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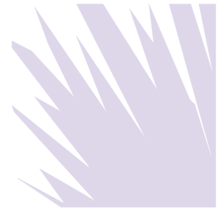

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THE PRACTICAL IMPLICATIONS OF PROPOSED RULE 502

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The attorney-client privilege and work product doctrine are designed to protect the "full and frank" communications between attorneys and their clients necessary to give sound and reasoned legal advice.[1] One of the more difficult issues facing counsel today is preventing inadvertent disclosure of documents that are possibly protected by the attorney-client privilege or work product doctrine. Given the volume, nature and variety of electronically stored information ("ESI") in large organizations today, litigation now often involves the review and production of thousands of documents, or more, and is often a time-consuming, burdensome and expensive process.[2] Counsel and their clients are often tasked with preventing the disclosure of privileged documents and a waiver of privilege in situations where, due to the large volume of ESI being produced, there is a substantial possibility of inadvertent production of privileged information. This article explores issues surrounding Proposed Rule 502 and the potential impact the enactment of the Rule will have in situations where privileged information is inadvertently disclosed.

I. INADVERTENT DISCLOSURE

Because of the volume of documents involved, even the most diligent of privilege reviews of ESI could lead to the inadvertent disclosure of privileged documents. Although some courts will find a waiver only if the disclosure was intentional,[3] other courts are not sympathetic and will rule that a party that has mistakenly produced a privileged document has waived the privilege, despite efforts to prevent the disclosure of protected documents.[4] In *In re Sealed Case*, a company mistakenly disclosed a privileged document to the Internal Revenue Service. Counsel for the company argued that the attorney-client privilege had not been waived because the disclosure was involuntary and a result of a "bureaucratic error."[5] The Circuit court held that the attorney-client privilege had been waived and refused to "distinguish between the various degrees of 'voluntariness'" in waivers of attorney-client privilege.[6]

The majority of courts will find a waiver only if the disclosing party acted carelessly in disclosing the protected materials and failed to request its return in a timely manner. A multi-factor test has been developed to determine whether the inadvertent disclosure constitutes waiver of privilege protections.[7] For example, in *Buntin v. Becker*, the court considered the following factors:

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1 *Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981) (explaining the importance of the attorney-client privilege); *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (explaining the need to protect attorney work product). *See* Melissa A. Nunez, Note, *The Attorney, the Client, and…the Government?: A New Dimension to the Attorney-Client Privilege and Work Product Protection in the Post-Enron Era*, 82 Notre Dame L. Rev. 1311 (2007) for a discussion on the attorney-client and work product protections.

2 *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (stating that electronic discovery may encompass millions of documents); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (stating that the cost of pre-production review for privileged and work product material could cost one defendant $120,000 and another $247,000, and that such review could take months).

3 *See, e.g., O'Mary v. Mitsubishi Electronics America, Inc.*, 59 Cal.App.4th 563, 69 Cal.Rptr.2d 389 (Cal. Ct. App. 1997); *People v. Murry*, 305 Ill. App.3d 311, 711 N.E.2d 1230 (Ill. App. Ct. 1999); *Premiere Digital v. Central Telephone*, 306 F. Supp.2d 1168 (D. Nev. 2005); *Trilogy Communications, Inc. v. Excom Realty, Inc.*, 279 N.J. Super. 442, 652 A.2d 1273 (N.J. Sup. Ct. Law. Div. 1994). *See also Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (discussing the three different approaches to analyzing inadvertent disclosure and privilege waiver cases); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For a Federal Rule of Evidence 502,* 58 SCLR 211(2006); Richard J. Heafey, *Return to Sender? Inadvertent Disclosure of Privileged Information*, 28 Am. J. Trial Advoc. 615 (2005).

4 *See, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

5 *Id.*

6 *Id.*

7 *See, e.g., Zapata v. IBP, Inc.*, 175 (F.R.D. 574, 576-577 (D. Kan. 1997); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993); *State Compensation Insurance Fund v. Telanoff*, 70 Cal.App.4th, 82 Cal. Rptr.2d 799 (Cal. Ct. App. 1999); *Dalen v. Ozite Corp.*, 230 Ill. App.3d 18, 594 N.E.2d 1365 (Ill. App. Ct. 1992); *Baliva v. State Farm Mutual*, 275 A.D.2d 1030, 713 N.Y.2d 376 (4th Dep't. 2000).

(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.[8]

Parties sometimes address the risk of inadvertent disclosure of privileged materials and the burden of reviewing large volumes of documents early in the discovery process by entering into "clawback" or "quickpeek" agreements. The recently amended Federal Rules of Civil Procedure provide that if parties can enter into an agreement akin to a clawback or quickpeek agreement, the court may enter a case-management order adopting the agreement.[9] Pursuant to clawback agreements, the production of privileged data is presumed inadvertent and will not constitute a waiver; the party who receives the privileged data must return the privileged material when demanded until the privilege issue is resolved. Under a quickpeek agreement, the requesting party is allowed to review potentially responsive data and selects that data it wishes produced (the production of privileged data is presumed inadvertent and will not constitute a waiver). The producing party reviews for privilege only the selected document set and produces the non-privileged data from that set.

When effective, these agreements can limit the burdens and costs of privilege review in cases involving voluminous documents. However, while these agreements may be incorporated into court orders, the agreements and orders may not provide protection against arguments made by subsequent litigants not party to the original agreements that the privilege protections were waived when the materials were previously disclosed. In the absence of litigation or authority giving these agreements preclusive affect in subsequent litigation, these agreements will not ordinarily bind persons or entities not party to them. Further, while clawback and quickpeek agreements may be effective in the jurisdiction where the litigation is occurring, it may not protect that information in another jurisdiction or forum.

II. SCOPE OF WAIVER

The inadvertent disclosure of protected material may result, under some circumstances, in the waiver of privilege with regard to all communications regarding the same subject matter. Some courts hold that when there has been a waiver of privilege as a result of an inadvertent disclosure, there is no subject matter waiver.[10] However, other courts have found that an inadvertent disclosure results in a subject matter privilege waiver.[11] In *In re Sealed Case*, for example, the court adopted a strict approach and found that an inadvertent disclosure resulted in not only the waiver of privilege as to the materials in question, but also as to the entire subject matter.[12] The court stated that a client must treat "the confidentiality of attorney-client communications like jewels – if not crown jewels."[13] The court reasoned that the care that the company used in protecting its privileged communications reflected the importance of the confidentiality to the holder. The court further reasoned that its ruling that inadvertent disclosures resulted in waiver of privilege would encourage greater care in how corporations review materials for privilege and restraint in how freely corporations label documents privileged.[14]

Other courts have adopted a fairness approach to determining whether a disclosure results in subject matter waiver, which analyzes whether the waiver of privilege would be fair to the opposing party.[15] These courts recognize that withholding privileged materials limits the availability of information relevant to the litigation and useful to an opposing party. This recognition sometimes leads to a finding that subject matter privilege has been waived, especially when a party acts unfairly toward another party, or strategically or selectively discloses privileged communications.[16] In *Alpex*

8 727 N.E.2d 734 (Ind. Ct. App. 2000).
9 Fed. R. Civ. P. 26(f). The Advisory Committee's note following the amendment to Rule 26(f) provides that parties "may attempt to minimize [the] costs and delays [associated with privilege review] by agreeing to protocols that minimize the risk of waiver."
10 *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204 (N.D. Ind. 1990); *International Digital Systems Corp., v. Digital Equipment Corp.*, 120 F.R.D. 445 (D. Mass 1988) (finding that there had been no subject matter waiver and that the inadvertent disclosure operates as "a waiver of the attorney-client privilege as to any documents disclosed by 'inadvertence'").
11 *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).
12 *Id.*
13 *Id.* at 980.
14 *Id.*
15 *See, e.g., In re Grand Jury Subpoena*, 341 F.3d 331, 336 -37 (4th Cir. 2003). *See also*, Broun, *supra* note 3, at 225; Jennifer A. Hardgrove, Note, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. Ill. L. Rev. 643 (1998).
16 *See* Broun, *supra* note 3, at 225-227 (citing *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46 (M.D.N.C. 1987).

Computer v. Nintendo Co., Ltd., the court allowed discovery of privileged documents after a party presented testimony related to those documents.[17] The court stated the aim of the subject matter waiver doctrine was to "prevent prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information," and that subject matter waiver is found "only in the event that the initial disclosure is made during the course of litigation and results in prejudice to the opposing party."[18]

III. SELECTIVE WAIVER

In addition to the problems surrounding inadvertent disclosure of protected information, government entities, such as the U.S. Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"), are increasingly requesting that corporations turn over privileged documents to show cooperation with government investigations, waiving any privilege that may exist as to those documents.[19] Courts are not in agreement regarding whether that disclosure to a government agency or regulatory entity constitutes a general waiver of the privilege as to the information disclosed or a "selective waiver."[20] Most courts will not find that a selective waiver has occurred, but will hold that the waiver of privileged or protected information to a government office or agency is a waiver for all purposes and all parties.[21] Some courts will find that a selective waiver occurred if the disclosure was made pursuant to an agreement of confidentiality with the government agency or regulatory entity.[22] A few courts have held that there is not a general waiver of privilege protection even if the disclosures to the government agency or regulatory entity were made in the absence of a confidentiality agreement.[23]

IV. PURPOSE OF PROPOSED RULE 502

On January 23, 2006, the Chair of the U.S. House of Representatives Committee on the Judiciary, Honorable F. James Sensenbrenner, Jr., wrote to the Director of the Administrative Office of the U.S. Courts, requesting that the Judicial Conference begin a "rule-making on forfeiture of privileges." Congressman Sensenbrenner explained that he was "informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process." He went on to urge the Judicial Conference to adopt a rule that would "protect against the forfeiture of privilege where a disclosure 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 the government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.[24]

In March of 2006 the Advisory Committee on Evidence Rules of Practice and Procedure (the "Advisory Committee") drafted proposed Rule 502 which was the subject of hearings at Fordham University on April 24 and 25, 2006. A revised version of Proposed Rule 502 was approved at the Advisory Committee's June 22-23, 2006 meeting and published for public comment. In proposing Rule 502, the Advisory Committee recognized that there was a need for clear and uniform federal rules regarding subject matter waiver, inadvertent disclosures and the authority of the courts and parties to enter orders or agreements on privilege waiver.[25] Thus, Proposed Rule 502 attempts to address the issues that arise during litigation and a government investigation regarding attorney-client

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17 1994 WL 330381 (S.D.N.Y. 1994).
18 *Id.* at 3.
19 Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Dec. 12, 2006) *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf; Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.
20 Braun, *supra* note 3, at 229-247 (discussing different approaches to analyzing selective waiver).
21 *See, e.g., Westinghouse Electronic Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *McKesson HBOC, Inc. v. Superior Court of San Francisco*, 9 Cal.Reptr.3d 812 (Cal.Ct.App. 2004). *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) (stating that most states have rejected selective waiver).
22 *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F.Supp. 638 (S.D.N.Y. 1981).
23 *See, e.g., Diversified Industries, Inc. v. Meredith*, 527 F.2d 596 (8th Cir. 1977).
24 Letter from Hon. F. James Sensenbrenner, Jr., Chair of the U.S. Cong. Comm. on the Judiciary to Leonidas Ralph Mecham, Dir. of the Admin. Office of the U.S. Courts 1 (Jan. 23, 2006 (on file with authors).
25 Committee Note (1) – "It resolves 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 disputes involving inadvertent and selective waiver." (2) – It responds to the widespread complaint that litigation costs for review and protection of material that is privilege or work product have become prohibitive due to the concern that 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."

privilege and work production protection and provide a standard and uniform set of rules governing privilege waiver. Hearings on Proposed Rule 502 were held in January 2007 and the public comment deadline was February 15, 2007.

V. PROPOSED RULE 502 AS IT WAS PRESENTED FOR PUBLIC COMMENT

The text of Proposed Rule 502 that was submitted for public comment provided as follows:

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

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

(b) Inadvertent disclosure. – A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings – and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

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

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

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

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

(1) “attorney-client privilege” means the protection provided for confidential attorney-client communications, under applicable law; and

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

VI. PRACTICAL IMPLICATIONS OF PROPOSED RULE 502 AS IT WAS PRESENTED FOR PUBLIC COMMENT

While it is undeniable that the burdens placed on litigators and corporate clients to protect against disclosure of attorney-client privileged and work product information has increased as a result

of the growing volume of ESI, and it seems clear that Proposed Rule 502 as it was presented for public comment would reduce that burden to some extent, counsel for large organizations should be aware of the following issues related to the impact of Proposed Rule 502 as it was presented for public comment. Below, in the section of this paper entitled "Changes to Proposed Rule 502 Based on Public Comments," we discuss how the Advisory Committee addressed certain of these issues.

1. Proposed Rule 502 as it was presented for public comment likely would have had no impact on state court actions where disclosure is initially made at the federal level. As illustrated above, state courts are split on how they analyze inadvertent disclosures, quick peek and clawback agreements, selective waiver and subject matter waiver. Because defendants cannot control the forum in which they are sued, in order to guard against possible privilege waiver in state court, litigants and corporate clients may not be able to effectively reduce the efforts expended on the review for privileged materials even if the initial disclosure takes place in federal court. Further, because the same set of documents are often reviewed for both federal and state proceedings simultaneously, the availability of the relief provided by Proposed Rule 502 as it was presented for public comment may not have reduced the burdens associated with reviewing for privilege, because state law considerations will drive the privilege review.

2. Proposed Rule 502(b) as it was presented for public comment attempted to reconcile the different approaches to analyzing inadvertent disclosures, but did not offer much guidance as to what constitutes "reasonable precautions" to prevent disclosures or "reasonably prompt measures" to rectify disclosures. The Committee Notes for Subdivision (b) referred to the split amongst the courts in dealing with inadvertent disclosures, and indicated that the rule opts for the middle-ground approach. The Committee Notes stated, "inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes 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." Proposed Rule 502 as it was presented for public comment seemingly adopted the majority approach for analyzing whether an inadvertent disclosure results in a waiver of privilege protections. The rule effectively put litigants on notice that they must take substantial steps to prevent disclosures of privileged documents, but that they should have some protection if the disclosure was not intentional or the result of negligence.

3. Proposed Rule 502(a) as it was presented for public comment limited the application of subject matter waiver to instances where the "undisclosed communication or information ought in fairness ...be considered with the disclosed communication or information." This language could have created contentious issues on when subject matter waiver has occurred. As it stands now, the courts are split on how to analyze subject matter waiver. Some courts lean toward finding subject matter waiver when there has been inadvertent disclosure and others hold that, only if the disclosure was intentional and fairness requires, will there be a subject matter waiver. The rule, as it was written, provided little guidance on distinguishing between an innocent disclosure and one that is done intentionally in order to gain a strategic advantage over the opposing party.

VII. CHANGES TO PROPOSED RULE 502 BASED ON PUBLIC COMMENTS

The Advisory Committee met on April 12 and 13, 2007 to discuss proposed Rule 502 as it was submitted for public comment and consider all of the comments received. On May 15, 2007, the Advisory Committee issued a Report to the Standing Committee regarding the April 2007 meetings ("the Report"). The Advisory Committee made a number of modifications to the proposed Rule in its Report.

In the Report, the Advisory Committee summarized the changes to Proposed Rule 502 as it was presented for public comment, as follows:

1. Changes were made by the Style Subcommittee of the Standing Committee, both to the text as issued for public comment, and to the changes to the rule made at the April 2007 Evidence Rules Committee Hearing.

2. The text was clarified to indicate that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision.

3. The text was clarified to stress that Rule 502 applies in state court with respect to the consequences of disclosure previously made at the federal level – despite any indication to the contrary that might be found in the language of Rules 101 and 1101.

4. Language was added to emphasize that a subject matter waiver cannot be found unless the waiver is intentional – so that an inadvertent disclosure can never constitute a subject matter waiver.

5. The Committee relaxed the requirements necessary to obtain protection against waiver from inadvertent disclosure. As amended, the inadvertent disclosure provision assures that parties are not required to take extraordinary efforts to prevent disclosure of privilege and work product; nor are parties required to conduct a post-production review to determine whether any protected information has been mistakenly disclosed.

6. The protections against waiver by mistaken disclosure were extended to disclosures made to federal offices or agencies, on the ground that production in this context can involve the same costs of pre-production privilege review as in litigation.

7. The selective waiver provision – on which the Evidence Rules Committee had never voted affirmatively – was dropped from the Proposed Rule 502. The Evidence Rules Committee approved a separate report to Congress on selective waiver, setting forth the arguments both in favor and against the doctrine, and explaining the Committee's decision to take no position on the merits of selective waiver. The Evidence Rules Committee also prepared language for a statute on selective waiver to accompany that separate report to Congress; while the Committee took no position on the merits, it determined that the language could be useful to Congress should it decide to proceed with a separate selective waiver provision.

8. The Committee deleted the language conditioning enforceability of federal court confidentiality orders on agreement of the parties. It concluded that a federal order finding that disclosure is not a waiver should be enforceable in any subsequent proceeding, regardless of party agreement.

9. The definition of work product was expanded to include intangible information, as the work product protection under federal common law extends to all materials prepared in anticipation of litigation, including intangibles.

The text of the post-public comment Proposed Rule 502 is as follows:

VIII. RULE 502. ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) Disclosure made in federal proceeding or to a federal office or agency; scope of waiver. – When the disclosure is made in a federal proceeding or to a federal 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:
(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. -- When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

(c) Disclosure made in a state proceeding. – When the disclosure is made in a state proceeding and is not the subject of a state-court order, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:
(1) would not be a waiver under this rule if it had been made in a federal proceeding; or
(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling effect of court order. – A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court. The order binds all persons and 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) Controlling effect of this rule. – Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) 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 material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

In the Report, the Advisory Committee recognized that several changes needed to be made to the proposed Rule in order for it to have the impact that was intended when Rule 502 was initially proposed. The Advisory Committee recognized that the lack of enforcement in the state courts could potentially create a problem for corporations attempting to manage discovery efforts during a federal court action, and agreed that Rule 502 "must apply in state court actions where the question considered by the state court is whether a disclosure previously made in federal court constitutes a waiver."[26] The Committee also made changes to the language used to define the requirements necessary to obtain protection against waiver from inadvertent disclosure so that it would be clear that parties will not be required to do anything extraordinary in order to seek protection against waiver. Under the modified rule, a party will be able to seek protection if it acted reasonably to prevent disclosure and took reasonably prompt measures to rectify the error, including following Fed. R. Civ. P. 26(b)(5)(B). This modification provides more guidance than the rule as it was presented for public comment on what a party will be required to show in order to seek protection against waiver.

One of the more notable post-public comment changes made to the proposed rule was the emphasis that subject matter waiver cannot be found unless the waiver was intentional. Inadvertent disclosure can never constitute a subject matter waiver under the rule as presently formulated. Another modification that will have a significant impact is the provision that states that a federal court order finding that privilege has not been waived will bind all persons and entities in all state and federal proceedings. Corporations will have a heightened ability to rely, even in state court, on agreements, such as "clawback agreements," which become a part of court orders, and the management of large-scale discovery should be less burdensome as a result.

Of particular note is the removal of the selective waiver provision from the pre-public comment Proposed Rule 502. The Advisory Committee received several comments expressing concern that the selective waiver provision would add to the "culture of waiver" that has been created

26 *Id.*

by government agencies' and regulatory entities' belief that it is appropriate to expect investigated corporations to disclose protected information and waive privilege protections to provide cooperation with the government's investigation.[27] Privilege protections allow an attorney to engage in the discussions necessary to uncover wrongdoing in a corporation, advise a client when it has been accused of wrongdoing and establish policies that prevent misbehavior. The fear was that this culture of waiver will cause individuals within the corporate environment to limit their communications with counsel because of the fear that those communications will subsequently be disclosed to the government in an effort to appear cooperative. The Advisory Committee listened to the comments for and against the selective waiver provision and decided to remove the provision from Proposed Rule 502.

IX. CONCLUSION

As noted earlier, a principal purpose behind the protections for attorney-client privilege and work product is to encourage full and frank communication between an attorney and his or her client. The growth in the volume, nature and complexity of ESI in recent years has increased the danger of privilege waivers resulting from innocent mistakes in the review and production of documents. Full and frank communication between an attorney and his or her client will be limited if there is no protection from waiver in these circumstances. By limiting the circumstances in which the inadvertent disclosure of privileged information can result in a waiver, and the scope of the waiver that could potentially be found, Proposed Rule 502 goes a long way toward mitigating this risk, and may be a welcome development for attorneys and their clients.

27 The Decline of the Attorney Client Privilege in the Corporate Context: Survey Results (2006) at 3, *available at* http://www.acca.com/Surveys/attyclient2.pdf.