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## §5.28 Waiver by Voluntary Disclosure

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## §5.28 Waiver by Voluntary Disclosure

Unless protected by a judicial non-waiver order under FRE 502(d), the attorney-client privilege is waived by the client's voluntary disclosure or consent to disclosure of any significant part of the privileged communication or matter in a nonprivileged setting. Waiver by disclosure can occur at any stage of a proceeding,<sup>1</sup> including discovery,<sup>2</sup> or in settings far removed from court proceedings.<sup>3</sup>

Disclosure that waives the privilege can be made by the client personally or by an attorney or other agent acting on the client's behalf.<sup>4</sup> Disclosure that waives the privilege can also be made by a third party who has knowledge of the privileged matter, and waiver results if the client or his lawyer makes no objection at the time.<sup>5</sup>

Because the client holds the privilege, the attorney cannot waive it over the client's objection. The attorney has, however, some degree of implied authority to assert or waive the privilege on the client's behalf in the course of legal representation,<sup>6</sup> and the scope of such authority is determined by the law of agency.<sup>7</sup> If the client fails to object to disclosure of privileged information by the attorney, the client impliedly consents.<sup>8</sup> If the attorney testifies on behalf of the client, the

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§5.28 1. *Velsicol Chem. Corp. v. Parsons*, 561 F.2d 671, 674-675 (7th Cir. 1977) (grand jury testimony by house counsel waived corporation's privilege), *cert. denied*, 435 U.S. 942.

2. *See, e.g., Weil v. Investors/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23-25 (9th Cir. 1981) (disclosure by officer-director on deposition waived privilege). On asserting the privilege during discovery, *see* §5.27, *supra*.

3. *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364 (Fed. Cir. 2012) (patent-owner's prelitigation transmission of privileged attorney opinion letter to competitor waived privilege, at least as to letter); *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) (privilege waived where defendant told detective about legal advice received from attorney).

4. *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979) (attorney-client privilege waived when attorney disclosed information to government and client had no proof disclosure was without his consent).

5. *Hollins v. Powell*, 773 F.2d 191, 197 (8th Cir. 1985) (city waived claim of attorney-client privilege when mayor voluntarily testified about privileged communications and city's attorney did not object), *cert. denied*, 475 U.S. 1119.

6. *See* ABA Model Rules of Professional Conduct Rule 1.6(a) (lawyer has authority to reveal confidential information when the disclosure is "impliedly authorized in order to carry out the representation").

7. Restatement (Third) of the Law Governing Lawyers §78, cmt. c (power of an agent to waive the privilege "is determined under the law of agency").

8. *See United States v. Tyerman*, 701 F.3d 552, 559 (8th Cir. 2012) (defendant implicitly waived privilege for communications with counsel about location of firearm when he authorized counsel to locate and deliver firearm to

privilege is waived for communications that bear on the attorney's testimony.<sup>9</sup> The client may not assert the privilege to block discovery with respect to matters that she plans to disclose at trial.<sup>10</sup>

### **Disclosure of significant part**

For waiver to occur, the disclosure must reveal a significant part of the privileged communication.<sup>11</sup> Waiver does not occur merely because a client discusses with others the same facts that she earlier discussed with the attorney<sup>12</sup> but only where she reveals the substance of the attorney-client communications,<sup>13</sup> whether accurately or inaccurately.<sup>14</sup> A client's statement that she discussed the subject with her attorney does not waive the privilege for the contents or substance of what she told her lawyer.<sup>15</sup>

A promise to waive the privilege in the future is not itself a waiver if the privileged

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prosecutor in the course of plea negotiations); *von Bulow v. von Bulow*, 114 F.R.D. 71, 76 (S.D.N.Y. 1987) (privilege waived in part where client encouraged lawyer to write a book about legal representation and reveal other confidences on television program), *modified*, 828 F.2d 94 (2d Cir. 1987).

9. *In re Pioneer Hi-Bred Intl., Inc.*, 238 F.3d 1370, 1376 (Fed. Cir. 2001) (counsel for party may be deposed by opposing party as fact witness without waiving attorney-client privilege, but privilege is waived if counsel discloses privileged matters); *Leybold-Heraeus Technologies, Inc. v. Midwest Instrument Co., Inc.*, 118 F.R.D. 609, 614 (E.D. Wis. 1987) (where attorney took stand, privilege waived for information necessary to cross-examine attorney).

10. *Clark v. City of Munster*, 115 F.R.D. 609, 615 (N.D. Ind. 1987) (if client plans to waive privilege at trial but refuses to allow discovery on privileged matter, court has discretion to exclude privileged matter if offered at trial).

11. Proposed-but-rejected FRE 511; URE 510 (1999). *See also Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983) (no waiver where press release summarizing findings of internal investigation did not disclose "significant part" of report).

12. *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) (in order to waive privilege, client "must disclose the communication with the attorney itself"). *See also ACN*, proposed-but-rejected FRE 511 (client does not waive attorney-client privilege "merely by disclosing a subject which he had discussed with his attorney").

13. *United States v. Davis*, 583 F.3d 1081, 1090 (8th Cir. 2009) (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").

14. *United States v. Jacobs*, 117 F.3d 82, 87-89 (2d Cir. 1997) (privilege waived where client gave inaccurate extrajudicial summary of letters from attorney, claiming he approved scheme when actually he disapproved it; disclosure of content waives privilege and so does inaccurate statement of privileged communication).

15. *Mitchell v. Superior Court*, 37 Cal. 3d 591, 603, 691 P.2d 642, 648, 208 Cal. Rptr. 886, 892 (1984) (plaintiff did not waive privilege "through her mere acknowledgment" that she discussed certain matters with attorney).

communications are never actually disclosed.<sup>16</sup> But communications *made with the intent* that they eventually be disclosed are usually not confidential, and no privilege arises in the first instance.<sup>17</sup>

The party asserting waiver has the burden of producing evidence that waiver occurred.<sup>18</sup> The holder is expected to rebut this evidence and has the ultimate burden of establishing that confidentiality was maintained, because confidentiality is an element of the privilege.<sup>19</sup> If the material claimed to be privileged is in the possession of a third party, the holder is expected to bear the burden of showing that the privilege was not waived because, under the circumstances, sharing with the third party was itself privileged.<sup>20</sup>

### **“Voluntary” disclosure**

The standard for evidentiary waiver is less strict than for constitutional waiver. While waiver of constitutional guarantees affecting the fairness of a trial requires the “intentional relinquishment or abandonment of a known right,”<sup>21</sup> an evidentiary privilege can be waived by voluntary disclosure even if the holder did not intend to relinquish the privilege.<sup>22</sup>

Disclosure is generally involuntary if privileged matter was procured by fraud, deception, or theft, which means that waiver does not occur.<sup>23</sup> Disclosure is also involuntary if it is compelled

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16. *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 339-341 (9th Cir. 1996).

17. *See* §5.13, *supra*.

18. Restatement (Third) of the Law Governing Lawyers §86(3) (one seeking to establish waiver or exception “must assert it and, if the assertion is contested, demonstrate each element of the waiver or exception”).

19. *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (privilege holder has burden of establishing “that privilege was not waived”); *Weil v. Investment/Indicators Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (one of elements privilege claimant must prove “is that it has not waived the privilege”).

20. *Status Time Corp. v. Sharp Elecs. Corp.*, 95 F.R.D. 27, 34 (S.D.N.Y. 1982) (where third party was in possession of privileged letter, burden on claimant to establish that privilege was not waived).

21. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *But see* *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-237, 248 (1973) (“knowing and intelligent” standard applies to constitutional guarantees necessary for fair trial; knowledge of right to refuse a search is only one factor in determining whether consent to search is valid under Fourth Amendment).

22. *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979) (intent to waive privilege “is not necessary for such waiver to occur”), *cert. denied sub nom. Sea Land Serv., Inc. v. United States*, 444 U.S. 915.

23. *See, e.g., In re Grand Jury Proceedings Involving Berkley & Co., Inc.*, 466 F. Supp. 863, 869 (D. Minn. 1979) (upholding privilege claim for stolen documents), *aff’d*, 629 F.2d 548 (8th Cir. 1980). *See also* proposed-but-rejected FRE 512 (no waiver where disclosure occurred “without opportunity to claim the privilege”). *But see* *Suburban Sew ‘N Sweep v. Swiss-Bernina*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (privilege lost where opponent

by court order after a privilege claim is overruled, and again waiver does not occur,<sup>24</sup> which means that the holder of the privilege (or the person in possession of the privileged material) may disclose it, and the holder can challenge the order later. If the order was erroneous, the privilege can be reasserted in subsequent proceedings.<sup>25</sup>

Disclosure is voluntary when made as a result of economic pressure rather than legal compulsion.<sup>26</sup> Disclosure in response to a subpoena is considered voluntary if the privilege holder produces the sought-after material without objecting.<sup>27</sup> If that material is obtained without the holder's consent during a government search, the privilege is not lost,<sup>28</sup> but the holder may lose the privilege if he does not reclaim it or file a suppression motion, or take other reasonable steps to preserve its confidentiality.<sup>29</sup>

If a client discloses privileged matter without objection on direct or cross-examination, doing so is a voluntary waiver unless the client was misled or confused by the question to such a degree that that it would be unfair to find waiver.<sup>30</sup>

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found privileged correspondence in client's dumpster).

24. *See* *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985) (no waiver where privileged matter disclosed at deposition, because privilege objection had previously been asserted to entire line of questioning and court had overruled objection), *cert. denied*, 475 U.S. 1119; *Transamerica Computer v. International Business Machs.*, 573 F.2d 646, 651 (9th Cir. 1978) (party does not waive privilege "for documents which he is compelled to produce"). *See also* proposed-but-rejected FRE 512 and URE 510 (1999) (even though privileged matter has already been disclosed, privilege not lost if disclosure was "compelled erroneously").

25. *See* *ACN*, proposed-but-rejected FRE 512 (even where holder does not "exhaust all legal recourse" in contesting order to disclose, holder may later challenge order as "erroneously compelled," and this "modest departure from usual principles of res judicata" is justified by fact that appeal is not always available and the advantage of having "one simple rule, assuring at least one opportunity for judicial supervision in every case").

26. *See* *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982) (privilege held waived even though client claimed disclosure to underwriter was involuntary "because it was coerced by the legal duty of due diligence and the millions of dollars riding on the public offering"; once disclosure is made "no matter what the economic imperatives" privilege is lost).

27. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1130 (9th Cir. 2012) (finding disclosure in response to subpoena "voluntary" where privilege holder chose not to assert the privilege before responding).

28. *United States v. De La Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (privilege can still be asserted where government discovered letter in course of executing search warrant).

29. *See, e.g.,* *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992) (privilege waived where holder "did nothing to recover the letter or protect its confidentiality during the six month interlude between its seizure and introduction into evidence").

30. *See, e.g.,* *Hoyas v. State*, 456 So. 2d 1225, 1229 (Fla. App. 1984) (privilege waived where court found appellant was not surprised or misled on direct examination and disclosed communication made to attorney).

Most authorities hold that waiver need not be “knowing” in the sense of awareness by the client that disclosure would result in loss of the privilege.<sup>31</sup> Still, the disclosure itself must be “knowing” or it does not amount to waiver.<sup>32</sup>

### **Privileged disclosure**

The privilege is not waived if disclosure is made to a person who is within the attorney-client privilege, such as a representative of the attorney<sup>33</sup> or a joint client<sup>34</sup> or someone who asserts a common defense.<sup>35</sup> Nor is the privilege lost if disclosure is made to a person having an independent privilege, such as a spouse, physician, or psychotherapist (provided that such disclosure meets the requirements of the independent privilege).<sup>36</sup>

Although disclosure in a prior court hearing normally waives the privilege,<sup>37</sup> obviously this principle does not mean that waiver occurs when the client or lawyer discloses privileged matter to the court during an *in camera* proceeding where the whole purpose is to determine whether the privilege applies, and the court needs assistance in ruling on the privilege claim.<sup>38</sup>

### **Selective or limited disclosure**

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31. *See, e.g.*, *Miller v. Continental Ins. Co.*, 392 N.W.2d 500, 505 (Iowa 1986) (waiver found when clients disclosed privileged communications in sworn affidavits, although they did not know such disclosure would waive privilege). *See generally* 8 Wigmore, Evidence §2327 at 636 (McNaughton rev. 1961) (privilege would seldom be found waived if holder’s “intention not to abandon could alone control”).

32. *See, e.g.*, *In re Grand Jury Proceedings Involving Berkley & Co., Inc.*, 466 F. Supp. 863, 869 (D. Minn. 1979) (privilege not waived when documents were stolen by former employee and given to government), *aff’d*, 629 F.2d 548 (8th Cir. 1980). *See also* proposed-but-rejected FRE 512 and URE 511 (1999) (no waiver where disclosure made “without opportunity to claim the privilege”).

33. *See* §5.10, *supra*.

34. *See* §5.14, *supra*.

35. *See* §5.15, *supra*.

36. *See* proposed-but-rejected FRE 511 (rule of waiver by voluntary disclosure does not apply “if the disclosure is itself a privileged communication”); URE 510 (1999) (no waiver if “disclosure itself is privileged”).

37. *United States v. Suarez*, 820 F.2d 1158, 1159-1160 (11th Cir. 1987) (privilege waived where defendant permitted attorney to testify at hearing on motion to withdraw guilty plea and could not be reasserted at trial to bar attorney from testifying to same subject matter), *cert. denied*, 484 U.S. 987.

38. *United States v. Zolin*, 491 U.S. 554, 568 (1989) (disclosing allegedly privileged materials to court for purposes of determining merits of claim “does not have the legal effect of terminating the privilege”).

A client generally cannot make “selective” or “limited” disclosure of privileged matter to unprivileged third persons without waiving the privilege.<sup>39</sup> Most authorities find waiver even when disclosure is made to government agencies in connection with an official investigation,<sup>40</sup> although a few courts have recognized a limited waiver doctrine in this context.<sup>41</sup> In the past, the Department of Justice sometimes demanded waiver of the attorney-client privilege by corporations as evidence of their good faith and cooperation in connection with government investigations. However, this policy was harshly criticized. Under current policy, prosecutors are directed not to ask for such waivers.<sup>42</sup>

Under FRE 502, which governs disclosures in a federal proceeding or to a federal office or agency, any waiver as a result of selective disclosure is limited to the material actually disclosed, and does not extend to additional privileged communications concerning the same subject matter unless “they ought in fairness” be considered with the disclosed material.<sup>43</sup>

The privilege is waived by disclosure to an adversary,<sup>44</sup> and by disclosure to outside auditors,<sup>45</sup> and even by disclosure to a person paying the client’s legal fees (except where the payer is also a client of the lawyer).<sup>46</sup> If disclosure to an unprivileged person was anticipated at the time of the communication, no privilege arises because the client did not intend the communication to be

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39. *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1128 (9th Cir. 2012) (rejecting theory of selective waiver); *Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (same); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (client cannot “pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others”).

40. *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1425-1427 (3d Cir. 1991) (rejecting selective waiver doctrine; privilege is not necessary “to encourage voluntary cooperation with government investigations”).

41. *United States v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990) (privilege not waived by voluntary disclosure to the government in connection with grand jury investigation), *cert. denied*, 498 U.S. 821.

42. *See* United States Attorneys’ Manual §9-28.710 (2008).

43. *See* FRE 502(a). Even prior to the adoption of FRE 502, most courts followed a similar standard. *See, e.g.*, *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).

44. *Smith v. Alyeska Pipeline Serv. Co.*, 538 F. Supp. 977, 980-982 (D. Del. 1982) (sending opposing party a copy of letter from attorney to client waived privilege with respect to letter and related communications), *aff’d without opinion*, 758 F.2d 668 (1st Cir. 1984), *cert. denied*, 471 U.S. 1066.

45. *United States v. M.I.T.*, 129 F.3d 681, 684-688 (1st Cir. 1997) (university waived attorney-client privilege by disclosing privileged documents to government audit agency); *United States v. Textron Inc.*, 507 F. Supp. 2d 138 (D.R.I. 2007) (disclosure to outside auditor waives attorney-client privilege).

46. *Grand Jury Subpoena (Wine)*, 841 F.2d 230, 234 (8th Cir. 1988) (privilege waived when client disclosed confidential attorney-client communications to fee payer).

confidential.<sup>47</sup>

## **Nonwaiver agreements**

Although the holder cannot preserve his privilege by a unilateral statement of nonwaiver at the time of disclosing to another,<sup>48</sup> the holder may enter into a nondisclosure or nonwaiver agreement with the party to whom disclosure is made.<sup>49</sup> Such agreements typically allow the holder to reclaim any privileged documents produced and to assert the privilege later. Such private agreements are enforceable between the parties,<sup>50</sup> and FRE 502(e) specifically recognizes this point.<sup>51</sup> The difficulty, however, is that private agreements do not bind outsiders who later seek the disclosed material, and these outsiders can argue that disclosure waived the privilege.<sup>52</sup>

FRE 502(d) addresses this issue by authorizing courts to enter protective orders that will prevent waiver of privilege even where disclosure to an unprivileged third party is made intentionally or without taking “reasonable steps” to prevent disclosure. As the ACN states, such a court order may provide for “return of documents without waiver irrespective of the care taken by the disclosing party” and contemplates use of “claw-back” and “quick peek” arrangements “as a way to avoid the excessive costs of pre-production review.”<sup>53</sup>

## **Effect of agreements and pretrial orders**

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47. See §5.13, *supra*. See also *United States v. Jones*, 696 F.2d 1069, 1072-1073 (4th Cir. 1982) (privilege as to legal opinions waived when clients publicized portions in brochures; court questions whether privilege ever attached, given intent for future disclosure).

48. *In re Subpoena Duces Tecum*, 99 F.R.D. 582, 584-586 (D.D.C. 1983) (disclosing party waived privilege even though it stated in transmittal letter to SEC that it did not waive privilege by submission of information), *aff'd*, 738 F.2d 1367, 1370 (D.C. Cir. 1984).

49. *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) (SEC or other government agency “could expressly agree to any limit on disclosure to other agencies consistent with their responsibilities under law”).

50. *Chubb Integrated Sys. Ltd. v. National Bank*, 103 F.R.D. 52, 67-68 (D.D.C. 1984) (agreement is contract between parties “to refrain from raising the issue of waiver” or “otherwise utilizing” information).

51. See FRE 502(e).

52. See FRE 502(e) (agreement on effect of disclosure in federal proceeding is “binding only on the parties to the agreement, unless it is incorporated into a court order”). See also *United States v. M.I.T.*, 129 F.3d 681, 684-688 (1st Cir. 1997) (nondisclosure agreement with government audit agency not binding on nonparties such as IRS).

53. ACN to FRE 502. A “claw back” provision generally allows a party to recover inadvertently disclosed material from an opponent without a finding of waiver. A “quick peek” arrangement allows a party to disclose material without waiver prior to any privilege review, with a later privilege review of any material designated by the opponent for copying.

Such a “nonwaiver” order of the court is binding not only in the proceeding where it was entered, but in “any other federal or state proceeding.” Thus this federal limitation on privilege waiver prevails over any state law to the contrary, which is one reason why it was necessary for this provision to be enacted by Congress.<sup>54</sup> With respect to disclosures of privileged material that occur in state proceedings, Rule 502 adopts the position that the waiver provision—state or federal—that is most protective of the privilege should control in determining the effect of that disclosure in a subsequent federal proceeding.<sup>55</sup>

### **Writings used to refresh recollection**

Difficult waiver questions arise when privileged documents are used to refresh the recollection of a witness for the purpose of testifying. FRE 612 provides that writings so used by a witness at trial are required to be produced at the request of an adverse party, and if the writings are used to refresh recollection before trial the court has discretion to order production. If the witness is outside the circle of persons who may receive the communication without destroying confidentiality,<sup>56</sup> it is unnecessary to consider the effect of FRE 612, because the privilege is lost under traditional principles of waiver. But if she is within the circle (perhaps a client or representative of a client or expert assisting counsel in trial preparation), the question arises whether FRE 612 overrides the privilege so production of the writing may be ordered.<sup>57</sup>

Courts are divided on the question whether (or the degree to which) an attorney’s use of work product or privileged material in preparing experts to testify has the effect of waiving protections of the work product doctrine or attorney-client privilege. Some courts hold that FRE 612, which says a court may order disclosure of written material reviewed by a witness before testifying, includes authority to overrule claims of privilege or work product,<sup>58</sup> and the underlying policy

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54. FRE 502 was enacted by Congress in 2008 as Senate Bill 2450 and signed by the president on September 19, 2008. It applies “in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.” (Pub. L. No. 110-322, 122 Stat. 3537).

55. *See* FRE 502(c).

56. *See* §5.13, *supra*.

57. Although the House Judiciary Committee stated its intent “that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory,” the Committee also viewed FRE 612 as consistent with “existing federal law.” House Report, at 13. Under preexisting federal law, a privileged document used to refresh a witness’s recollection during his testimony was subject to production. *See, e.g., Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D. Ill. 1972). There is no indication that the Committee intended a different rule to apply to writings used to refresh prior to testifying. *See Wheeling-Pittsburg Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8, 10 (N.D. Ill. 1978) (“If the paramount purpose of federal discovery rules is the ascertainment of the truth, the fact that a document was used to refresh one’s recollection prior to his testimony instead of during his testimony is of little significance.”).

58. *See, e.g., Marshall v. United States Postal Serv.*, 88 F.R.D. 348, 350 (D.D.C. 1980) (FRE 612 authorizes a finding of waiver when privileged documents are used to refresh witness’s recollection).

behind these holdings is that it is unfair to let a witness rely on writings or conversations with counsel that are beyond reach of discovery or protected from inquiry on cross-examination of the expert.<sup>59</sup> Some courts have concluded that FRE 612 allows them even to require pretrial production of privileged writings reviewed by the witness before testifying.<sup>60</sup>

Other courts are more cautious, and the underlying policy is that opening up conversations with the lawyer for the calling party, and exposing materials covered by work product or attorney-client privilege, drive lawyers away from using written material and toward reliance on oral briefings, force lawyers to hire experts who never testify, and lead to disclosure going beyond the actual basis of any testimony ultimately offered. Courts taking this view ask whether production is “necessary in the interests of justice”<sup>61</sup> or require the other side to show that the witness actually did rely on a particular writing in refreshing his memory or in formulating his testimony.<sup>62</sup> Of course showing reliance can be hard if a witness is uncooperative or untruthful, and it seems that a witness should not be able to block production simply by denying that he relied on something, particularly if he spent a lot of time reviewing it or if his testimony reflects detailed information that he could not readily have memorized or gotten somewhere else. Before ordering production, some courts undertake *in camera* review to determine the extent of reliance, if any, on documents

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59. *See* *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”). *But see* *Davidson & Voth, Waiver of the Attorney-Client Privilege*, 64 Or. L. Rev. 637, 666 (1986) (criticizing cases requiring production of privileged writings used to refresh, because allowing witnesses to review prior statements “is hardly a means to influence testimony improperly”; moreover, production can be easily evaded by briefing witnesses orally, a method that may have a greater danger of improperly influencing the witness’s testimony).

60. *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144-146 (D. Del. 1982) (when counsel made decision to “educate” witness with protected work product, opponent is entitled “to know the content of that education”); *Wheeling-Pittsburg Steel Corp. v. Underwriters Laboratories, Inc.*, 81 F.R.D. 8, 9 (N.D. Ill. 1978) (use of documents to refresh memory prior to deposition effectively waived attorney-client privilege).

61. *See, e.g., Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 327 (D. Mont. 1988) (no waiver from disclosure for purposes of refreshment unless testimony discloses significant portion of privileged material). *See generally* *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).

62. *Sporck v. Peil*, 759 F.2d 312, 318 (3d Cir. 1985) (party cannot seek production of refreshment material without first asking questions at deposition and showing that testimony related to documents used to refresh), *cert. denied*, 474 U.S. 903. *See also* *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 144-145 (D.C. Cir. 2015) (granting writ of mandamus to block order to produce privileged corporate internal investigation materials under FRE 612, where party conducting deposition had directed corporate representative to be prepared on topic of internal investigation and then claimed right to see privileged material that was reviewed in preparation for deposition; “[a]llowing privilege and protection to be so easily defeated would defy ‘reason and experience,’ and potentially upend certain settled understandings and practices about the protections for such investigations”).

and conversations with counsel.<sup>63</sup> If privilege or work product protection is lost, any waiver applies only to documents and other material actually considered, not to other things.<sup>64</sup>

### Scope of waiver

If a client discloses or consents to disclosure of any significant part of a communication, the traditional rule has been that the privilege is waived not only for the matter disclosed but for all other related communications.<sup>65</sup> The rationale for this “part-whole” rule of waiver is that a litigant should not be allowed to make partial disclosure of a privileged communication<sup>66</sup> because the part disclosed might be unrepresentative, misleading to the opponent or trier of fact, or unduly favorable to the disclosing party.<sup>67</sup>

FRE 502(a) rejects this view and provides that waiver extends to undisclosed communications relating to the same subject matter only where “they ought in fairness to be considered together.”<sup>68</sup> Courts are most likely to rule that partial disclosure results in broad waiver when it is made to a

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63. *Barrer v. Women’s Natl. Bank*, 96 F.R.D. 202, 205 (D.D.C. 1982) (court resolved conflict between FRE 612 and attorney-client privilege by undertaking *in camera* review of documents to determine whether there was discrepancy between testimony and documents used to refresh).

64. *Marshall v. United States Postal Serv.*, 88 F.R.D. 348, 351 (D.D.C. 1980) (using a document to aid recollection “requires only the disclosure of the document to opposing counsel” and disclosure does not “constitute any further waiver of the attorney-client privilege”).

65. *See, e.g., In re Sealed Case*, 676 F.2d 793, 809 (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”); *Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1024 (7th Cir. 2012) (noting general rule that a party voluntarily disclosing part of a privileged conversation “waives the privilege as to the portion disclosed and to all other communications relating to the same subject matter”).

66. 8 Wigmore, *Evidence* §2327, at 638 (attorney-client privilege is “intended only as an incidental means of defense, and not as an independent means of attack”).

67. *Patrick v. City of Chicago*, 154 F. Supp. 3d 705, 715-716 (N.D. Ill. 2015) (declining to apply subject matter waiver because “subject matter waiver generally occurs only where the party holding the privilege seeks to gain some strategic advantage by disclosing favorable, privileged information, while holding back that which is unfavorable”); *International Paper Co. v. Fiberboard Corp.*, 63 F.R.D. 88, 92 (D. Del. 1974) (it would be “manifestly unfair” to allow one party to make factual assertions and then deny the other party “the foundation for those assertions in order to contradict them”). A factor to be considered is how intertwined the disclosed communication is with other communications necessary to present a balanced account. *Cf.* FRE 106, discussed in §§1.17-1.18, *supra*.

68. ACN to FRE 502(a) (subject matter waiver “is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner”). *See also Wi-LAN, Inc. v. Kilpatrick, Townsend & Stockton LLP*, 684 F.3d 1364, 1369 (Fed. Cir. 2012) (noting that FRE 502(a) “limited the effect of waiver by strongly endorsing fairness balancing”).

trier of fact who could be misled by a privileged communication taken out of context<sup>69</sup> or when a party tries to gain some advantage by partial disclosure.<sup>70</sup> If a party makes partial disclosure of privileged matter prior to trial, this tactic could be unfair if it interferes with the opponent's ability to prepare for trial or distorts settlement expectations.<sup>71</sup> Although FRE 502(a) does not apply to prelitigation disclosures that were not made in a federal proceeding or to a federal office or agency, federal courts apply similar fairness principles as a matter of federal common law in assessing the effect of such disclosures.<sup>72</sup>

Once the attorney-client privilege is waived, it generally cannot be reasserted.<sup>73</sup> If disclosure occurs without waiver, however, as happens when a court compels disclosure erroneously, the holder can assert the privilege to bar introduction of the evidence in a later proceeding.<sup>74</sup> Similarly, even though theft, interception, or breach of confidentiality by the attorney can destroy the secrecy of the communication, the privilege itself is not necessarily lost (if proper precautions were taken) and may be asserted at a subsequent proceeding.<sup>75</sup>

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69. *See, e.g.,* ITT Corp. v. United Tel. Co., 60 F.R.D. 177, 185-186 (M.D. Fla. 1973) (once litigant introduces part of correspondence with attorney, production of all related correspondence may be required).

70. *In re Sealed Case*, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982) (when party reveals part of privileged communication to gain an advantage in litigation, court can find waiver for all other communications on same subject matter); *North Dakota v. United States*, 64 F. Supp. 3d 1314, 1353 (D.N.D. 2014) (fairness required waiver with respect to privileged opinions on same subject matter as voluntarily disclosed privileged opinion because government used disclosed opinion to gain tactical litigation advantage).

71. *See generally* Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1633-1637 (1986).

72. *See* *Wi-LAN, Inc. v. Kilpatrick, Townsend & Stockton LLP*, 684 F.3d 1364, 1373 (Fed. Cir. 2012) (finding that fairness analysis applied to patent-holder's intentional prelitigation disclosure of privileged attorney opinion letter to later adversary not expressly covered by FRE 502(a)); *North Dakota v. United States*, 64 F. Supp. 3d 1314, 1346 (D.N.D. 2014) (adopting fairness test of subject matter waiver for all disclosures where plaintiffs alleged waiver through government's prelitigation public disclosures of privileged attorney opinion memoranda, as well as intentional disclosures in discovery process).

73. *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987) (attorney-client privilege waived when defendant's attorney testified at pretrial hearing to withdraw guilty plea; once attorney testified at hearing to withdraw guilty plea, privilege "could not bar his testimony on the same subject at trial"), *cert. denied*, 484 U.S. 987.

74. *See* proposed-but-rejected FRE 512; URE 510 (1999).

75. *United States v. Sindona*, 636 F.2d 792, 804-805 (2d Cir. 1980) (allowing assertion of privilege with respect to evidence improperly divulged by lawyer in breach of duty of confidentiality), *cert. denied*, 451 U.S. 912; *In re Dayco Corp. Derivative Sec. Litig.*, 102 F.R.D. 468, 470 (S.D. Ohio 1984) (upholding privilege to prevent introduction of privileged matter at trial, despite fact that it had already been published in newspaper).