

PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE*

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

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

4 **(a) Disclosure made in a federal proceeding or to a**
5 **federal office or agency; scope of a waiver. — When the**
6 disclosure is made in a federal proceeding or to a federal
7 office or agency and waives the attorney-client privilege or
8 work-product protection, the waiver extends to an undisclosed
9 communication or information in a federal or state
10 proceeding only if:

11 **(1) the waiver is intentional;**

*New material is underlined.

2 FEDERAL RULES OF EVIDENCE

12 (2) the disclosed and undisclosed
13 communications or information concern the same
14 subject matter; and

15 (3) they ought in fairness to be considered
16 together.

17 (b) **Inadvertent disclosure.** — When made in a
18 federal proceeding or to a federal office or agency, the
19 disclosure does not operate as a waiver in a federal or state
20 proceeding if:

21 (1) the disclosure is inadvertent;

22 (2) the holder of the privilege or protection took
23 reasonable steps to prevent disclosure; and

24 (3) the holder promptly took reasonable steps to
25 rectify the error, including (if applicable)
26 following Fed. R. Civ. P. 26(b)(5)(B).

27 (c) **Disclosure made in a state proceeding.** — When
28 the disclosure is made in a state proceeding and is not the

29 subject of a state-court order, the disclosure does not operate
30 as a waiver in a federal proceeding if the disclosure:

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

33 (2) is not a waiver under the law of the state
34 where the disclosure occurred.

35 **(d) Controlling effect of court order.** — A federal
36 court may order that the privilege or protection is not waived
37 by disclosure connected with the litigation pending before the
38 court. The order binds all persons and entities in all federal
39 or state proceedings, whether or not they were parties to the
40 litigation.

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

45 (f) Controlling effect of this rule.—Notwithstanding
46 Rules 101 and 1101, this rule applies to state proceedings in
47 the circumstances set out in the rule. And notwithstanding
48 Rule 501, this rule applies even if state law provides the rule
49 of decision.

50 (g) Definitions. — In this rule:

51 1) “attorney-client privilege” means the
52 protection that applicable law provides for confidential
53 attorney-client communications; and

54 2) “work-product protection” means the
55 protection that applicable law provides for tangible
56 material (or its intangible equivalent) prepared in
57 anticipation of litigation or for trial.

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Committee Note

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This new rule has two major purposes:

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

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2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (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 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

87 production that bear no proportionality to what is at stake in the
88 litigation”)

89 The rule seeks to provide a predictable, uniform set of
90 standards under which parties can determine the consequences of a
91 disclosure of a communication or information covered by the
92 attorney-client privilege or work product protection. Parties to
93 litigation need to know, for example, that if they exchange privileged
94 information pursuant to a confidentiality order, the court’s order will
95 be enforceable. Moreover, if a federal court’s confidentiality order is
96 not enforceable in a state court then the burdensome costs of privilege
97 review and retention are unlikely to be reduced.

98 The Committee is well aware that a privilege rule proposed
99 through the rulemaking process cannot bind state courts, and indeed
100 that a rule of privilege cannot take effect through the ordinary
101 rulemaking process. See 28 U.S.C § 2074(b). It is therefore
102 anticipated that Congress must enact this rule directly, through its
103 authority under the Commerce Clause. Cf. Class Action Fairness Act
104 of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power
105 to regulate state class actions).

106 The rule makes no attempt to alter federal or state law on
107 whether a communication or information is protected under the
108 attorney-client privilege or work product immunity as an initial
109 matter. Moreover, while establishing some exceptions to waiver, the
110 rule does not purport to supplant applicable waiver doctrine generally.

111 The rule governs only certain waivers by disclosure. Other
112 common-law waiver doctrines may result in a finding of waiver even
113 where there is no disclosure of privileged information or work
114 product. *See, e.g., Nguyen v Excel Corp.*, 197 F.3d 200 (5th Cir.
115 1999) (reliance on an advice of counsel defense waives the privilege

116 with respect to attorney-client communications pertinent to that
117 defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983)
118 (allegation of lawyer malpractice constituted a waiver of confidential
119 communications under the circumstances). The rule is not intended
120 to displace or modify federal common law concerning waiver of
121 privilege or work product where no disclosure has been made.

122 **Subdivision (a).** The rule provides that a voluntary disclosure
123 in a federal proceeding or to a federal office or agency, if a waiver,
124 generally results in a waiver only of the communication or
125 information disclosed; a subject matter waiver (of either privilege or
126 work product) is reserved for those unusual situations in which
127 fairness requires a further disclosure of related, protected information,
128 in order to prevent a selective and misleading presentation of
129 evidence to the disadvantage of the adversary. *See, e.g., In re von*
130 *Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged
131 information in a book did not result in unfairness to the adversary in
132 a litigation, therefore a subject matter waiver was not warranted); *In*
133 *re United Mine Workers of America Employee Benefit Plans Litig.*,
134 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited
135 to materials actually disclosed, because the party did not deliberately
136 disclose documents in an attempt to gain a tactical advantage). Thus,
137 subject matter waiver is limited to situations in which a party
138 intentionally puts protected information into the litigation in a
139 selective, misleading and unfair manner. It follows that an inadvertent
140 disclosure of protected information can never result in a subject
141 matter waiver. See Rule 502(b). The rule rejects the result in *In re*
142 *Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that
143 inadvertent disclosure of documents during discovery automatically
144 constituted a subject matter waiver.

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146 The language concerning subject matter waiver — “ought in
147 fairness” — is taken from Rule 106, because the animating principle

148 is the same. A party that makes a selective, misleading presentation
149 that is unfair to the adversary opens itself to a more complete and
150 accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699
151 (5th Cir. 1996) (under Rule 106, completing evidence was not
152 admissible where the party's presentation, while selective, was not
153 misleading or unfair)

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

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

170 The rule opts for the middle ground: inadvertent disclosure
171 of protected communications or information in connection with a
172 federal proceeding or to a federal office or agency does not constitute
173 a waiver if the holder took reasonable steps to prevent disclosure and
174 also promptly took reasonable steps to rectify the error. This position
175 is in accord with the majority view on whether inadvertent disclosure
176 is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D.
177 Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145

178 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege);
179 *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994)
180 (attorney-client privilege). The rule establishes a compromise
181 between two competing premises. On the one hand, a communication
182 or information covered by the attorney-client privilege or work
183 product protection should not be treated lightly. On the other hand,
184 a rule imposing strict liability for an inadvertent disclosure threatens
185 to impose prohibitive costs for privilege review and retention,
186 especially in cases involving electronic discovery.

187 The rule applies to inadvertent disclosures made to a federal
188 office or agency, including but not limited to an office or agency that
189 is acting in the course of its regulatory, investigative or enforcement
190 authority. The consequences of waiver, and the concomitant costs of
191 pre-production privilege review, can be as great with respect to
192 disclosures to offices and agencies as they are in litigation.

193 Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &*
194 *Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins*
195 *Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-
196 factor test for determining whether inadvertent disclosure is a waiver.
197 The stated factors (none of which are dispositive) are the
198 reasonableness of precautions taken, the time taken to rectify the
199 error, the scope of discovery, the extent of disclosure and the
200 overriding issue of fairness. The rule does not explicitly codify that
201 test, because it is really a set of non-determinative guidelines that vary
202 from case to case. The rule is flexible enough to accommodate any
203 of those listed factors. Other considerations bearing on the
204 reasonableness of a producing party's efforts include the number of
205 documents to be reviewed and the time constraints for production.
206 Depending on the circumstances, a party that uses advanced analytical
207 software applications and linguistic tools in screening for privilege
208 and work product may be found to have taken "reasonable steps" to

209 prevent inadvertent disclosure. The implementation of an efficient
210 system of records management before litigation may also be relevant.

211 The rule does not require the producing party to engage in a
212 post-production review to determine whether any protected
213 communication or information has been produced by mistake. But the
214 rule does require the producing party to follow up on any obvious
215 indications that a protected communication or information has been
216 produced inadvertently.

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

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

230 **Subdivision (c).** Difficult questions can arise when 1) a
231 disclosure of a communication or information protected by the
232 attorney-client privilege or as work product is made in a state
233 proceeding, 2) the communication or information is offered in a
234 subsequent federal proceeding on the ground that the disclosure
235 waived the privilege or protection, and 3) the state and federal laws
236 are in conflict on the question of waiver. The Committee determined
237 that the proper solution for the federal court is to apply the law that
238 is most protective of privilege and work product. If the state law is

239 more protective (such as where the state law is that an inadvertent
240 disclosure can never be a waiver), the holder of the privilege or
241 protection may well have relied on that law when making the
242 disclosure in the state proceeding. Moreover, applying a more
243 restrictive federal law of waiver could impair the state objective of
244 preserving the privilege or work-product protection for disclosures
245 made in state proceedings. On the other hand, if the federal law is
246 more protective, applying the state law of waiver to determine
247 admissibility in federal court is likely to undermine the federal
248 objective of limiting the costs of production.

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

263 **Subdivision (d).** Confidentiality orders are becoming
264 increasingly important in limiting the costs of privilege review and
265 retention, especially in cases involving electronic discovery. *See*
266 *Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial
267 Center 2004) (noting that fear of the consequences of waiver “may
268 add cost and delay to the discovery process for all sides” and that
269 courts have responded by encouraging counsel “to stipulate at the

270 outset of discovery to a ‘nonwaiver’ agreement, which they can adopt
271 as a case-management order.”). But the utility of a confidentiality
272 order in reducing discovery costs is substantially diminished if it
273 provides no protection outside the particular litigation in which the
274 order is entered. Parties are unlikely to be able to reduce the costs of
275 pre-production review for privilege and work product if the
276 consequence of disclosure is that the communications or information
277 could be used by non-parties to the litigation.

278 There is some dispute on whether a confidentiality order
279 entered in one case can bind non-parties from asserting waiver by
280 disclosure in a separate litigation. *See generally Hopson v. City of*
281 *Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this
282 case law. The rule provides that when a confidentiality order
283 governing the consequences of disclosure in that case is entered in a
284 federal proceeding, its terms are enforceable against non-parties in
285 any federal or state proceeding. For example, the court order may
286 provide for return of documents without waiver irrespective of the
287 care taken by the disclosing party; the rule contemplates enforcement
288 of “claw-back” and “quick peek” arrangements as a way to avoid the
289 excessive costs of pre-production review for privilege and work
290 product. As such, the rule provides a party with a predictable
291 protection — predictability that is needed to allow the party to plan
292 in advance to limit the prohibitive costs of privilege and work product
293 review and retention.

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

298 **Subdivision (e).** Subdivision (e) codifies the well-established
299 proposition that parties can enter an agreement to limit the effect of

300 waiver by disclosure between or among them. *See, e.g., Dowd v.*
301 *Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the
302 parties stipulated in advance that certain testimony at a deposition
303 “would not be deemed to constitute a waiver of the attorney-client or
304 work product privileges”); *Zubulake v. UBS Warburg LLC*, 216
305 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into
306 “so-called ‘claw-back’ agreements that allow the parties to forego
307 privilege review altogether in favor of an agreement to return
308 inadvertently produced privilege documents”). Of course such an
309 agreement can bind only the parties to the agreement. The rule makes
310 clear that if parties want protection in a separate litigation from a
311 finding of waiver by disclosure, the agreement must be made part of
312 a court order.

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

324 Moreover, the costs of discovery can be equally high for state
325 and federal causes of action, and the rule seeks to limit those costs in
326 all federal proceedings, regardless of whether the claim arises under
327 state or federal law. Accordingly, the rule applies to state law causes
328 of action brought in federal court.

329 **Subdivision (g).** The rule's coverage is limited to attorney-
330 client privilege and work product. The operation of waiver by
331 disclosure, as applied to other evidentiary privileges, remains a
332 question of federal common law. Nor does the rule purport to apply
333 to the Fifth Amendment privilege against compelled self-
334 incrimination.

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

340 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**

341 The following changes were made from the Proposed Rule
342 502 as issued for public comment:

343 1. Stylistic changes were provided by the Style Subcommittee
344 of the Standing Committee

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

348 3. The text was clarified to stress that Rule 502 applies in state
349 court to determine whether a disclosure previously made at the
350 federal level constitutes a waiver — despite any indication to the
351 contrary that might be found in the language of Rules 101 and 1101.