence Rules in order to determine when the the year-based time periods in Rules 609, 803(16) and 901(b)(8) start and stop.

But it would seem quite unnecessary to enact a rule to determine when those year-based time periods start and stop. It is extremely unlikely that such a counting rule would ever need to be applied to the year-based time periods in the Evidence Rules. The circumstances in which a time-counting rule might be necessary for those year-based time periods would be exceedingly narrow. Here is a hypothetical: a party offers a newspaper published exactly 20 years ago on the day in which it is offered into evidence as an ancient document. Does the first day count? Under the template, the answer would appear to be no, because you exclude the day of the "event that triggers the period" (assuming that publication is indeed the event that triggers the period). To state the hypothetical shows how unlikely it is to occur. Notably, there is no reported case raising any problems of day-based time-counting for the year-based periods in the Evidence Rules.

It should be noted that a court faced with a time-counting question for the year-based Evidence Rules, in the absence of a specific Evidence Rule on time-counting, would not be at a complete loss. It would have several plausible options, including: 1) use the Civil and Criminal Rules by analogy; 2) wait a day to admit the evidence (or wait to call the witness in the case of Rule 609(b)); or 3) use discretion to decide admissibility. But fundamentally, the complete unlikelihood of such a problem arising in practice appears to cut against amending the Evidence Rules to add a free-standing time-counting rule.

B. Problems Raised by Adopting the Text of the Template in the Evidence Rules

The goal of the time-counting project is to provide a uniform solution to time-counting for all the national rules; this means that, so much as possible, the language in each set of rules is to be identical. If the template is adopted as an Evidence Rule and kept uniform with the Civil and Criminal Rule, some anomalies may arise. What follows is a short description of some of those anomalies.

1. The template contains an entire subdivision on counting hour-based time periods. But there are no hour-based time. It seems unusual to have a rule on counting hour-based periods when there are no such periods in the Evidence Rules — nor is there likely ever to be an hour-based time period in the Evidence Rules. Including such a provision may well create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based time period that they have overlooked.

2. The template provides extensive treatment of what to do if the clerk's office is inaccessible. But the clerk's availability is essentially irrelevant to the time-based periods in the Evidence Rules. Certainly the year-based time periods have nothing to do with filing anything with the clerk. And Rules 413-415 do not require "filing", they require the government to "disclose the evidence to the defendant" at least 15 days before the scheduled date of trial, unless excused by good cause. So no clerk is involved in these rules. Rule 412 does envision "a written motion" and so perhaps an issue of filing and clerk inaccessibility might be involved. But the provision on inaccessibility, as applied to this single possibility in the Evidence Rules, may be seen as making a mountain out of a molehill — especially since Rule 412 is raised relatively infrequently in the federal courts. And especially since Rule 412 contains a good cause provision in which the court could address inaccessibility without the need for any time-counting rule.

3. Similarly, the "last day" provision, which is tied to when something can be filed with the clerk, is unlikely to have any applicability to any time-based question in the Evidence Rules.

C. Can the Text of the Template Be Adapted to Delete the Provisions Addressing Problems That Do Not Arise Under the Evidence Rules?

One might argue that the anomalies raised above (of having provisions with no practical utility) could be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But that solution raises problems of its own. Any time-counting Evidence Rule would have to co-exist with the time-counting Civil and Criminal Rules. To the extent those rules do not match, there will be confusion and an invitation to litigation — one party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the *rules*, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it

applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly. The alternative, perhaps, is to change the template version to provide that the time-counting Evidence Rule is applicable only to time-counting under the Evidence Rules. But disuniformity would still create a problem if the Evidence Rule counted one way as to the time-based Evidence Rules, but the Civil or Criminal Rule came out differently.

With risks of disuniformity on the one hand and irrelevant provisions on the other, it could be argued that the costs of amending the Evidence Rules to provide for time-counting outweigh the minimal benefit.

C. Do the Time Periods in Rules 412-415 Need To Be Changed If the Template Is Enacted?

One aspect of the time-counting project is to ask the Advisory Committees to review each of the time-specific periods in the respective national rules, in order to integrate those periods with the time-counting rules established in the template. Assuming that the template is enacted to apply to the Evidence Rules, then time periods counted in 11 days or less should be changed to multiples of seven, because weekend days and holidays are now counted toward the total (i.e., "days are days"). But in this respect, no amendment to any of the individual Evidence Rules would be required. Rule 412 provides for a 14-day period and Rules 413-415 each provide for a 15-day period for providing notice. The change provided by the template, to a days-are-days approach, would not alter the actual length of the period because even under the current rules 14-day periods are counted on a days-are-days basis.

The day-specific periods in the Evidence Rules are all backward-counted deadlines, i.e., computed from a time in the future (the date scheduled for trial). The template has a rule for computing backward-counted time periods: If the end-point of the period falls on a weekend or holiday, the template makes clear one should continue counting in the same direction (i.e., backwards) to the next day that's not a weekend or holiday. It is at least possible that this new approach to backward-counted deadlines differs from current practice — assuming there is such a practice, as there is no case law on the subject. But even if the backward-counting rule would affect the application of the Evidence Rules deadlines (i.e. the notice requirement might fall on a different day), that possible change would not be a reason to change the length of the notice periods themselves. Note that as to the Evidence Rules, any general lengthening of the notice periods is likely to be opposed because it would mean that the party must file notice *sooner* than under current practice — it is not like lengthening the time period for filing a motion.

It should be noted that the 15 -day periods of Rules 413-415 are somewhat more likely to trigger the backward-counting template rule (again assuming it is applicable) than is the 14-day period of Rule 412. Fourteen day periods only create a problem if the last day counted backward is

a holiday. By definition there is no weekend problem under Rule 412, because the time is counted back from the time of a trial date, and that would not be on a weekend. Fifteen day periods are more likely to trigger the rule that a backward date falling on a weekend or a holiday extends the period to the next week day that is not a holiday. But this would not appear to be a reason to propose an amendment to the length of the time periods of Rules 413-415, e.g., to shorten them to 14 days. It would simply mean that the proponent of the evidence would, in some rare situations, be required to provide notice a day or two earlier than otherwise.

In sum, it would appear that the current day-based time periods in the Evidence Rules would function well within the template's time-counting rules. Thus, no change to the number of days set forth in any of those rules would seem to be necessary, whether or not the Evidence Rules are amended to add a freestanding rule on time-counting.

III. Time-Counting Template Adapted to the Evidence Rules

This section assumes the Committee determines that the Evidence Rules should be amended to add a time-counting rule. But variations must be made to the Committee Note, as it is written in terms of an amendment to the existing Civil Rule. So it must be adapted to a rule that would be new in the Federal Rules of Evidence.

For the Committee's review, the language in the text of the template that appears to be irrelevant to the Evidence Rules is in brackets. This language could only be deleted if the Committee (and the Standing Committee) finds uniformity with the Civil and Criminal Rules to be expendable — and then only if the coverage of the Evidence Rule is limited to "these rules", deleting the coverage of statutes, local rules, and court orders.

Rule 1104. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any statute, local rule, or court order.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

[(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.**]**

[(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day of a filing period computed under Rule 6(a)(1), then the time for filing is extended to the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour of a filing period computed under Rule 6(a)(2), then the time for filing is extended to the same time on the first day when the clerk's office is accessible that is not a Saturday, Sunday, or legal holiday.**]**

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note, Blacklined from Template

Subdivision (a). Subdivision ~~(a) has been amended to simplify and clarify~~ sets forth the basic provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of ~~Civil Procedure~~ Evidence, a statute, a local rule, or a court order. ~~In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).~~

Reporter's Note: If the Committee decides to limit coverage to the Federal Rules only, it might change the second sentence of the above paragraph to the following:

"Subdivision (a) governs the computation of any time period found in a Federal Rule of ~~Civil Procedure~~ Evidence~~, a statute, a local rule, or a court order~~**.** Computation of time periods for statutes, local rules and court orders is found in Civil Rule 6 and Criminal Rule 45."

The Note continues:

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule ~~60(b)~~ 609(b).

~~Under former Rule 6(a), a period of 11 days or more was computed differently than~~

~~a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).~~

Under ~~new~~ subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

~~Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.~~

~~Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].~~

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of ~~Civil Procedure~~ Evidence. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

[Reporter's Note: The immediately preceding sentence would have to be deleted if the coverage of the Rule were limited to the Evidence Rules — which would mean that there would really be no excuse at all for having an hour-based counting period.]

Under ~~new~~ subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

~~The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system.~~ Weather can ~~still~~ be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility; the concept of inaccessibility will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases), while many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). ~~New subdivision~~ Subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2). Subdivision (a)(4)'s definition does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941).

Subdivision (a)(4) does not address the court's authority to permit such a filing under the statute; instead, the rule is designed to deal with the ordinary course of events.

Subdivision (a)(5). ~~New subdivision~~ Subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of ~~Civil Procedure~~ Evidence contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., ~~Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment")~~ Rule 609(b) (admissibility of conviction for impeachment is affected by whether ten years have passed since the witness's conviction or release from confinement). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, ~~Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)")~~ Rule 412 (a party intending to offer evidence under the Rule must file a notice "at least 14 days before trial" unless the court for good cause provides for a different time period). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing ~~is~~ were to be due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing ~~is~~ were to be due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). ~~New subdivision~~ Subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of ~~Civil Procedure~~ Evidence~~, including the time-computation provisions of subdivisions (a)(1) and (a)(2)~~.

MEMORANDUM

DATE: March 13, 2007

TO: Time Computation Subcommittee
Committee Reporters

FROM: Judge Mark R. Kravitz
Catherine T. Struve

CC: Judge David F. Levi
John K. Rabiej

RE: Two additional template issues

Since circulating the template draft last week, we have become aware of two issues that we would like to bring to your attention in advance of the Advisory Committee meetings this spring. At least one of those issues will require a change to the language of the proposed time-counting Rule.

The first issue concerns the template's effect on statutory provisions that both set a time period for use in litigation and provide explicit instructions on how the period should be computed. The second issue relates to the application of the "legal holidays" definition to litigation that takes place in the Territories, the District of Columbia or Puerto Rico. These issues are addressed in parts I and II below.

I. Statutory periods expressed in "business days" or similar language

Our subcommittee's master list of short statutory time periods omits periods that explicitly instruct that weekends and holidays not be counted. Those periods were omitted based on the assumption that since the statute specifies the manner of counting, no court would apply a contrary time-counting Rule. But it occurred to us recently that this assumption might have been hasty.

Most statutes that set time periods relating to litigation fail to specify how the periods should be counted. Some other statutes set periods in "calendar days";[1] those provisions are omitted from our master list on the assumption that they will continue to be counted the same way under the Rules' new days-are-days approach. And – of greatest relevance to this memo – a few statutes specify a time-counting method that is different from the one that will apply under the proposed template's approach; those provisions (13 statutes and one regulation) are listed in the enclosed spreadsheet.

As you know, the template states that its "rules apply in computing any time period specified in ... any statute...." And subdivision (a)(1) instructs that "[w]hen the period is stated in days or a longer unit of time" one must "count every day, including intermediate Saturdays, Sundays, and legal holidays." For all sets of Rules other than the Bankruptcy Rules, the supersession authority granted to the rulemakers means that once the template is adopted as part of the Rules, all statutory provisions to the contrary will be of no force and effect. So the question is whether any court would interpret the Rules' days-are-days time-counting directive to supersede an explicit statutory directive to use a non-days-are-days approach. As a policy matter, we believe it would be undesirable for the Rules to trump such directives. Those directives may have arisen, for example, from a legislative desire to set a short period but to avoid imposing hardship in the event that the period includes a weekend or holiday.

It is informative to consider the rationales that courts have used when applying existing or prior versions of the time-counting Rules to compute statutory periods. Some courts have applied those Rules as gap-filling measures in the absence of any contrary indication from Congress.[2] In some instances, courts have applied a time-counting Rule "by analogy," or as a reasonable estimation of congressional intent in enacting the relevant statutory scheme, rather

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[1] See, e.g., 12 U.S.C. § 3410(b) ("All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.").

[2] For example, the Third Circuit reasoned as follows in a Federal Tort Claims Act case: "Section 2401(b) does not contain a time computation rule. It does not say whether the day of the liability causing event is included or excluded. It says nothing about weekends or holidays at the end of the two year period. Both with its beginning and with its end interpretation is required. Aside from the government's rule of interpretation that the claimant ought always to lose, no more satisfactory rule has been called to our attention than that, approved by Congress, and announced in Rule 6(a)." Frey v. Woodard, 748 F.2d 173, 175 (3d Cir. 1984). See also United Mine Workers of America, Intern. Union v. Dole, 870 F.2d 662, 665 (D.C. Cir. 1989) ("The [Mine Safety and Health Act of 1977] ... makes no separate provision for the computation of time and was enacted subsequent to the adoption of Rule 26(a); we conclude therefore that Congress intended its time periods to be computed in accordance with the federal rule.").

than indicating that the Rule controls of its own force.[3] In other cases, courts have applied a time-counting Rule to compute a statutory period without giving much or any explanation for that application. But courts confronted with a specific statutory counting method have refused to apply a contrary directive in the relevant time-counting Rule.[4]

Clearly, courts applying a time-counting Rule as a gap-filling measure will not apply the Rule when the statute specifies a contrary time-counting method, for in that event there is no gap to be filled. Likewise, courts that look to congressional intent would infer from the statute's specification of a time-counting method that Congress did not intend them to use the time-counting Rule's contrary method. And courts that already reject the time-counting Rule when faced with a statutorily-specified time-counting method would continue to do so.

Nonetheless, a technical argument could be made that says that, as to statutes that predate the adoption of the template in the time-counting Rules, the later-adopted Rule trumps the previously-adopted statutory time-counting provision.[5] It would arguably rise to the level of absurdity to apply a days-are-days time-counting Rule to calculate a period explicitly set in

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[3] *See, e.g.*, Tribue v. U.S., 826 F.2d 633, 635 (7th Cir. 1987) (reasoning in Federal Torts Claims Act case that "if we found § 2401(b) ambiguous regarding whether to exclude the mailing date, we would exclude the mailing date by analogy to Rule 6(a)"); Pearson v. Furnco Const. Co., 563 F.2d 815, 819 (7th Cir. 1977) (holding "that in the light of the purposes intended to be served by Title VII, it is a sound interpretation of congressional intent" to apply Civil Rule 6(a)'s approach to the computation of the limitations period). Likewise, in an early decision interpreting the time limit for petitions for certiorari under 28 U.S.C. § 2101, the Supreme Court drew upon the approach stated in Civil Rule 6(a): "Since [Rule 6(a)] had the concurrence of Congress, and since no contrary policy is expressed in the statute governing this review, we think that the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. s 2101(c)." Union Nat. Bank of Wichita, Kan. v. Lamb, 337 U.S. 38, 41 (1949).

[4] See F.D.I.C. v. Enventure V, 77 F.3d 123, 126 (5th Cir. 1996) ("In § 1821(d)(14)(A), Congress provided that the limitations period began 'on the date the claim accrues.' The use of the word 'on' is clear and creates a more specific rule which overrides the application of Rule 6(a)."); Slinger Drainage, Inc. v. E.P.A., 237 F.3d 681, 683 (D.C. Cir. 2001) (refusing to apply Rule 26(a) to determine the period's start date because "the statute currently before us clearly establishes a separate provision for the computation of time: a person may obtain review by filing 'within the 30-day period *beginning on the date the civil penalty issued.*' 33 U.S.C. § 1319(g)(8)(B) (emphasis added)").

[5] This argument assumes that the time-counting Rules' application to the relevant time period is valid under the Rules Enabling Act's scope limitation. That assumption may not always hold true. For example, 18 U.S.C. § 3142(d)'s time limit on detention may implicate substantive rights.

"business days" or "working days." If such applications are absurd, it seems a small step to conclude that it would likewise be absurd to apply the time-counting Rules' days-are-days approach when the statute explicitly directs one to exclude weekends and holidays. But even if this line of reasoning ultimately leads courts to reject the notion that the new time-counting Rules supersede explicit statutory directives concerning the method of computation, it would be best if we could draft the Rules to preempt litigation on this point.

We therefore suggest amending the first sentence in the template Rule as follows:

> The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute~~[, local ru...urt order.]~~ that does not specify a time-computation method.

We also favor adding a sentence to the Note to observe that state-court interpretations of state statutes count as specifying a statutory method.

II. Legal holidays in the Territories, the District of Columbia or Puerto Rico

As you know, the Rules apply not only to district court proceedings held within states, but also to district court proceedings held within the District of Columbia and Puerto Rico. Moreover, the Rules apply in proceedings in various territorial courts.[6] The template rule defines "legal holiday" to include the listed holidays plus "any other day declared a holiday by the President, Congress, or the state where the district court is located." This provision may require amendment in order to ensure that the "legal holiday" definition functions appropriately in proceedings within the Territories, the District of Columbia, or Puerto Rico.[7]

The background definitional principles vary. Civil Rule 81(e) provides that "When the word 'state' is used, it includes, if appropriate, the District of Columbia." Our understanding is that the Civil Rules Committee may be considering whether this definition should be expanded

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[6] See, e.g., Criminal Rule 1(a)(1) (subject to certain exceptions, Criminal Rules govern criminal proceedings in district courts in Guam, Northern Mariana Islands, and Virgin Islands); Am. Jur. Federal Courts § 2585 ("[W]hile the District Courts of Guam, the Northern Mariana Islands, and the Virgin Islands are constituted by the respective Organic Acts for such territories, rather than by Chapter 5 of the Judicial Code, it is expressly provided in such acts that the Federal Rules of Civil Procedure apply in such courts.").

[7] Admittedly, courts may decide to interpret the existing language to include more than just states. Cf. Reyes-Cardona v. J. C. Penney Co., Inc., 690 F.2d 1, 1 (1st Cir. 1982) ("But that day was a legal holiday in Puerto Rico honoring Eugenio Maria de Hostos. See 1 L.P.R.A. s 75. As such it is not counted in the computation of time. Rule 6(a) F.R.Civ.P...."). But it seems advisable to clarify the matter in rule text.

to include more than the District of Columbia. Criminal Rule 1(b)(9) could provide a model for such expansion; that Rule provides that "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Appellate Rules contain no such definitional provision, and the Bankruptcy Rules appear to contain no relevant definition either.

We therefore would ask the Advisory Committees (other than the Criminal Rules Committee)[8] to consider whether they wish to adopt a general definition such as that in Criminal Rule 1(b)(9). If each set of Rules is amended to contain such a definition, then no change to the template's definition of "legal holiday" would be required. If such a definition is not adopted, however, then seems advisable to add the following at the end of the template's subdivision (a)(6)(B):

> The word 'state,' as used in this Rule, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.

* * *

We regret that these changes did not surface before we circulated the official version of the template last week for use in the Advisory Committee meetings this spring. Generally, our plan is to hold any smaller suggestions for change (such as small changes to Note wording) until later, so that the Advisory Committees and Reporters do not have to work with a moving target for purposes of their spring meetings. But these two changes seemed to us to warrant an exception to that policy, and we wanted to place these issues before the Advisory Committees for discussion at the spring meetings.

Thank you for your work on this project.

Encl.

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[8] Obviously, this request is relevant to the Evidence Rules Committee only if it decides to recommend adopting a time-computation provision in the Evidence Rules.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Length - Unit	Length - Number	Comments
2	386	(c)	(c) Order and time of taking testimony The order in which the parties may take testimony shall be as follows: (1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired. (2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired. (3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.	Time for litigant to act			Y		Day	10	this provision is included only for completeness, because of its relation to sections 388 and 394. even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394.
2	388	(b)	(a) Issuance Upon application of any party, a subpena for attendance at a deposition shall be issued by: (1) a judge or clerk of the United States district court for the district in which the place of examination is located; ... (b) Time, method, and proof of service Service of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.	Notice to litigants or other entities			Y		[Business day]	3	Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved.

2	394	(a)	(a) Method of computing time In computing any period of time prescribed or allowed by this chapter or by the rules or any order of the committee, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. For the purposes of this chapter, "legal holiday" shall mean New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States.	Computation method			Y				
15	78eee	(b)(1)	Upon receipt of an application by SIPC under subsection (a)(3) of this section, the court shall forthwith issue a protective decree if the debtor consents thereto, if the debtor fails to contest such application, or if the court finds that such debtor-- [* * *] Unless the debtor consents to the issuance of a protective decree, the application shall be heard three business days after the date on which it is filed, or at such other time as the court shall determine, taking into consideration the urgency which the circumstances require.	Time for court to act			Y		Business day	3	

18	2704	(a)	(a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order.	Time for third party to act				Y	Business day	2	
18	3142	(d)	(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.--If the judicial officer determines that-- (1) such person-- (A) is, and was at the time the offense was committed, on-- (i) release pending trial for a felony under Federal, State, or local law; (ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or (iii) probation or parole for any offense under Federal, State, or local law; or (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and (2) such person may flee or pose a danger to any other person or the community; such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the	Limit on detention				Y	[Business day]	10	

18	3142	(f)	(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community-- * * * The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, s	Limit on continuance				Y	[Business day]	3, 5	). Pub.L. 104-132, § 729, added "(not including any intermediate Saturday, Sunday, or legal holiday)" following "five days" and following "three days".
18	3612	(d) & (e)	(d) Notification of delinquency.--Within ten working days after a fine or restitution is determined to be delinquent as provided in section 3572(h), the Attorney General shall notify the person whose fine or restitution is delinquent, to inform the person of the delinquency. (e) Notification of default.--Within ten working days after a fine or restitution is determined to be in default as provided in section 3572(i), the Attorney General shall notify the person defaulting to inform the person that the fine or restitution is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.	Time for government to act				Y	Working day	10	

20	7711	(b)	(b) Judicial review of Secretarial action (1) In general A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 30 working days (as determined by the local educational agency or State) after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. The clerk of the court shall promptly transmit a copy of the petition to the Secretary. The Secretary shall then file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of Title 28.	Time to seek review of agency action	Y				Working day as determined by local agency or state	30	
24	326	(a)	(a) Request; determination of right to retain; retention after request If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings.	Limit on detention			Y?		Hours, excluding Sundays & holidays	48	

29	1342	(b)	(b) Appointment of trustee (1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.	Time for court to act			Y		Business day	3	
29	1342	(d)	(d) Powers of trustee (1)(A) A trustee appointed under subsection (b) of this section shall have the power-- * * * If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.	Time for trustee to act			Y		Business day	3	

30	1734		(a) Action for royalty, interest, or civil penalty; limitations; notice of suit * * * (1) A State may commence a civil action under this section against any person to recover any royalty, interest, or civil penalty which the State believes is due, based upon credible evidence, with respect to any oil and gas lease on Federal lands located within the State. (2)(A) No action may be commenced under paragraph (1) prior to 90 days after the State has given notice in writing to the Secretary of the payment required. * * * (B) If, within the 90-day period specified in subparagraph (A), the Secretary issues a demand for the payment concerned, no action may be commenced under paragraph (1) with respect to such payment during a 45-day period after issuance of such demand. * * * (C) If the Secretary refers the case to the Attorney General of the United States within the 45-day period referred to in subparagraph (B) or within 10 business days after the expiration of such 45-day period, no action may be commenced under paragraph (1) if the Attorney General,	Time for governme nt to act			Y		Business day	10	
37	CFR 1.304		(a)(1) The time for filing the notice of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is two months from the date of the decision of the Board of Patent Appeals and Interferences. * * * (b) The times specified in this section in days are calendar days. The times specified herein in months are calendar months except that one day shall be added to any two-month period which includes February 28. If the last day of the time specified for appeal or commencing a civil action falls on a Saturday, Sunday or Federal holiday in the District of Columbia, the time is extended to the next day which is neither a Saturday, Sunday nor a Federal holiday.	Time to seek review of agency action	Y				Calendar months, but extra day if includes February	2	

42	16913	(b)	(b) Initial registration The sex offender shall initially register-- (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment. (c) Keeping the registration current A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.	Time for litigant to act				Y	Business day	3	
42	16921	(c)	(b) Program notification Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following: * * * (c) Frequency Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days.	Time for governme nt to act				Y?	Business day	5	

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Restylization of Evidence Rules
Date: October 15, 2006

At its last meeting, the Committee approved a pilot project to restyle some selected Evidence Rules. The pilot project is designed to give the Committee information on what restyled Evidence Rules might look like; how they might improve the existing Rules; and the problems that might arise (and need to be solved) for restylization to be successful.

Professor Joseph Kimble graciously agreed to provide examples of how three Evidence Rules could be restylized. After some negotiation with the Reporter, it was agreed that the three exemplars would be Rules 103, 404 and 612. Time constraints did not permit restylization of more than three rules. Both the Reporter and Professor Kimble agreed that it would be too difficult under the time constraints to undertake restylization of any of the rules on hearsay.

What follows is Rules 103, 404 and 612, as they have been restylized by Professor Kimble. Professor Kimble did a first draft, and the Reporter reviewed that draft and provided comments, most of them directed to substantive changes that had been made in the draft. Professor Kimble considered the comments and provided a second draft, which is set out below. Reporter's comments are included after each restylized rule. Finally, the memo includes a side-by-side comparison of the current rule and the draft restlyized rule.

It should be noted that if the Evidence Rules are in fact to be restylized, the process involves the further steps of submitting Professor Kimble's draft to the Style Subcommittee of the Standing Committee, and then further review by the Evidence Rules Committee.

Restylized Rule 103

Rule 103 — Rulings on Evidence

(a) Preserving a Claim of Error.

A party may claim error in a ruling to admit or exclude evidence only if the error affects the party's substantial right and:

(1) if the ruling admitted evidence, the party, on the record:

(A) timely objected or moved to strike; and

(B) stated the specific ground, unless it was apparent from the context; or

(2) if the ruling excluded evidence, the party informed the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions.

(b) Not Needing to Renew an Objection or Offer of Proof.

Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error.

(c) Court's Statements About the Ruling; Directing an Offer of Proof.

The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may also direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence.

In a jury trial, the court must, to the extent practicable, conduct the proceedings so that inadmissible evidence is not suggested to the jury by any means [, including statements, offers of proof, questions, or arguments? Professor Kimble would omit, Reporter would include these examples].

(e) Taking Notice of Plain Error.

An appellate court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Reporter's Comments on Rule 103:

1. Subdivision (b) on renewal of objections is derived from a hanging paragraph in the existing Subdivision (a). That paragraph was added in 2000. Current style conventions frown on hanging paragraphs. With the addition of subdivision (b), all of the existing subdivisions in the Rule get moved down accordingly.

The potential problem with creating a new subdivision and moving the others down is that what was, for example, Rule 104(b) is no longer Rule 104(b). This change to the lettering and sequencing of subdivisions is likely to upset settled expectations; it might make for incorrect specific objections (i.e., "I object under Rule 104(b) your honor"); and it definitely will create difficulty and uncertainty for electronic searches.

The restylization of the Civil Rules resulted in some additions of subdivisions and changes of numbering, but the intent was to keep such changes to a minimum. It the Evidence Committee undertakes restylization, it could provide suggestions on a less onerous alternative to an addition of new subdivisions. Other possibilities in Rule 104 include moving the new subdivision (b) to the end of the Rule (though this sacrifices logical sequencing).

2. Professor Kimble would cut the bracketed examples in subdivision (d). The Reporter would like to keep them as helpful illustrations. This is not a substantive argument. Rather, it is the kind of style question that will have to be confronted throughout a restylization process — are examples helpful, or balky?

Rule 404 — Character Evidence; Evidence of Crimes or Other Acts

(a) Character Evidence.

(1) ***In General.*** Evidence of a person's character trait is not admissible to prove that the person acted in accordance with the trait on a particular occasion.

(2) ***Exceptions.*** The following exceptions apply:

(A) a criminal defendant may offer evidence of the defendant's pertinent [relevant?] trait, and the prosecutor may offer evidence to rebut it;

(B) a criminal defendant may offer evidence of an alleged crime victim's pertinent [relevant?] trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait;

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor; and

(D) evidence of a witness's trait may be admitted under Rules 607, 608, and 609.

(b) Crimes or Other Acts.

(1) ***In General.*** Evidence of a crime or other act is not admissible to prove a character trait that led the person to act in accordance with the trait on a particular occasion.

(2) ***Exceptions; Notice.*** Evidence of a crime or other act is admissible for other purposes, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident. On request by a criminal defendant, the prosecutor must:

(A) provide reasonable notice of the general nature of that evidence if the prosecutor intends to use it at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses

lack of pretrial notice.

Reporter's Comment on Rule 404:

1. Rule 404(a) currently refers to "character or a trait of character". Professor Kimble and the Reporter agreed that this was redundant language. The evidence that is admitted is that of a character trait. So the reference to "trait" is carried throughout the rule. The Reporter is of the opinion that the reference should always be to "character trait" rather than simply "trait." That is the kind of question that the Evidence Committee can consider; and the Committee could recommend to the Style Committee that "character trait", while a bit more cumbersome, is probably more clear and more in line with the way lawyers usually refer to this kind of evidence.

2. The bracket on "relevant" in 404(a)(2)(A) and (B) raises an interesting question. The word in the current rule is "pertinent." It should probably have been "relevant" rather than "pertinent" in the beginning, as the term "relevant" is used throughout the Evidence Rules, and the term "pertinent" is used in only one other rule (Rule 803(4), statements "pertinent" to medical treatment or diagnosis). While the use of the word "pertinent" in Rule 404 might be unfortunate, the fact is that there is case law construing whether "pertinent" means "relevant." In deciding whether to change the term to "relevant" the Committee would have to consider this case law thoroughly; any indication that "pertinent" means something other than "relevant" would mean that a change to "relevant" would be a substantive change.

3. Rule 404(b) is restyled into subdivisions. While this does not constitute renumbering per se, the fact is that Rule 404(b) has been employed in thousands of cases; if it is broken down into subdivisions there is sure to be some comment from practitioners that this will upset settled expectations.

4. What is set forth as Rule 404(b)(2) is an exceptions provision. It states that bad act evidence can be admitted for "other purposes." To the question "other than what?", reference needs to be made back to subdivision (b)(1), which sets forth the impermissible purpose for this evidence. Professor Kimble believes that in restyling within a single rule, explicit references to the language used in prior subdivisions is not necessary. That is, the rule can be read as a whole. Thus, in Professor Kimble's view, it is not necessary to say in (b)(2) that the evidence is admissible "to prove a purpose other than an act in accordance with the character trait on a particular occasion." Whether the Committee agrees with this assessment is one of the issues that would have to be addressed in a restyling project.

5. Rule 404(b) currently covers evidence of "other crimes, *wrongs* or acts." The restylized rule covers evidence of "a crime or other act." The word "wrongs" is dropped. Arguably the word "wrongs" is superfluous. But research would be necessary to determine whether "wrongs" has an independent meaning in the case law. If it does, it would have to be reinstated, otherwise the restylizing would end up making a substantive change.

Rule 612 — Writing Used to Refresh a Witness's Memory.

(a) General Application.

This rule gives an adverse [opposing?] party certain rights when a witness uses a writing — including an electronic one — to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that the party should have those rights.

(b) Adverse Party's Rights; Deleting Unrelated Matter.

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, the adverse [opposing?] party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes an unrelated matter, the court must examine it in camera [in chambers?], delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over [either party's?] objection must be preserved for the record.

(c) Failure to Produce or Deliver.

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or [may?] declare a mistrial.

Reporter's Comment on Rule 612:

1. This rule was hard to restylize. As currently written, the Rule uses poor terminology in focusing on a right of inspection. The current rule says that "if a witness uses a writing to refresh memory . . . before testifying, if the court in its discretion determines *it* is necessary in the interests of justice" then the adverse party can inspect the writing. The "it" seems to refer to the *use of the document to refresh recollection*. But that cannot be the case, because there is clearly no requirement that a party must get an order from the court to allow a witness to refresh recollection before trial. Rather, the "it" refers to the right to inspect that is set forth later on in the rule. Usually, the use of

"it" refers to what has gone before, not to what will come in the future. This led Professor Kimble, in the first draft, to restyle the rule as granting a right to refresh recollection (subject to court order) as opposed to granting a right of inspection. This was changed on redraft, but Professor Kimble is not ecstatic with the result, as the introductory language seems kind of balky.

2. The bracketed language "[opposing?]" instead of "adverse" raises another question of a possible substantive change. The current rule uses "adverse." Research would be required to determine whether that has a different meaning that "opposing."

3. The new subdivision (c) drops a good deal of language from the existing rule, which states that if the prosecution does not comply, "the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." The restyled provision cuts out the reference to interests of justice and treats a mistrial and striking the testimony as equally available options. But the existing rule seems to say that a mistrial is really a last resort, only when required in the interest of justice. An argument can be made that the deletion of the interests of justice language is a substantive change. But again, research would be needed to determine if the change is inconsistent with existing law.

4. The restyled rule specifically covers writings in electronic form. One of the major benefits of restyling will be the opportunity to update the Evidence Rules to accommodate electronic information. Research will be needed, however, to determine whether extending a rule to cover electronic evidence will effect a substantive change.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: March 15, 2007

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases considering whether certain hearsay is "testimonial" are grouped by subject matter. The last section of the memo sets forth the cases discussing whether the Confrontation Clause regulates non-testimonial hearsay after *Crawford.*

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Hearsay Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant

as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

10. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

Hearsay Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation.

7. Statements made for purpose of medical treatment.

8. 911 calls reporting crimes.

9. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

10. Accusatory statements in a private diary.

11. Warrants of deportation in immigration cases.

12. Odometer statements prepared before any crime of odometer-tampering occurred.

13. A present sense impression describing an event that took place months before a crime occurred.

14. Business records — including medical records prepared with a view to litigation, and certificates of authenticity prepared for trial.

15. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

Conclusion as to Rulemaking:

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is some uncertainty, though the Supreme Court's decision in *Davis* (discussed below) has been applied by the lower courts to narrow the definition of "testimonial" and thus to resolve some of that uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether the *Crawford* test is intended to apply to ministerial law enforcement activities such as a search for public records or certifications of records; and whether and when statements made to law enforcement officials responding to an emergency become testimonial.

There is now no question, however, about the viability of *Roberts*. It is dead. The Court unanimously held in *Bockting, infra,* that the Confrontation Clause imposes no limitation on the admissibility of hearsay that is not testimonial. It could be argued, then, that rulemaking has become critical after *Bockting*, because rulemaking is the only way to regulate the reliability of hearsay if it is not testimonial. So for example, the previously proposed amendment to Rule 804(b)(3) might be thought to have renewed relevance after *Bockting*. That amendment would have required that before a declaration against penal interest could be admitted against the accused, the government would

have to prove corroborating circumstances clearly indicating the trustworthiness of the statement. (Currently, the corroborating circumstances requirement applies only to statements offered by the accused, not against the accused.) The Department of Justice objected to the amendment on the ground that the government already had the obligation, under the *Roberts* test, to prove that the declaration against penal interest was reliable under the circumstances, so the corroborating circumstances requirement would impose either a redundant or, worse, a slightly different obligation on the government. But that argument no longer holds water after *Bockting* – the government does not have an obligation under the Confrontation Clause to prove that a declaration against penal interest is reliable. So the Committee may wish to reconsider the proposed amendment to Rule 804(b)(3) — and similar proposals directed toward assuring that hearsay offered against an accused is reliable under the circumstances. Of course, any amendment to the hearsay exceptions would have to be drafted in a way that would distinguish testimonial from non-testimonial hearsay, at least where it is offered against an accused.

Cases Defining "Testimonial" Hearsay After Crawford, Arranged By Subject Matter

Admissions

Defendant's own hearsay statement was not testimonial: ***United States v. Lopez,*** 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.* The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront himself. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself. ***See also United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of defendant's own statements does not violate *Crawford*).

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: ***United States v. Gibson,*** 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Co-Conspirator Statements

Co-conspirator statement not testimonial: ***United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005): The court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord** ***United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.").

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford.* Such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators. **Accord** ***United States v. Bobb,*** 471 F.3d 491 (3d Cir. 2006) (noting that the holding in *Hendricks* was not limited to cases in which the declarant was a confidential informant).

Statement admissible as co-conspirator hearsay is not testimonial: ***United States v. Robinson***, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005).

Statement by an anonymous coconspirator is not testimonial: ***United States v. Martinez,*** 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime." ***See also United States v. Mooneyham,*** 473 F.3d 280 (6th Cir. 2007) (statements made by co-conspirator in furtherance of the conspiracy are not testimonial because the one making them "has no awareness or expectation that his or her statements may later be used at a trial"; the fact that the statements were made to a law enforcement officer was irrelevant because the officer was undercover and the declarant did not know he was speaking to a police officer).

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: ***United States v. Lee,*** 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004).

Statements in furtherance of a conspiracy are not testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." ***See also United States v. Larson,*** 460 F.3d 1200 (9th Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

Statements admissible under the co-conspirator exemption are not testimonial: *United States v. Townley,* 472 F.3d 1267 (10th Cir. 2007): The court rejected the defendant's argument that hearsay is testimonial under *Crawford* whenever "confrontation would have been required at common law as it existed in 1791." It specifically noted that *Crawford* did not alter the rule from *Bourjaily* that a hearsay statement admitted under Federal Rule 801(d)(2)(E) does not violate the Confrontation Clause.

Statements made during the course and in furtherance of the conspiracy are not testimonial: *United States v. Underwood,* 446 F.3d 1340 (11th Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford.* But the court found no error and affirmed. The court explained as follows:

> In this case, the challenged evidence consisted of recorded conversations between the confidential informant and Darryl in which arrangements were made for the confidential informant to purchase cocaine. This evidence is neither testimony at a preliminary hearing, nor testimony before a grand jury, nor testimony at a former trial, nor a statement made during a police interrogation. Moreover, the challenged evidence does not fall within any of the formulations which *Crawford* suggested as potential candidates for "testimonial" status. Darryl, the declarant in the challenged evidence, made statements to Hopps in furtherance of the criminal conspiracy. His statements clearly were not made under circumstances which would have led him reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.
>
> Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. * * * The co-conspirator statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

Declarations Against Penal Interest (Including Accomplice Statements to Law Enforcement)

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States,* statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3) when they implicate the defendant, because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide.

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished other cases in which an informant's statement to police officers was found testimonial, on the ground that those other cases involved statements made by accomplices to police officers, so that "the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame."); ***United States v. Johnson,*** 440 F.3d 832 (6th Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn't know he was speaking to law enforcement, and so a person in his position "would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.").

Accomplice confession to law enforcement is testimonial, even if redacted: *United States v. Jones,* 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford.* The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Accomplice confession to law enforcement is testimonial: *United States v. Rashid,* 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made to loved ones. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Excited Utterances, 911 Calls, Etc.

911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v. Washington* and *Hammon v. Indiana,* 126 S.Ct. 2266 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford.* In *Davis,* the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon,* the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon.* The Court set the dividing line for such statements as follows:

> Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an "exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them." Among other things, the Court stated that "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial." Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

> Although we necessarily reject the Indiana Supreme Court's implication that virtually any "initial inquiries" at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that "[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." Such exigencies may *often* mean that "initial inquiries" produce nontestimonial statements.

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d

53 (1st Cir. 2005): The Court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington*. The Court refused, however, to adopt a categorical rule that an excited utterance could never be testimonial under *Crawford*. The Court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The Court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The Court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

> **Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon*, the First Circuit's analysis appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls.**

911 call is non-testimonial under *Davis/Hammon: United States v. Thomas,* 453 F.3d 838 (7th Cir. 2006): The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

> When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator

and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an arguable emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.

Excited utterance not testimonial under the circumstances, even though made to law enforcement: ***Leavitt v. Arave,*** 371 F.3d 663 (9th Cir. 2004): In a murder case, the government

introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.
>
> **Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. The Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were geared more toward dealing with an emergency than toward investigating or prosecuting a crime.**

Grand Jury, Plea Allocutions, Etc.

Grand jury testimony and plea allocution statement are both testimonial: *United States v. Bruno,* 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.* The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford.* **See *also United States v. Snype,*** 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); ***United States v. Gotti,*** 459 F.3d 296 (2d Cir. 2006)

(redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); ***United States v. Al-Sadawi,*** 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

Grand jury testimony is testimonial: ***United States v. Wilmore,*** 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford.* It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Informal Circumstances, Private Statements, etc.

Informal letter found reliable under the residual exception is not testimonial: ***United States v. Morgan,*** 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels,*** 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive, it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Private conversation between mother and son is not testimonial: ***United States v. Brown,*** 441 F.3d 1330 (11th Cir. 2006): The defendant was convicted of murder of a federal employee. At trial, the court admitted testimony that the defendant's mother received a phone call, apparently from

the defendant; the mother asked whether the defendant had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford.* The court reasoned as follows:

> We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford.* (Citations omitted).

Interrogations, Etc.

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The Court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the Court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004). . . [w]e think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating

or prosecuting the offense.

Reporter's Note: In *Cromer,* discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the reasonable anticipation that it would be used against the defendant.

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Statements made by accomplice to police officers during a search are testimonial: *United States v. Arbolaez,* 450 F.3d 1283 (11th Cir. 2006): In a marijuana prosecution, the Court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the Court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The Court also found that the accomplice's statements were testimonial under *Crawford v. Washington*, because they were made

in response to questions from police officers.

Law Enforcement Involvement

Police officer's count of marijuana plants found in a search is testimonial: ***United States v. Taylor,*** 471 F.3d 832 (7th Cir. 2006): The court found plain error in the admission of testimony by a police officer as to the number of marijuana plants found in the search of the defendant's premises. The officer did not himself count all of the plants; part of his total count was based on a hearsay statement of another officer who assisted in the count. The court held that the officer's hearsay statement about the amount of plants counted was clearly testimonial.

Statements made by a child-victim to a forensic investigator are testimonial: ***United States v. Bordeaux,*** 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.
>
> **Note: The court's statement that multi-purpose statements might be testimonial is surely correct, but it must be narrowed in light of the Supreme Court's subsequent decision in *Davis*. There, the Court declared that it would find an excited utterance to be testimonial only if the *primary* purpose was to prepare a statement for law enforcement rather than to respond to an emergency.**

Compare United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005) (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

Statements made by a child-victim to a detective are testimonial: ***Bockting v. Bayer,*** 399 F.3d 1010 (9th Cir. 2005), *rev'd on other grounds,* 2007 U.S. Lexis 2826: The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford*. The court also held that *Crawford* was retroactive to cases on habeas review — a ruling that was reversed by the Supreme Court.

Medical Statements

United States v. Peneaux, 432 F.3d 882 (8th Cir. 2005): "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial."

Miscellaneous

Statement of an accomplice made to his attorney is not testimonial: ***Jensen v. Pliler,*** 439 F.3d 1086 (9th Cir. 2006): Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of testimonial, Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

Statement admitted against co-defendant only does not implicate ***Crawford: Mason v. Yarborough,*** 447 F.3d 693 (9th Cir. 2006): A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned, and *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference, and the jury is instructed that the evidence is not admissible against the defendant. For similar reasons, the court found no *Crawford* violation, because the codefendant was

not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

Not Offered for Truth

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford,* as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The Court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admissible not for truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause."). ***See also Furr v. Brady,*** 440 F.3d 34 (1st Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him). ***United States v. Hansen,*** 434 F.3d 92 (1st Cir. 2006) (admission of undercover informant's statements made in a conversation with the defendant did not violate the Confrontation Clause, because they were not offered for their truth but rather to provide context for the defendant's own statements).

Statements by informant to police officers, offered to prove the "context" of the police investigation, probably violate *Crawford,* but admission is not plain error: *United States v. Maher,* 454 F.3d 13 (1st Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because "the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial." The court then addressed the government's argument that the Constitution was not violated because the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

> The government's articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford's* constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon "information received," or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant's statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony "was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs."

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2d Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford.* The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford.* But in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds

of hearsay, but did not make a specific Confrontation Clause objection. This again shows the need to provide congruence between the hearsay rule and the Confrontation Clause. Otherwise there is a trap for the unwary, possibly resulting in an inadvertent waiver of the protections of the Confrontation Clause. Preventing such a trap was the rationale for proposing the amendment to Rule 804(b)(3).

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford,* as they were admitted to provide context: *United States v. Paulino,* 445 F.3d 211 (2d Cir. 2006): The Court stated: "It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant's Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary."

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford* because they were not offered for their truth: *United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006): In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire

testimonial presentation and thereby obstruct justice.

Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted for its truth: ***United States v. Trala,*** 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: ***United States v. Holmes,*** 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford.*

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: ***United States v. Price,*** 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert"identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury

was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted." ***See also United States v. Tolliver,*** 454 F.3d 660 (7th Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator's statements: "*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye's statements were admissible to put Dunklin's admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.").

Statements not offered for truth cannot be testimonial: ***United States v. Faulkner,*** 439 F.3d 1221 (10th Cir. 2006): The court stated that "it is clear from *Crawford* that the [Confrontation] Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement."

Present Sense Impression

Present sense impression, describing an event that occurred months before a crime, is not testimonial: ***United States v. Danford,*** 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Records, Certificates, Etc.

Warrant of deportation is not testimonial: ***United States v. Garcia,*** 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not

testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than "mechanically register an unambiguous factual matter." The court found no reason to disagree with the other circuits.

Autopsy reports are not testimonial: ***United States v. Feliz,*** 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court held that in order to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found inadmissible:

> Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Certificate prepared by government officials for purposes of litigation is NOT testimonial: ***United States v. Rueda-Rivera,*** 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Warrant of deportation not testimonial: ***United States v. Valdez-Matos***, 443 F.3d 910 (5th Cir. 2006): In an illegal reentry case, the court found that a warrant of deportation was not testimonial. The court relied on *Rueda-Rivera*, supra, and stated that "generally documents in a defendant's immigration file are analogous to non-testimonial business records." The court concluded that a warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter."

Business records are not testimonial: ***United States v. Jamieson,*** 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker,*** 458 F.3d 513 (6th Cir. 2006) ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: ***United States v. Ellis,*** 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

> Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, Ellis may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against Ellis in some kind of trial. . . .

> Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in Ellis's medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. *See, e.g., United States v. Cervantes-Flores,* 421 F.3d 825, 833 (9th Cir. 2005); *United States v. Rueda-Rivera,* 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford.*

The *Ellis* court found that the Supreme Court's analysis in *Davis* supported its view that a statement is not testimonial simply because it is prepared with the knowledge that it is likely to be used in a prosecution:

> In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. The Court considered the 911 operator's questioning of the woman to be an interrogation, and the operators themselves to be at least "agents of law enforcement." In the face of Davis's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. We believe this holding necessarily implies that consciousness on the part of the person reporting an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in Davis was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. . . . So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

As to the medical reports, the *Ellis* court concluded as follows:

> While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those

observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that they were not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

> As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.
>
> The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford.* But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Certificate of nonexistence of an immigration record is not testimonial: *United States v. Urqhart,* 469 F.3d 745 (8th Cir. 2006): The defendant was convicted of illegal reentry into the United States after deportation. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It stated that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford.*"

Certificate prepared by government officials is NOT testimonial: *United States v. Cervantes-Flores,* 421 F.3d 825 (9th Cir. 2005): The defendant was convicted of being found in the United States after deportation, without permission to re-enter. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It explained that while the *certificate* was prepared for litigation, the underlying records were not. (Though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence could still be so because the certificate is prepared for purposes of litigation). The court concluded as follows:

> Finally, we note the obvious—that the CNR does not resemble the examples of testimonial evidence given by the Court [in *Crawford*]. "Police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" all involve live out-of-court statements against a defendant elicited by a government officer with a clear eye to prosecution. Ruth Jones' certification that a particular record does not exist in the INS's files bears no resemblance to these types of evidence.

See also United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation was non-testimonial "because it was not made in anticipation of litigation, and because

it is simply a routine, objective, cataloging of an unambiguous factual matter."); ***United States v. Weiland,*** 420 F.3d 1062 (9th Cir. 2006) (certification of a record of conviction by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloguing of an unambiguous factual matter,' but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.") (quoting *Bahena-Cardenas*).

Note: The result and rationale of *Cervantes-Flores* (and similar results in other circuits) indicate that hearsay statements offered under Rule 803(10), as well as affidavits authenticating business records under Rules 902(11) and (12), will be considered non-testimonial and therefore admissible even after *Crawford.*

Foreign business records are not testimonial: *United States v. Hagege,* 437 F.3d 943 (9th Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford.* The court rejected this argument and affirmed the convictions. It relied on the statement in *Crawford* that business records are an example of the kind of statements "which by their nature are not testimonial." The court noted that "[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford.*"

Warrant of deportation prepared by government officials is NOT testimonial: *United States v. Cantellano,* 430 F.3d 1142 (11th Cir. 2005): In an illegal reentry case, the defendant argued that the warrant of deportation was testimonial under *Crawford* and therefore his right to confrontation was violated by its admission. The warrant was offered to prove that the defendant left the country. The Court held that the warrant was not testimonial. It reasoned as follows:

> Although the Court in *Crawford* declined to give a comprehensive definition of "testimonial" evidence, non-testimonial evidence fails to raise the same concerns as testimonial evidence. Because non-testimonial evidence is not prepared in the shadow of criminal proceedings, it lacks the accusatory character of testimony. Non-testimonial evidence is not inherently adversarial. We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.

The court also relied on the fact that the Fifth and the Ninth Circuits have held that certificates of no grant of entry (CNR's) are non-testimonial.

Testifying Declarant

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Statements to police officers implicating the defendant in the conspiracy are testimonial, but no confrontation violation because the declarant testified: *United States v. Allen,* 425 F.3d 1231 (9th Cir. 2005): The court held that a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Supreme Court

Strong indication (albeit dicta) that the *Roberts* test no longer governs non-testimonial hearsay: *Davis v. Washington and Hammon v. Indiana,* 126 S.Ct. 2266 (2006). In *Davis/Hammon*, the Court considered, in passing, "whether the Confrontation Clause applies only to testimonial hearsay." The Court stated that the answer to this question "was suggested in *Crawford,* even if not explicitly held." The Court then quoted a passage from *Crawford* indicating that the use of the term "witness" in the Sixth Amendment was intended to refer only to those who give "testimony" The Court then concluded that a "limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its core, but its perimeter." Thus, the strong implication from *Davis/Hammon* is that if hearsay is not testimonial, then the Confrontation Clause provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions — and perhaps by the Due Process Clause — but not by the Confrontation Clause.

But the language in *Davis/Hammon* does not rise to a holding, because there was no question in the case about application of the Confrontation Clause to any non-testimonial hearsay.

Clear statement and holding that *Crawford* overruled *Roberts* even with respect to non-testimonial hearsay: *Whorton v. Bockting,* 2007 U.S. Lexis 2826: The habeas petitioner argued that testimonial hearsay was admitted against him in violation of *Crawford.* His trial was conducted ten years before *Crawford*, however, and so the question was whether *Crawford* applies retroactively to benefit habeas petitioners. Under Supreme Court jurisprudence, a new rule is applicable on habeas only if it is a "watershed" rule that is critical to the truthseeking function of a trial. The Court found that *Crawford* was a new rule because it overruled *Roberts.* It further held that *Crawford* was not essential to the truthseeking function; its analysis on this point is pertinent to whether *Roberts* retains any vitality with respect to non-testimonial hearsay. The Court declared as follows:

> *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of fact-finding in criminal cases is not easy to assess.
>
> With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases.

> Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. But see 418 F.3d at 1058 (O'Scannlain, J., dissenting from denial of rehearing en banc) (observing that it is unlikely that this occurred "in anything but the exceptional case"). **But whatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford's* elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.**

Unlike the same type of statement in *Davis,* which was dicta, it appears that this analysis constitutes part of the holding of the case. One of the main reasons that *Crawford* in not retroactive (the holding) is that it is not essential to the accuracy of a verdict. And one of the reasons *Crawford* is not essential to accuracy is that, with respect to non-testimonial statements, *Crawford* conflicts with accurate factfinding because it lifts all constitutional reliability requirements imposed by *Roberts.*

Post-Davis/Hammon Cases on the Roberts Question

Non-testimonial hearsay is no longer covered by the Confrontation Clause: *United States v. Feliz,* 467 F.3d 227 (2d Cir. 2006): The court declared that if hearsay is non-testimonial, "the Confrontation Clause poses no bar to the statement's admission." The court considered that the admissibility of non-testimonial hearsay might be regulated for reliability under the due process clause, but found it unnecessary to resolve the question in this case, where proffered autopsy reports were clearly reliable.

Roberts* test still applies to non-testimonial hearsay: *United States v. Thomas, 453 F.3d 838 (7th Cir. 2006): The court held that a 911 call was non-testimonial under *Crawford* and also admissible under the Evidence Rules as an excited utterance. It then applied the *Roberts* test and found that test satisfied because the hearsay exception for excited utterances is firmly-rooted. On the continued viability of the *Roberts* test as applied to non-testimonial hearsay after *Davis/Hammon*, the court had this to say:

> While at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause. Where the Court addresses nontestimonial statements such language is conspicuously absent.

Note: This case was decided before the Supreme Court's decision in *Whorton v. Bockting*,

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Dictum that *Roberts* no longer regulates nontestimonial hearsay after *Davis/Hammon*: *United States v. Tolliver,* 454 F.3d 660 (7th Cir. 2006): This case involved statements admitted for a non-hearsay purpose. The court therefore found *Crawford* inapplicable. The court dropped a footnote which stated as follows:

> *Crawford's* focus was testimonial hearsay. As for treatment of nontestimonial hearsay under the Confrontation Clause, *Crawford* left the issue unresolved, stating: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." However, the Supreme Court's recent decision on the matter, *Davis v. Washington*, appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause. 126 S. Ct. at 2273, 2274-76, 2277-78.