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§ 5:33 Waiver of Privilege — Voluntary Disclosure or Failure to Claim

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§ 5:33 Waiver of privilege—Voluntary disclosure or failure to claim

A client who voluntarily discloses the content of communications covered by the attorney-client privilege waives the privilege. Such waiver by disclosure can occur at any stage of a proceeding,[1] including discovery,[2] and in settings far removed from court proceedings.[3] Disclosure can come from the client personally or

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[1]Seventh Circuit: Velsicol Chemical Corp. v. Parsons, 561 F.2d 671, 674 (7th Cir. 1977) (grand jury testimony by house counsel waived corporate privilege).

Eighth Circuit: U.S. v. Tyerman, 701 F.3d 552, 559 (8th Cir. 2012) (in felon-in-possession case, defendant's intentional disclosure of gun's location to DA through defense counsel during plea negotiations implicitly waived privilege with respect to communications about gun's location).

from her lawyer or other agent acting on her behalf.[4] In the slightly different situation in which a third person having knowledge of the privileged matter discloses its substance, as may happen if a communicative intermediary or office functionary or expert speaks out of turn, waiver results if the client or lawyer has an opportunity to object and does not do so.[5]

The client holds the privilege, and the attorney cannot waive it over the client's objection. Still, the attorney has the client's implied authority to assert or waive the privilege in the course of

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U.S. v. Davis, 583 F.3d 1081, 1090 (8th Cir. 2009), cert. denied, 2010 WL 85968 (2010) (by testifying about what attorney told him, defendant waived privilege for what he told attorney, which was "information directly related to that which was actually disclosed") (and conversations between defense attorney and prosecutor were not privileged).

[2]Ninth Circuit: See, e.g., Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 23 (9th Cir. 1981) (disclosure by officer-director on deposition waived privilege).

[3]Federal Circuit: Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton, 684 F.3d 1364 (Fed. Cir. 2012) (patent owner's pre-litigation disclosure of opinion letter to competitor waived attorney-client privilege as to letter).

Second Circuit: Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 170 (2d Cir. 2003) (client sent documents to lawyer to secure legal advice and autho- rized him to send them to SEC for audit, thus waived privilege).

U.S. v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997) (client gave inaccurate extrajudicial summary of letters from lawyer and claimed that lawyer approved scheme when actually he did not; disclosure of content waived privilege).

Sixth Circuit: U.S. v. Collis, 128 F.3d 313, 320 (6th Cir. 1997) (charged with submitting forged letter from employer at sentencing hearing, defendant waived privilege and lawyer could testify about the letter; defendant had already talked to investigating officers about lawyer's advice on this point; lawyer could also describe the way he obtained the final signed copy of the letter because defendant had already disclosed his false version to investigators).

Seventh Circuit: Burden-Meeks v. Welch, 319 F.3d 897, 901–902 (7th Cir. 2003) (in suit by employees against city and mayor, nonparty agency waived privilege for report by showing copy to mayor).

Ninth Circuit: U.S. v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (defendant waived by telling detective about lawyer's legal advice).

Tenth Circuit: U.S. v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989) (client told third party he verified legality of loans with attorney, thus waived privilege).

[4]Tenth Circuit: U.S. v. Bump, 605 F.2d 548, 551 (10th Cir. 1979) (privilege waived when attorney disclosed information to government, and client could not show disclosure was without his consent).

[5]Eighth Circuit: Hollins v. Powell, 773 F.2d 191, 197 (8th Cir. 1985) (city waived privilege when mayor voluntarily testified about communications and city's attorney did not object).

Ninth Circuit: U.S. v. Gurtner, 474 F.2d 297, 299 (9th Cir. 1973) (disclosure made by accountant without objection).

legal representation,[6] and principles of agency law determine the scope of such authority.[7] A client who fails to object to disclosure impliedly consents to disclosure.[8] An attorney who testifies on behalf of the client waives the privilege for communications that bear on that testimony.[9] The client may not assert the privilege

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[6]ABA Model Rules of Professional Conduct, Rule 1.6(a) (lawyer shall not reveal confidential information unless client consents, "except for disclosures that are impliedly authorized in order to carry out the representation").

Fourth Circuit: U.S. v. Mierzwicki, 500 F. Supp. 1331, 1334 (D. Md. 1980) (attorney's disclosure to IRS waived privilege where client authorized attorney to negotiate with government on tax matter).

Fifth Circuit: U.S. v. Martin, 773 F.2d 579, 583 (4th Cir. 1985) (attorney representing client before IRS auditor authorized to waive privilege).

Seventh Circuit: Sandra T.E. v. South Berwyn School Dist. 100, 600 F.3d 612, 618 (7th Cir. 2010) (privilege belongs to client, but lawyer may claim it on client's behalf).

[7]Restatement Third, The Law Governing Lawyers Chapter 2, Topic 4, Introductory Note (lawyer's authority "to speak and act for the client with respect to the rights of third persons" are matters raising "classical issues of the law of agency").

Tenth Circuit: Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1370 (10th Cir. 1997) (privilege not waived by lawyer showing document to third party because only client can waive).

[8]Second Circuit: In re von Bulow, 828 F.2d 94 (2d Cir. 1987) (client waived privilege by encouraging lawyer to write book about legal representation and reveal other confidences on television in promoting book; waiver reaches confidential communications disclosed in book, but not related matters that were not disclosed)

Drimmer v. Appleton, 628 F. Supp. 1249, 1251 (S.D. N.Y. 1986) (client waived privilege by not objecting when attorney testified to contents of confidential communication).

Montana: State v. Statczar, 743 P.2d 606, 611 (Mont. 1987) (client's failure to object to attorney's unauthorized disclosures at competency hearing did not waive privilege, but only because client was incompetent).

[9]Seventh Circuit: Leybold-Heraeus Technologies, Inc. v. Midwest Instrument Co., Inc., 118 F.R.D. 609, 614 (E.D. Wis. 1987) (testimony by lawyer caused waiver of privilege for information needed to cross-examine him).

Brown v. Trigg, 791 F.2d 598, 601 (7th Cir. 1986) (defendant waived privilege by calling lawyer's agent as witness in prior juvenile proceeding).

Ninth Circuit: Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (attorney testified in support of defense of good faith; client waived privilege for communications bearing on that defense).

Tenth Circuit: Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995) (fact that corporation designated lawyer as representative at deposition is "wholly insufficient ground" to find general waiver of privilege).

to block discovery with respect to matters that she plans to disclose at trial.[10]

Disclosure only waives the privilege if it reveals a significant part of the privileged communication.[11] A client who discusses with outsiders the same facts that she also discussed with her attorney has not waived her claim of privilege,[12] nor does she waive it by telling another that she discussed a particular subject with her attorney.[13] She does waive the privilege it if she describes to an outsider her statements to her lawyer, thus revealing the substance of the communications themselves.[14] The underlying

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[10]Seventh Circuit: Clark v. City of Munster, 115 F.R.D. 609, 615 (N.D. Ind. 1987) (if client plans to waive privilege at trial, but blocks discovery of privileged matter, court may exclude privileged matter).

Eleventh Circuit: International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (fairness and justice require that if defendant intends to waive by introducing testimony on privileged matter, he must allow discovery on "matters material" to testimony).

[11]Fifth Circuit: U.S. v. Newell, 315 F.3d 510, 526 (5th Cir. 2002) (defendant in mail fraud trial did not waive privilege by disclosing good faith defense, which was not based on advice of counsel, but on lack of knowledge or intent) (but defendant waived by disclosing communications to accountant).

Sixth Circuit: In re Dayco Corp. Derivative Securities Litigation, 99 F.R.D. 616, 619 (S.D. Ohio 1983) (no waiver where press release summarized findings of internal investigation but did not disclose "significant part" of report).

[12]Federal Circuit: In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370, 1374 (Fed. Cir. 2001) (one does not waive privilege on merger negotiations by disclosing merger, negotiations concerning it, or property rights of prospective parties; waiver only occurs if privileged information disclosed).

Second Circuit: U.S. v. Cunningham, 672 F.2d 1064, 1073 n 8 (2d Cir. 1982) (privilege "attaches not to the information but the communication" of information).

Seventh Circuit: U.S. v. O'Malley, 786 F.2d 786, 793 (7th Cir. 1986) (waiver only happens if client discloses "the communication with the attorney itself").

Kansas: Contra, State ex rel. Stovall v. Meneley, 22 P.3d 124, 141 (Kan. 2001) (where M discussed O's drug use with attorney, and later discussed O's drug use with J and B, M waived privilege) (unsound; discussing same subject with outsiders, as opposed to disclosing the communication to outsiders, should not waive).

[13]District of Columbia: U.S. v. White, 887 F.2d 267, 271 (D.C. Cir. 1989) (general assertion "lacking substantive content" that attorney examined "certain matter" is not sufficient to waive privilege).

California: Mitchell v. Superior Court, 208 Cal. Rptr. 886, 892, 691 P.2d 642, 648 (1984) (plaintiff did not waive privilege "through her mere acknowledgment" that she discussed certain matters with attorney).

[14]Tenth Circuit: U.S. v. Bernard, 877 F.2d 1463, 1465 (10th Cir. 1989) (by telling third party that he verified legality of loans with lawyer, defendant waived privilege on this point).

principle is that the privilege covers communications, not underlying facts embedded or expressed or conveyed in statements to the lawyer, and not the mere fact that the client discussed a particular subject with her lawyer. Waiver by disclosure only occurs if the client (or her lawyer) reveals what one told the other.

The party asserting waiver generally has the burden of proving that waiver occurred.[15] If the material covered by a privilege claim is in the possession of third party or has been turned over intentionally or inadvertently to the adverse party, the court may require the holder to show that he did not waive the privilege.[16]

Voluntary disclosure. Voluntary disclosure constitutes waiver under a standard that is more akin to the relaxed constitutional standard that applies to consensual searches than to the stricter standard that applies to such things as right to counsel that are essential to a fair trial.[17] Hence disclosure waives the lawyer-client privilege even if the client speaks without intentionally or purposefully relinquishing his privilege claim, so long as he intentionally and purposefully reveals the substance of a confidential communication. In other words, waiver need not be "knowing" in the sense of awareness by the client that disclosure results in loss of the privilege,[18] so long as the client "knows" that he is disclosing privileged material.[19]

Disclosure resulting from fraud or theft does not constitute

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[15]Restatement Third, The Law Governing Lawyers § 86(3) (one seeking to establish waiver or exception "must assert the waiver or exception and, if the assertion is contested, demonstrate each of its elements).

[16]Second Circuit: Status Time Corp. v. Sharp Electronics Corp., 95 F.R.D. 27, 34 (S.D. N.Y. 1982) (third party held privileged letter, so claimant had to prove he had not waived privilege).

[17]Supreme Court: Compare Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (classic statement that waiver requires showing "intentional relinquishment or abandonment of a known right") with Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) (in connection with search, voluntary consent turns on totality of circumstances, does not require showing that defendant knew he could refuse).

[18]District of Columbia: In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir. 1979) (waiver may occur even without intent to waive privilege as such).

Ninth Circuit: Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18 (9th Cir. 1981) (subjective intent is only one factor in assessing implied waiver).

Iowa: Miller v. Continental Ins. Co., 392 N.W.2d 500, 505 (Iowa 1986) (clients disclosed privileged communications, waiving privilege even though they did not know that disclosure would have this effect).

[19]Eighth Circuit: In re Grand Jury Proceedings Involving Berkley and Co., Inc., 466 F. Supp. 863, 869 (D. Minn. 1979), aff'd as modified, 629 F.2d 548 (8th

waiver,[20] although some courts have found waiver from clever questioning leading to disclosure.[21] Disclosure in compliance with a court order that rejects the client's claim of privilege is not waiver either.[22] In the latter situation, the holder may disclose and challenge the ruling on appeal or by other available means later, and if the order to disclose is wrong, the holder may reassert the privilege claim thereafter.[23]

Disclosure resulting from economic pressure rather than legal compulsion is voluntary,[24] as is disclosure in response to a

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Cir. 1980) (privilege not waived when documents were stolen by former employee and given to government).

[20]Seventh Circuit: But see Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 260 (N.D. Ill. 1981) (privilege lost for papers that opponent found in client's dumpster).

Eighth Circuit: In re Grand Jury Proceedings Involving Berkley and Co., Inc., 466 F. Supp. 863, 869 (D. Minn. 1979), aff'd as modified, 629 F.2d 548 (8th Cir. 1980) (upholding privilege claim for stolen papers).

Massachusetts: Matter of Reorganization of Elec. Mut. Liability Ins. Co., Ltd. (Bermuda), 681 N.E.2d 838, 841 (Mass. 1997) (if "reasonable precautionary steps were taken," disclosure of stolen document is presumed to be involuntary, so no waiver).

[21]Fourth Circuit: In re Grand Jury Subpoena, 341 F.3d 331, 336–337 (4th Cir. 2003) (FBI agent asked defendant about terrorism, then asked whether lawyer helped him with immigration form; disclosure not produced by deception).

[22]Eighth Circuit: Hollins v. Powell, 773 F.2d 191, 196 (8th Cir. 1985) (after court overruled objection to whole line of questioning based on privilege, disclosure during deposition was not waiver).

Ninth Circuit: Transamerica Computer Co., Inc. v. International Business Machines Corp., 573 F.2d 646, 651 (9th Cir. 1978) (party does not waive privilege "for documents which he is compelled to produce").

[23]See proposed-but-rejected Rule 512 ("Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege"). See also ACN to this proposed rule (holder need not "exhaust all legal recourse" in contesting order to disclose, and may later challenge order as "erroneously compelled," and this "modest departure" from usual principles of res judicata is appropriate because appeal may not be available, and it is better to have "one simple rule" assuring one possible review).

[24]Second Circuit: In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (disclosure to underwriter waived privilege even though disclosure was "coerced by the legal duty of due diligence and the millions of dollars riding on the public offering") ("no matter what the economic imperatives," disclosure results in loss of privilege).

Third Circuit: In re Chevron Corp., 633 F.3d 153, 165 (3d Cir. 2011) (attorney-client privilege and work-product doctrine, with respect to documents created by nontestifying environmental consultant, were waived by disclosure to court-appointed damage expert, where purpose was to advance position of disclosing party in expert's final assessment).

subpoena if the privilege claimant produces the sought-after matter without objecting.[25] Disclosure without objection during direct or cross-examination is voluntary unless the privilege holder was so misled or confused by the question that it would be unfair to find waiver.[26]

If officials obtain privileged material during the course of a government search, the privilege is not lost.[27] However, failing to challenge the search by means of an attempt to retrieve the material or by means of a suppression motion or other reasonable steps may constitute waiver or relinquishment of the rights otherwise secured by the privilege.[28]

Privileged disclosure. Of course disclosure to a person who is within the magic circle covered by the privilege, such as a representative of the attorney,[29] a joint client[30] or one who asserts a

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Fifth Circuit: U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 684 (1st Cir. 1997) (disclosure to audit agency waived privilege; court rejects claim that disclosure was not voluntary because required by university's status as defense contractor).

[25]Third Circuit: Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1427 n14 (3d Cir. 1991) (disclosure in response to subpoena was voluntary where client withdrew motion to quash and produced documents; had he "continued to object," disclosure would not have been voluntary).

Ninth Circuit: In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (without threat of contempt, subpoena does not render testimony or production of documents involuntary; whether subpoenaed party chose not to assert privilege is relevant to waiver analysis; where privilege holder solicited subpoena and did not claim privilege, it was waived even though subpoena contemplated that attorney might redact privileged materials).

[26]Florida: Hoyas v. State, 456 So. 2d 1225, 1229 (Fla. Dist. Ct. App. 3d Dist. 1984) (claimant waived by answering; he was not surprised or misled on direct examination).

Missouri: Knight v. M.H. Siegfried Real Estate, Inc., 647 S.W.2d 811, 816 (Mo. Ct. App. W.D. 1982) (testifying waived privilege; answers did not result from surprise or deception).

[27]Ninth Circuit: U.S. v. de la Jara, 973 F.2d 746, 749 (9th Cir. 1992) (claimant could assert privilege for letter that government discovered in executing search warrant).

[28]Third Circuit: In re Impounded Case (Law Firm), 879 F.2d 1211, 1213 (3d Cir. 1989) (motions to seal and obtain return of privileged documents seized from law office pursuant to search warrant).

Eighth Circuit: In re Berkley and Co., Inc., 629 F.2d 548, 551 (8th Cir. 1980) (seeking suppression of privileged documents, one set stolen by an employee, the other obtained by search and seizure).

Ninth Circuit: U.S. v. de la Jara, 973 F.2d 746 (9th Cir. 1992) (holder "did nothing to recover the letter or protect its confidentiality" during months between seizure and trial, thus waived privilege).

[29]See § 5:15, supra.

common defense,[31] does not waive the privilege. Any other result would be incongruous, raise mindless complexities, and go far toward destroying the privilege. Only slightly less obvious is the fact that disclosure is not waiver where an independent privilege covers the disclosing communication itself. Thus a client can tell a spouse, physician, or psychotherapist the substance of what the client told his lawyer, and doing so does not waive the attorney- client privilege if the privilege for spousal privileges, or for state- ments to physicians or psychotherapists, covers the disclosing statement.[32] Here the notion is that if disclosure waives the privilege covering the earlier statement, the result penalizes the holder for making the disclosing statement, and exacts what would be an unfair and unforeseen cost for making the later communication, even though it is covered by another privilege.

Disclosure in a prior court hearing normally waives the privilege,[33] but disclosing confidential communications in court for in camera inspection or otherwise for the purpose of helping the court rule on a privilege claim does not itself waive the privilege.[34] There would be no sense in imposing waiver as the cost of mak-

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Third Circuit: In re Chevron Corp., 633 F.3d 153, 164 (3d Cir. 2011) (disclosure to third party waives privilege unless it furthers goal of obtaining legal assistance).

[30]See § 5:19, supra.

[31]See § 5:20, supra.

Fifth Circuit: See U.S. v. Seale, 600 F.3d 473, 491–93 (5th Cir. 2010), cert. denied, 131 S.Ct. 163 (2010) (in conspiracy trial of S, coconspirator E told FBI that S had confessed; E then told his own lawyer that E's statement to the FBI was false; E's lawyer then communicated this point to S's lawyer; even if E knew his lawyer was talking to S's lawyer, E did not intend to waive privilege and did not "personally disclose" any confidential information) (no waiver).

[32]See proposed-but-rejected Rule 511 (rule of waiver by voluntary disclosure does not apply "if the disclosure is itself a privileged communication"); Uniform Rule 510 (no waiver if "disclosure itself is privileged").

[33]Tenth Circuit: In re Grand Jury Proceedings, 616 F.3d 1172, 1184 (10th Cir. 2010) (transmission of information to court in previous briefing on argument to remove prosecutor waived privilege).

Eleventh Circuit: U.S. v. Suarez, 820 F.2d 1158, 1159–1160 (11th Cir. 1987) (letting lawyer testify at motion to withdraw guilty plea waived privilege, and client could not prevent lawyer from testifying to the same point at trial) (apparently defendant did not object under Rule 410).

[34]Supreme Court: U.S. v. Zolin, 491 U.S. 554, 568 (1989) (disclosing materials to court for purposes of determining privilege claim does not terminate privilege).

Ninth Circuit: See also Lambright v. Ryan, 98 F.3d 808 (9th Cir. 2012) (court should enter protective order exempting privileged materials in habeas proceeding where ineffective assistance claims related to self-incriminating information relevant to sentencing on remand).

ing the case for the privilege, and the doctrine would be a capricious thing if it could be lost by the act of claiming it.

Selective or limited disclosure. A client generally cannot make "selective" or "limited" disclosure to outsiders without waiving the privilege.[35] The generally stated reason behind this principle is that the protection of the privilege already gives clients what they need in order to obtain legal representation, and allowing them to share with outsiders what is covered by the privilege would invite manipulation. An objection to this argument would stress that talking to or sharing documents with outsiders is not necessarily manipulative, and does not necessarily damage opponents. In a variety of circumstances the privilege does indeed apply despite such sharing, as happens in the case of joint clients and the pooled defense (or common interest) doctrines, and in the case of communicative intermediaries, as noted above. Nor does a willingness to disclose to some outsiders prove that the privilege

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[35]District of Columbia: Permian Corp. v. U.S., 665 F.2d 1214, 1221 (D.C. Cir. 1981) (client cannot "pick and choose among his opponents," waiving privilege as to some but not others, nor invoke privilege if he has compromised confidentiality for his own benefit).

First Circuit: U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 684 (1st Cir. 1997) (university waived privilege by disclosing to audit agency; nondisclosure agreement does not prevent waiver of privilege as to nonparties to agreement, such as IRS).

Fourth Circuit: In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988) (prior disclosures to government in effort to resolve criminal investigation waived privilege for previously disclosed information and related communications).

U.S. v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) (selective disclosure for tactical purposes waives privilege).

Ninth Circuit: In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (declining to apply selective waiver principle to documents disclosed to government by crime victim in compliance with grand jury subpoena; victims do not need protection that selective waiver principle would provide in order to be encouraged to report crimes to government; documents were disclosed to government under grand jury subpoena sought by privilege claimant).

Tenth Circuit: In re Qwest Communications Intern. Inc., 450 F.3d 1179, 1187–97 (10th Cir. 2006), cert. denied, 127 S.Ct. 584 (2006) (rejecting rule of selective waiver to prevent disclosure to plaintiffs in class action of privileged documents that had been previously provided to government investigators; doctrine is not required to assure compliance with official investigation and record did not support contention that compliance with government requests would diminish in absence of selective waiver; nor would selective waiver doctrine further policies underlying attorney-client privilege).

See generally Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1643 to 48 (1985) (waiver should not result from selective disclosure on confidential basis, but unprivileged person to whom disclosure was made can be compelled to testify).

plays no role or is unnecessary for the purpose of helping clients obtain legal services, since most of the things that a client shares in confidence with a lawyer are things that a client might be willing to share with at least some friendly outsiders.

Somewhat surprisingly, even disclosure to auditors,[36] or to the person paying the client's legal fees (unless the latter is a joint client)[37] usually waives the privilege. Here one might imagine that the doctrine extending privileged protection to communicative intermediaries might apply, but at least sometimes it does not.

Still more surprisingly, under the majority rule disclosure to governmental agencies in connection with official investigations waives the privilege,[38] although some courts do recognize a

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[36]Second Circuit: In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982) (showing internal investigative report to auditor waived privilege).

Fifth Circuit: U.S. v. El Paso Co., 682 F.2d 530, 540 (5th Cir. 1982).

Ninth Circuit: U.S. v. Ruehle, 583 F.3d 600, 611 (9th Cir. 2009) (in trial of corporate CFO relating to stock option practices, CFO's statements to corporation's attorneys were not confidential; they were made in course of internal investigation of stock option practices, and were to be disclosed to outside auditors).

Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992) (corporation concedes that providing documents to outside auditor waived privilege).

[37]Eighth Circuit: In re Grand Jury Proceedings Subpoena to Testify to: Wine, 841 F.2d 230, 234 (8th Cir. 1988) (client waived privilege by disclosing confidential communications to fee payer).

[38]District of Columbia: In re Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (disclosure to SEC waived privilege).

Federal Circuit: Genentech, Inc. v. U.S. Intern. Trade Com'n, 122 F.3d 1409 (Fed. Cir. 1997) (refusing to recognize limited privilege after accidental disclosure for ITC patent investigation).

First Circuit: U.S. v. Massachusetts Institute of Technology, 129 F.3d 681, 684 (1st Cir. 1997) (university waived privilege by disclosing documents to government audit agency; nondisclosure agreement with agency does not prevent waiver as to nonparties such as IRS; work product protection also waived because disclosure was made to potential adversary).

Second Circuit: Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 170 n5 (2d Cir. 2003) (disclosure for release to SEC waived privilege; rejecting limited waiver argument).

In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (disclosure to SEC waived work product protection).

Third Circuit: Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1425 (3d Cir. 1991) (rejecting selective waiver doctrine; privilege not necessary to encourage cooperation with government investigations).

Sixth Circuit: In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 302 (6th Cir. 2002) (courts split on selective waiver;

limited waiver doctrine in this context.[39] Arguably a doctrine favoring cooperation with regulatory, administrative, and investigative functions of government would create countervailing considerations justifying preservation of the privilege.[40] There is perhaps some force in the point that privilege holders will cooperate anyway, but this argument is reminiscent of the claim that the whole privilege is unnecessary because clients cannot afford not to talk to their lawyers, and this Benthamite objection ordinarily gets short shrift. Those cases endorsing the selective waiver theory, particularly in the setting of information-sharing with government agencies, have the better of the argument. Occasionally statutes come to the aid of parties who disclose to

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client cannot release privileged documents to agencies during investigation and then assert privilege against others).

Ninth Circuit: In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012) (declining to enforce promise not to disclose documents provided in response to grand jury subpoena; refusing to apply selective waiver principle where agreement post-dated disclosure and contravened purpose to encourage frank conversation at time of legal advice; Congress did not adopt selected waiver principle for purpose of encouraging cooperation with government).

Tenth Circuit: In re Qwest Communications Intern. Inc., 450 F.3d 1179 (10th Cir. 2006), cert. denied, 127 S.Ct. 584 (2006) (rejecting selective waiver theory).

See generally Note, The Limited Waiver Rule: Creation of An SEC—Corporation Privilege, 36 Stan. L. Rev. 789, 816 to 19 (1984); Comment, When Does a Limited Waiver of the Attorney-Client Privilege Occur?, 24 Boston College L. Rev. 1283 (1983); Comment, Stuffing the Rabbit Back Into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation, 130 U. Pa. L. Rev. 1198 (1982).

[39]Sixth Circuit: Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 687 (S.D. N.Y. 1980) (voluntary disclosure during nonpublic SEC investigation should waive privilege only for that proceeding).

Eighth Circuit: U.S. v. Shyres, 898 F.2d 647, 657 (8th Cir. 1990) (privi- lege not waived by voluntary disclosure to government in connection with grand jury investigation).

Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) (allowing "limited waiver" of attorney-client privilege for disclosure of privileged material to SEC during a "nonpublic" investigation).

See Comment, Reconciling Voluntary Disclosure with the Attorney-Corporate Client Privilege: A Move Toward a Comprehensive Limited Waiver Doctrine, 39 Mercer L. Rev. 1341 (1988) (supporting limited waiver doctrine).

[40]See generally Imwinkelried, The New Wigmore on Evidence (Evidentiary Privileges) § 6.12.4 (2002) (reporting that "prevailing view" rejects selective waiver theory, but arguing that the "minority view" favoring selective waiver "seems preferable").

government agencies in an effort to cooperate,[41] and some courts recognize a possibility that clients working with government agencies may take advantage of the branch of the privilege that applies where parties pool information while retaining separate counsel, under which the privilege is not destroyed by sharing.[42] An agreement on the part of an agency not to disclose to outsiders information shared in this way might carry some weight as well, particularly if it helps demonstrate the existence of the common purpose that allows parties generally to share information while retaining a privilege.[43]

Rule 502 as originally submitted for public comment contained a provision that would have codified the selective waiver doctrine for disclosure to public agencies, although this provision was deleted from the final version.[44] However, this Rule, which is

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[41]See, e.g., 23 U.S.C.A. § 409 (information collected under highway Hazard Elimination Program is inadmissible); Regulatory Relief Act of 2006, § 607, 12 U.S.C. 1828 ("The submission by any person of any information to any Federal, State or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency . . . 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").

[42]Second Circuit: In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993) (avoiding "rigid rule" that disclosure to SEC always waives work product protection, which fails to anticipate situations where "the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials").

[43]For discussion of voluntary waiver as a factor in organizational sentencing leniency in connection with corporate misconduct, see Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waiver, 39 Wake Forest L. Rev. 587 (2004). For discussion of circuit split on the question whether disclosure of a corporation's confidential documents in response to government investigation waives the privilege, along with a proposal for limited immunity in such cases, see Pinto, Cooperation and Self-Interest Are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation, 106 W. Va. L. Rev. 359 (2004).

See generally the discussion of the pooled defense or allied lawyer cases in § 5:20, supra, and the discussion of the work product doctrine in § 5:38, infra, where it is sometimes possible to share work product with other allied parties without losing protection of the doctrine.

[44]Proposed Rule 502 [(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-

discussed in § 5:35, is a rule that limits privilege waiver, not expands it. Therefore, it does not overturn the cases that continue to recognize a selective waiver doctrine or bar additional courts from doing so. A protective order entered under Rule 502(d) can in some circumstances allow selective disclosure of privileged or protected material as distinguished from selective waiver.[45]

Of course unprotected disclosure to an adversary waives the privilege.[46] Also, if the client intends that what he tells her lawyer, or what she turns over to her lawyer, should be immediately disclosed, no privilege attaches because such communications fail the confidentiality requirement.[47] In this setting, however, a tentative or contingent decision to disclose at some future time should not have the effect of negating a privilege claim because clients and lawyers should have some flexibility in deciding when and whether to disclose, and under what circumstances, and there is nothing unreasonable in allowing the client to change directions and decide not to disclose.[48] Nor is any harm done, in such situations, if indeed a decision to disclose is later changed.

Writings used to refresh recollection. Difficult waiver questions arise when a lawyer uses privileged writings to refresh the recollection of a witness for the purpose of testifying. Rule 612

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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.]

[45]See discussion in § 5:35, infra.

[46]Third Circuit: Smith v. Alyeska Pipeline Service Co., 538 F. Supp. 977, 980 (D. Del. 1982), aff'd, 758 F.2d 668 (Fed. Cir. 1984) (sending opposing party copy of letter from attorney to client waived privilege for letter and related communications).

Fourth Circuit: U.S. v. Jones, 696 F.2d 1069, 1072–1073 (4th Cir. 1982) (publicizing legal opinions in brochures waived privilege).

Federal Deposit Ins. Corp. v. Kerr, 112 F.R.D. 131, 133 (W.D. N.C. 1986) (disclosure to attorney for third party with conflicting interests waived privilege).

Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974) (disclosure to adversary for settlement purposes waived privilege).

Eighth Circuit: U.S. v. Tyerman, 701 F.3d 552, 559 (8th Cir. 2012) (in felon-in-possession case, intentional disclosure of gun's location to DA through defense counsel during plea negotiations implicitly waived privilege with respect to communications about gun's location).

[47]See § 5:18, supra.

[48]Ninth Circuit: Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 339 (9th Cir. 1996) (agreement or promise to waive privilege in future does not waive when communication is not actually disclosed; intent to waive is not waiver in absence of actual disclosure).

provides that an adverse party may require production of writings used by a witness at trial, but that the court has discretion either to require or not to require production of writings used to refresh recollection before trial. If the witness is outside the circle of persons covered by the attorney-client privilege, then showing privileged matter to the witness waives the privilege independently of Rule 612.[49] However, if the witness is the client or someone else, such as an expert retained to facilitate communication between client and lawyer, the question arises whether using privileged matter to prepare the witness to testify can result in loss of privileged protection. Framed another way, the question is whether the power to order disclosure of material used to prepare such a witness, which Rule 612 provides for, can override the attorney-client privilege so production of the writing may be ordered.

Legislative history seems at best inconclusive.[50] It seems likely that Rule 612 does give courts discretion to override claims of attorney-client privilege, at least sometimes, for documents used to refresh the memory of a witness.[51] The best argument favoring this result is that it is unfair to let a witness rely on written ma-

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[49]See § 5:18, supra.

[50]The Judiciary Committee said that "nothing in [Rule 612]" should be "construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." House Report, at 13. A colloquy on the floor of the House supports a similar conclusion. See the discussion of Rule 612 in § 6:92 and § 6:97.

On the other hand, the Judiciary Committee also said that Rule 612 was consistent with "existing federal law," see House Report at 13, and at that time some authority suggested that such uses waived privilege claims. At least one trial-level decision required production of privileged documents used to refresh memory during trial, see Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972), and at least one other said there was no distinction between using such material during trial and using it before, see Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 10 (N.D. Ill. 1978).

[51]District of Columbia: Marshall v. U.S. Postal Service, 88 F.R.D. 348, 350 (D.D.C. 1980) (under Rule 612, court can find that witness waives privilege by using documents to refresh recollection).

Second Circuit: See Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, (S.D. N.Y. 1977) (attorney should not be able to use work product to refresh memory but then withhold it from adversary).

Third Circuit: See James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982) (when counsel decided to "educate" witness with work product, opponent is entitled "to know the content of that education").

Seventh Circuit: Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 9 (N.D. Ill. 1978) (using documents to refresh memory before deposition waived privilege).

terial that the cross-examiner cannot see or ask about.[52] The best counterargument is that providing the opposition ready access to privileged material simply because a person within the protection of the privilege reviews it before testifying weakens the privilege too much, and would likely expose to hostile view and use far more than the passages that might be critical. Moreover, the cross-examiner can often get as much as one might want by bringing out the fact that the witness reviewed the course of his upcoming testimony with the lawyer, and a great deal of such "woodshedding" (witness preparation) happens without creating any form of paper record that could be examined by the opposition, which means that finding waiver in this use would push lawyers to avoid using paper.[53]

The wiser course is to require disclosure only when the opponent shows that indeed the witness relied on privileged material,[54] although demonstrating reliance can be difficult if a wit-

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Floyd, A "Delicate and Difficult Task": Balancing the Competing Interests of Federal Rule of Evidence 612, the Work Product Doctrine, and the Attorney-Client Privilege, 44 Buff. L. Rev. 101 (1996).

[52]Seventh Circuit: Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (accepting plaintiff's claim would ignore "unfair disadvantage" that could be placed on the cross-examiner "by the simple expedient of using only privileged writings to refresh recollection").

[53]See generally Note, Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules, 88 Yale L. J. 390, 404 to 05 (1978) (opposing broad production of privileged writings reviewed by witness before testifying; information seeker should be required to show need).

Davidson & Voth, Waiver of the Attorney-Client Privilege, 64 Or. L. Rev. 637, 666 (1986) (criticizing cases requiring production of privileged writings; because letting witness review prior statements is "hardly a means to influence testimony improperly," and obligation to produce can be evaded by oral briefings, which may enhance the possibility of improperly influencing testimony).

[54]Third Circuit: Sporck v. Peil, 759 F.2d 312, 318 (3d Cir. 1985) (one cannot seek material that adversary used to refresh memory of witness without first asking questions and showing that testimony related to documents used to refresh).

Eighth Circuit: Joseph Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd., 85 F.R.D. 118, 119–120 (W.D. Mo. 1980) (attorney said he looked at correspondence file before testifying; opponent sought production of file, but court would not order production without testimony indicating that attorney reviewed particular documents; heavy reliance on document "would be a factor favoring disclosure").

See generally Comment, Resolving the Conflict Between Federal Rule of Evidence 612 and the Work Product Doctrine: A Proposed Solution, 38 U. Kan. L. Rev. 1039 (1990); Note, Federal Rule of Evidence 612 and the Work Product Doctrine—Conflict or Congruity?, 1986 Ariz. St. L. J. 543, 554–556.

ness is reticent or untruthful.[55] In such cases it seems that the party holding the privilege should disclose only those portions of the material that relate to the testimony given, and deciding this point is likely to require in camera review of the material.[56] Otherwise disclosure should proceed when "necessary in the interests of justice."[57] Even though the privilege may be lost where documents are used to refresh the recollection of a witness, the waiver reaches only the documents actually disclosed and does not constitute a more general waiver extending to other documents that may or may not be related or similar in content. It is surely unwise to require essentially blanket production of all writings that the witness reviewed before testifying.[58]

Similar issues of waiver, arising from use of material to prepare witnesses to testify, arise in connection with work product protection.[59]

Scope of waiver. Prior to the adoption of Rule 502, the traditional rule was that a client who disclosed or consented to disclose any significant part of a communication waived the priv-

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[55]Arguably one should not be able to block production by denying reliance on documents reviewed before testifying. Production seems justified if the witness spent time reviewing privileged documents and her testimony contains details that she would not likely remember without review.

[56]District of Columbia: Barrer v. Women's Nat. Bank, 96 F.R.D. 202, 205 (D.D.C. 1982) (undertaking in camera review to see whether there was discrepancy between testimony and documents used to refresh).

[57]Federal Circuit: Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1373 (Fed. Cir. 2012) (prior to patent suit, plaintiff released to defense letter from counsel, which subpoenaed "documents and testimony" from lawfirm relating to subject matter of letter; under Rule 502(a)(1), reviewing court holds that waiver resulting from prelitigation disclosure is limited to undisclosed materials that ought in fairness to be considered together with what was disclosed; court applied wrong standard in ordering disclosure of all material that relates to that already disclosed) (quoting authors of this Treatise).

First Circuit: See, e.g., Derderian v. Polaroid Corp., 121 F.R.D. 13, 15 (D. Mass. 1988) (denying request for production of writings used to refresh plaintiff's recollection prior to her deposition, but allowing request to be renewed at trial).

Ninth Circuit: Baker v. CNA Ins. Co., 123 F.R.D. 322, 327 (D. Mont. 1988) (no waiver unless testimony discloses significant portion of privileged material).

Joseph Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1980) (otherwise privileged document should receive "special discretionary safeguards against disclosure").

[58]District of Columbia: Marshall v. U.S. Postal Service, 88 F.R.D. 348, 351 (D.D.C. 1980) (using document to aid recollection "requires only the disclosure of the document" itself, and does not lead to "any further waiver of the attorney-client privilege").

[59]See the discussion of this point in § 5:38, infra.

ilege not only for the matter disclosed but also for related communications.[60] Some authority even extended the waiver to later communications, which made waiver particularly risky and penalized parties for changing strategies as conditions changed.[61] This harsh rule was abrogated in 2008 by the adoption of Rule 502(a) which provides that when a disclosure is made that waives the attorney-client privilege the waiver "extends to an undisclosed communication or information" 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 be considered together." Rule 502(a) applies where the disclosure "is made in a federal proceeding or to a federal officer or agency."

Thus subject matter waiver is now limited to situations where a party tries to gain tactical advantage by partly disclosing something while covering up the rest[62] or where fairness requires disclosure of underlying or related documents.[63] Partial disclosure should lead to a broader waiver if continuing protection for the

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[60]In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) (voluntary disclosure of privileged document to third party waives the privilege not only for document but "all the communications relating to the same subject matter").

Third Circuit: Smith v. Alyeska Pipeline Service Co., 538 F. Supp. 977, 979 (D. Del. 1982), aff'd, 758 F.2d 668 (Fed. Cir. 1984) (after attorney mailed copy of opinion letter prepared for client to opposing attorney, which waived privilege with respect to all communications relating to subject matter of letter).

Fourth Circuit: Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1191 (D.S.C. 1974) (client's voluntary waiver on certain documents "waives the privilege as to all communications between the same attorney and the same client on the same subject").

[61]Third Circuit: Smith v. Alyeska Pipeline Service Co., 538 F. Supp. 977, 982 (D. Del. 1982), aff'd, 758 F.2d 668 (Fed. Cir. 1984) (waiver extends to subsequent correspondence on same subject).

[62]District of Columbia: In re Sealed Case, 676 F.2d 793, 809 n 54 (D.C. Cir. 1982) ("where the client has merely disclosed a communication to a third party, as opposed to making some use of it," court need not find full waiver for everything on same subject).

Second Circuit: U.S. v. Aronoff, 466 F. Supp. 855, 861–863 (S.D. N.Y. 1979) (no subject matter waiver; holder did not rely on disclosed material, so effect was "to let a whisker out of the bag but not the whole cat").

Ninth Circuit: Bittaker v. Woodford, 331 F.3d 715, 719 n5 (9th Cir. 2003) (trend in modern cases is toward finding only limited waivers) (quoting authors of this Treatise).

[63]See discussion of Rule 502(a) in § 5:35, infra.

Third Circuit: Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977) (privilege is waived only if factors relevant to particular and narrow subject are disclosed in situation in which it would be "unfair to deny the other party an opportunity to discover other relevant facts" on same subject matter).

balance of the material in the same subject area would cause the part disclosed to be misleading in court proceedings under a principle of completeness like the one found in Rule 106.[64] Partial disclosure of privileged matter before trial could be unfair if it interfered with the opponent's ability to prepare or distorted settlement expectations.[65] If the disclosing party agrees not to use at trial any of the privileged matter that was partially disclosed, this may obviate the need for a broader waiver.

Rule 502(a) applies to disclosures outside the setting of a "proceeding" when made "to a federal office or agency," and its policy should apply to other disclosures as well, thereby resulting in a narrow waiver limited to the matters disclosed.[66] If the disclosure was inadvertent rather than intentional, Rule 502(a) does not allow subject matter waiver.[67]

Once the privilege is waived, the former holder generally cannot reclaim the privilege.[68] However, disclosure that occurs without waiver, as may happen if a court compels disclosure in

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[64]Eleventh Circuit: International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177, 185–186 (M.D. Fla. 1973) (litigant who introduces part of his correspondence with attorny must produce all related correspondence).

[65]See Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605, 1633–1637 (1986).

[66]First Circuit: In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 24 (1st Cir. 2003) (extrajudicial disclosure of attorney-client communications during conference call at which third parties were present, when not thereafter used by client to gain adversarial advantage in judicial proceedings, cannot impliedly waive confidentiality of all other communications on same subject matter).

Second Circuit: In re von Bulow, 828 F.2d 94, 103 (2d Cir. 1987) (disclosure "extrajudicially and without prejudice" to opposing party only waived privilege for "matters actually revealed").

Ninth Circuit: Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (disclosure of documents to outside auditor waived privilege only for those documents).

Weil v. Investment/Indicators, Research and Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981) (waiver "only as to communications about the matter actually disclosed").

[67]See § 5:34 and § 5.35, infra. See also ACN to Rule 502(a) ("inadvertent disclosure of protected information can never result in a subject matter waiver").

[68]Second Circuit: Taylor v. Curry, 708 F.2d 886, 890 (2d Cir. 1983) (state interest in attorney-client communication "dissipated" when document was introduced at first trial).

Sixth Circuit: U.S. v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954) (if client waives privilege at first trial, "he may not claim it at a subsequent trial" because communication "is no longer confidential").

Eleventh Circuit: U.S. v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987) (privilege waived when attorney testified at pretrial hearing to withdraw guilty

error, does not lead to waiver, and the holder can later assert the privilege to block use of the material covered in a later proceeding.[69] Even though theft, interception, or breach of confidentiality by the attorney can destroy the secrecy of the communication, the privilege itself is not lost.[70]

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plea; after this testimony, privilege "could not bar his testimony on the same subject at trial").

[69]See proposed-but-rejected Rule 512; Uniform Rule 511.

[70]Second Circuit: U.S. v. Sindona, 636 F.2d 792, 804–805 (2d Cir. 1980) (al- lowing privilege for evidence improperly divulged by lawyer in breach of duty of confidentiality).

Sixth Circuit: In re Dayco Corp. Derivative Securities Litigation, 102 F.R.D. 468, 470 (S.D. Ohio 1984) (privilege blocks use of evidence even though privileged matter had been published in newspaper).

See also Uniform Rule 26(1)(c)(iii) (client can block testimony describing communication known to witness as result of "breach of the lawyer-client relationship").