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## § 5:35 Fed. R. Evid. 502--Limitations on Waiver of Privilege and Work Product Immunity

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**Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE (4<sup>th</sup> edition, Thomson Reuters 2013)**

**§ 5:35 Fed. R. Evid. 502--Limitations on waiver of privilege and work product immunity**

In 2008 Congress enacted Rule 502 which significantly limits waiver of the attorney-client privilege and work product immunity when disclosure of protected material is made “in a federal proceeding or to a federal office or agency.” The effect of Rule 502 on inadvertent disclosures is discussed in the preceding section.

Rule 502 was enacted to address conflicting judicial standards about the grounds for waiver and the scope of waiver, as well as concerns about the expense involved in complying with discovery requests under preexisting law. Because of the risk of inadvertent disclosure when producing documents during discovery, and particularly the danger that inadvertent disclosure might result in a general subject matter waiver, litigators could be forced to spend enormous amounts of time and money conducting privilege reviews. The ACN to the Rule expresses particular concern for cases involving electronic discovery, citing the time and expense incurred by attorneys in scrutinizing “millions” of documents, often bearing no proportionality to what is at stake in the litigation, and the inevitability of errors despite diligent efforts.<sup>1</sup> Rule 502 was intended to help alleviate these problems.

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**[Section 5:35]**

<sup>1</sup>Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on Evidence Rules, June 2006 at 8 (citing *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 425–26 (S.D. N.Y. 2002)). See also Report to the Judicial Conference

Because Rule 502 can supersede state law on waiver, it necessarily required enactment by Congress and did not go through the normal rule making process. Rule 502 affects only the grounds and scope of waiver by disclosure. It does not alter existing state or federal law concerning whether a particular communication or other evidence is protected by the attorney-client privilege or work product immunity, and the rule applies only to material that is in fact privileged or protected.<sup>2</sup> Nor does the rule alter federal common law addressing waiver by means other than disclosure, such as implied waiver by claim preclusion (e.g., waiver of privilege by claiming reliance on advice of counsel or assertion of certain claims or defenses).<sup>3</sup> The rule also does not alter the burdens on parties in establishing the elements of a privilege or work product immunity claim, or the exceptions to such a privilege or immunity. Rather, the rule creates exceptions to waiver by disclosure under certain circumstances.<sup>4</sup>

In diversity cases and other cases where state law supplies the rule of decision, state law controls on whether a matter is privileged or subject to work product immunity, but Rule 502 controls on whether the attorney-client privilege or work product immunity is waived and the scope of such waiver.<sup>5</sup>

Rule 502 applies in criminal proceedings as well as civil proceedings, but is rarely used in this context because of the more limited scope of discovery.

Rule 502 applies only to waiver of the attorney-client privilege or work product immunity, not to other privileges that might apply to disclosed material. However, courts sometimes apply the

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Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure, September 2005 at 27; *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005)).

Fifth Circuit: Southern District of Texas: *Alpert v. Riley*, 267 F.R.D. 202, 209 n. 2 (S.D. Tex. 2010) (Rule 502 does not appear to govern effect of disclosures that do not occur during discovery).

<sup>2</sup>Third Circuit: *Peterson v. Bernardi*, 262 F.R.D. 424 (D. N.J. 2009) (disclosing party failed to establish that material was privileged; it is “axiomatic that Rule 502 does not apply unless privileged or otherwise protected documents are produced”).

<sup>3</sup>This ground of waiver is discussed in § 5:36, *infra*.

<sup>4</sup>See Elizabeth Kim, *Waving Goodbye to Waiver? Not So Fast: Inadvertent Disclosure, Waiver of the Attorney-Client Privilege, and Federal Rule of Evidence 502*, 32 *Campbell L. Rev.* 467 (2010) (reviewing history of Rule 502 and early application in district courts).

<sup>5</sup>Rule 502(f) (“And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.”).

standards of Rule 502 in deciding whether inadvertent disclosure waived other privileges as well.<sup>6</sup>

Scope of waiver. Rule 502(a) rejects the harsh common law rule that a client who discloses or consents to disclosure of any significant part of a communication waives the privilege not only for the matter disclosed but also for related communications.<sup>7</sup> This rule had the potential to punish any breach in confidentiality with broad subject matter waiver extending beyond the original mistaken disclosure and possibly inflicting irreparable damage on the disclosing party's case. Rule 502(a) instead 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.”<sup>8</sup>

Intentional waiver. Some courts and commentators have suggested that the word “intentional” under Rule 502(a) means simply “voluntary,” but such a construction is neither accurate nor helpful. An inadvertent disclosure during the course of discovery is “voluntary” too in the sense that it was not com-

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<sup>6</sup>*Sikorsky Aircraft Corp. v. U.S.*, 106 Fed. Cl. 571 (Fed. Cl. 2012) (no reason to refrain from embracing Rule 502(b) pertaining to inadvertent disclosures and extending it to context of deliberative process privilege).

<sup>7</sup>D.C. Circuit: *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) (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 of certain documents “waives the privilege as to all communications between the same attorney and the same client on the same subject”).

Some authority even extended the waiver to later communications, which made waiver particularly risky and penalized parties for changing strategies as conditions changed. See *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).

<sup>8</sup>D.C. Circuit: *Trustees of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 11 (D.D.C. 2010) (Rule 502 abolishes unqualified subject matter waiver; if privileged information is intentionally disclosed, disclosure of additional information is required only where it concerns same subject and ought in fairness to be considered together; disclosure of nonprivileged information alone does not waive privilege for evidence on same subject).

pelled to be made. A more useful distinction between intentional disclosure and inadvertent disclosure is the disclosing party's awareness that privileged information is being released. Thus, "intentional waiver" for purposes of Rule 502(a) should be construed to mean a voluntary disclosure in a nonprivileged setting of material that the disclosing party knew or should have known to be privileged or protected by work product immunity. However, the rule does not require a showing of subjective intent to waive the privilege or protection.

If the disclosure was inadvertent rather than intentional, Rule 502(a) does not allow subject matter waiver.<sup>9</sup> As noted by the ACN, the Rule is limited to situations where a party "intentionally puts protected information into the litigation in a selective, misleading and unfair manner," and therefore "an inadvertent disclosure of protected information can never result in a subject matter waiver."<sup>10</sup>

Fairness. Under Rule 502(a) subject matter waiver is now limited to situations where a party tries to gain tactical advantage by partly disclosing privileged or protected material while covering up the rest<sup>11</sup> or where other grounds of fairness require disclosure of underlying or related documents.<sup>12</sup> Partial disclosure should lead to a broader waiver if continuing protection for the 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.<sup>13</sup> Partial disclosure of privileged matter before trial could be unfair if it interfered with the opponent's ability to prepare or

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<sup>9</sup>See § 5:33, *supra*.

<sup>10</sup>ACN Rule 502(a).

<sup>11</sup>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).

<sup>12</sup>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).

<sup>13</sup>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 attorney must produce all related correspondence).

distorted settlement expectations.<sup>14</sup> If the disclosing party agrees not to use at trial any of the privileged matter that was partially disclosed, this may obviate fairness concerns and the need for a broader waiver.<sup>15</sup> In evaluating fairness in the context of work product immunity, courts sometimes give greater protection to opinion work product than fact work product.<sup>16</sup>

Rule 502(a) also applies to disclosures outside the setting of a “proceeding” when made “to a federal office or agency,” thereby resulting in a narrow waiver limited to the matters disclosed.<sup>17</sup> Courts also often follow this standard and refuse to adopt subject matter waiver in settings beyond the scope of Rule 502(a).<sup>18</sup>

Effect of agreements and pretrial orders. A particularly significant provision in Rule 502, and one that required Congressional

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<sup>14</sup>See Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1633–1637 (1986).

<sup>15</sup>Second Circuit: *Seyler v. T-Systems North America, Inc.*, 771 F.Supp.2d 284, 288 (S.D.N.Y. 2011) (Rule 502’s high standard for subject matter waiver not met where plaintiff would not use disclosed email in litigation, thereby precluding argument that fairness required disclosure of other document on same subject).

<sup>16</sup>*Eden Isle Marina v. U.S.*, 89 Fed. Ct. 480 at 504–05 (2009) (even though Rule 502(a) does not distinguish between fact work product and opinion work product, when deciding whether fairness requires disclosure court should consider special protection afforded opinion work product).

<sup>17</sup>Federal Circuit: *Wi-Lan, Inc. v. LG Electronics, Inc.*, 684 F.3d 1364 (Fed. Cir. 2012) (recognizing issue but not deciding whether Rule 502(a) “governs the scope of waiver resulting from prelitigation [intentional] disclosure”).

<sup>18</sup>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 (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”).

Federal Circuit: *Wi-Lan, Inc. v. LG Electronics, Inc.*, 684 F.3d 1364 (Fed. Cir. 2012) (applying fairness standard to limit waiver to letter that was intentionally disclosed and not allowing discovery of related material).

action,<sup>19</sup> is subdivision (d) which allows enforceable confidentiality orders by a federal court that are binding on third parties, even in state courts, and even where the disclosure would otherwise constitute a waiver under preexisting federal or state law.<sup>20</sup> Rule 502(d) authorizes courts to enter orders “that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.”<sup>21</sup>

Even prior to the enactment of Rule 502, litigants had the ability to negotiate their own nondisclosure agreements providing that any privileged material inadvertently produced would be returned and no claim of waiver would be made. The problem with such agreements was that, even though they could bind the parties,<sup>22</sup> they were not binding on third parties.<sup>23</sup> Therefore a third party who learned of the disclosure could claim waiver of

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<sup>19</sup>The Evidence Advisory Committee recognized that a federal privilege rule binding state courts would have to be enacted by Congress through its authority under the Commerce Clause. Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on Evidence Rules, June 2006 at 9

<sup>20</sup>See Model Draft of a Rule 502(d) Order, 81 *Fordham L. Rev.* 1587 (2012) (“[I]f a party (the ‘Disclosing Party’) discloses information in connection with the pending litigation that the Disclosing party thereafter claims to be privileged or protected by the attorney-client privilege or work product protection (‘Protected Information’), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture—in this or any other action—of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.”).

<sup>21</sup>See generally Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 *Wash. & Lee L. Rev.* 675 (2009).

<sup>22</sup>District of Columbia: *Chubb Integrated Systems Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 67 (D.D.C. 1984) (agreement is contract between parties to refrain from “raising the issue of waiver” or “otherwise utilizing” information).

Second Circuit: *Eutectic Corp. v. Metco, Inc.*, 61 F.R.D. 35, 42 (E.D. N.Y. 1973) (waiver by partial disclosure rule does not apply where plaintiff and defendant signed protective order providing for no waiver of privileged documents produced during discovery).

<sup>23</sup>District of Columbia: *Chubb Integrated Systems Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 67–68 (D.D.C. 1984) (finding waiver despite nondisclosure agreement in earlier lawsuit).

Second Circuit: *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D. N.Y. 1981) (confidentiality agreement cannot foreclose nonparties from discovery of relevant material).



the privilege or protection and seek production of the disclosed documents.

Parties may continue to draft their own confidentiality agreements, a practice that is specifically recognized and authorized by Rule 502(e), but Rule 502(d) now allows litigants to submit such agreements to the court to be incorporated in a judicially enforceable confidentiality order that is binding on third parties in both federal and state proceedings. The court may adopt the agreement as drafted by the parties, but it is not required to do so. The court remains free to reject a request for such an order or to impose its own terms and conditions in the order. Although normally such orders are issued at the joint request of the parties, the Rule allows the Court to issue such orders at the request of only one party<sup>24</sup> or even on its own motion.<sup>25</sup> However, a court should not rely on a Rule 502(d) order to compel disclosure without privilege review or to impose discovery deadlines that deny a party the opportunity for privilege review, because there can be costs to the client resulting from inadvertent disclosure even if the disclosed documents can be reclaimed.<sup>26</sup>

There has been some confusion about whether Rule 502(d) orders must incorporate the standards of Rule 502(b) that prevent waiver by inadvertent disclosure only where “reasonable steps”

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See also Rule 502(e) (“An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.”).

<sup>24</sup>S2 Automation, LLC v. Micron Technology, Inc., 2012 WL 3150387 (D.N.M. 2012) (court entered Rule 503(d) order over objection of a party).

<sup>25</sup>See ACN, Rule 502(d) (“[A] confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreements should not be a condition of enforceability of a federal court’s order.”)

See also Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence (Cong. Rec. H7818, Sept. 8, 2008):

“This subdivision [d] is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party’s right to assert the privilege to preclude use in litigation of information disclosed in such discovery.”

<sup>26</sup>Federal Court of Claims: But see *Jicarilla Apache Nation v. U.S.*, 91 Fed. Cl. 489, 493–94 (2010) (denying government’s stay of production of documents during appellate review of privilege claim on basis that irreparable harm was unlikely because government would not lose privilege by disclosure under protective order, government could invoke Rule 502(d) to ensure return of any privileged matter).

Ninth Circuit: *Radian Asset Assurance, Inc. v. College of the Christian Brothers of New Mexico*, 2010 WL 4928866 (D.N.M. 2010) (ordering production without privilege review).



were taken to prevent the disclosure and to rectify the error.<sup>27</sup> To incorporate these standards into a Rule 502(d) order invites litigation challenging the conduct of the disclosing party, both before and after the disclosure, thereby creating uncertainty and undermining the protection of such an order. It is clear that no such incorporation is required. The ACN provides that the order can protect disclosures that were made without any privilege review. It states that the court order may provide for return of the documents without waiver “irrespective of the care taken by the disclosing party.” It specifically approves “claw back” and “quick peek” agreements between the parties.<sup>28</sup> Under such arrangements, a party agrees to forego privilege review altogether and allow the adversary to see the documents with an understanding that any privileged documents that are privileged will be returned and no claim of waiver will be made.<sup>29</sup> Thus a Rule 502(d) order can protect disclosures that do not meet the requirements of Rule 502(b) and is not limited to inadvertent disclosure.<sup>30</sup>

If a Rule 502(d) order incorporates the standards of Rule 502(b), it does not provide the litigants with any greater protection from a finding of waiver than they would have under Rule 502(b) by itself, except that if there is a finding of nonwaiver such a finding will be binding on third parties. The legislative history indicates that the intent of the rule was to allow parties instead to craft their own standards for privilege review, subject of course to judicial approval. A court should give considerable deference to the judgment of the parties in tailoring the privilege review necessary to protect privileged material or work product applying a cost-benefit analysis. In determining what level of privilege review to require, courts should be mindful of the proportionality factors set forth in FRCP 26(b)(2)(C)(iii), which require consideration of whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

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<sup>27</sup>Tenth Circuit: *Spieker v. Quest Cherokee, LLC*, 2009 WL 2168892 (D. Kan. 2009) (refusing to approve nondisclosure order under Rule 502(d) that would not require predisclosure review; court appeared to assume erroneously that a Rule 502(d) order must incorporate requirements of Rule 502(b)).

<sup>28</sup>ACN Rule 502(d).

<sup>29</sup>Second Circuit: *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D. N.Y. 2003) (decision cited by ACN to Rule 502(d)).

<sup>30</sup>Fifth Circuit: *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil and Gas Corp.*, 2009 WL 464989 (N.D. Tex. 2009) (Rule 502(d) order is not limited to inadvertent disclosures).

In deciding whether to forego privilege review or conduct only a minimal review, lawyers are of course bound by their general ethical obligation to protect confidential client information.<sup>31</sup> They may need to confer with their clients about the costs, risks and benefits of various levels and techniques of privilege review.<sup>32</sup>

Parties need to exercise caution and precision in drafting their proposed Rule 502(d) orders. If the order is intended to exclude the standards of Rule 502(b), it should say so.<sup>33</sup> Otherwise a court may apply the standards of Rule 502(b) by implication.<sup>34</sup> In one case it was held insufficient for the protective order to say that “The Parties agree that the inadvertent production of privileged documents or information shall not, in and of itself, waive any privilege that would otherwise attach to the document or information produced.” This language was construed as incorporating the reasonableness standards of Rule 502(b).<sup>35</sup>

Similarly the order should specify the obligations of the parties once inadvertent disclosure is discovered, such as the time period for asserting the privilege and seeking to reclaim the released documents. It should also specify the procedures for contesting a claim of privilege or work product protection.<sup>36</sup> In absence of such

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<sup>31</sup>ABA Model Rule of Professional Conduct 1.6(a) provides that: “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

<sup>32</sup>See Ann M. Murphy, *Is it Safe? The Need for State Ethical Rules to Keep Pace with Technological Advances*, 81 *Fordham L. Rev.* 1651 (2013).

<sup>33</sup>See Model Draft of a Rule 502(d) Order, 81 *Fordham L. Rev.* 1587 (2012) (“The provisions of Federal Rule of Evidence 502(b)(2) are inapplicable to the production of Protected Information under this Order.”)

<sup>34</sup>Fourth Circuit: *Mt. Hawley Insurance Co. v. Felman Production, Inc.*, 271 F.R.D. 125 (S.D.W.Va. 2010) (agreement was silent on the pre-production obligations of parties so court applied standard of Rule 502(b)).

<sup>35</sup>Third Circuit: *U.S. v. Sensient Colors, Inc.*, 2009 WL 2905474 (D.N.J. 2009) (finding waiver because non-waiver agreement protected only against “inadvertent” production of privileged or protected documents and did not specifically mention a “claw-back” provision which would allow nonreviewed documents to be reclaimed later).

<sup>36</sup>See Model Draft of a Rule 502(d) Order, 81 *Fordham L. Rev.* 1587 (2012) (“If the Receiving Party contests the claim of attorney-client privilege or work product protection, the Receiving Party must—within five business days of receipt of the notice of disclosure—move the Court for an Order compelling disclosure of the information claimed as unprotected (a ‘Disclosure Motion’). The Disclosure Motion must be filed under seal and must not assert as a ground for compelling disclosure the fact or circumstances of the disclosure. Pending resolution of the Disclosure Motion, the Receiving party must not use the chal-

specificity, courts may “default” to the requirements of Rule 502(b).<sup>37</sup>

A well drafted Rule 502(d) order should identify the order as the sole basis for judging whether the privilege is waived by disclosure.<sup>38</sup> Such an order containing procedures agreed to by the parties should reduce the number of discovery disputes and the need for judicial resolution under Rule 502(b).

Selective waiver. Rule 502 does not authorize selective waiver whereby a litigant can waive the privilege as to one party and yet maintain the privilege against the rest of the world.<sup>39</sup> However, the rule is designed to limit privilege waiver, not expand it, and therefore does not overturn the minority of decisions that have allowed selective waiver for disclosure to government agencies.<sup>40</sup>

An earlier version of the Rule contained a provision that would have allowed selective waiver under limited circumstances, but it was deleted from the final version. A court order entered under Rule 502(d) does provide protection for selective disclosure as

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lenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed Disclosure Motion.”).

<sup>37</sup>Fourth Circuit: *U.S. Home Corp. v. Settlers Crossing, LLC*, 2012 WL 3025111 (D.Md. 2012) (where confidentiality order does not “provide adequate detail regarding what constitutes inadvertence, what precautionary measures are required, and what the producing party's post-production responsibilities are to escape waiver, the court will default to Rule 502(b) to fill in the gaps in controlling law”; court finds waiver applying standards of Rule 502(b)).

Ninth Circuit: *Luna Gaming-San Diego, L.L.C. v. Dorsey & Whitney, L.L.P.*, 2010 WL 275083 (S.D.Cal. 2010) (despite existence of a nonwaiver agreement, plaintiff waived privilege not by disclosure but by unreasonable delay in reclaiming of disclosed material already used at a deposition and in support of motion for summary judgment; agreement failed to specify time period for reclaiming privileged material after discovery of its release so court applied standards of Rule 502(b) and found steps taken by plaintiff to rectify the error not to be reasonable).

<sup>38</sup>Seventh Circuit: *Alcon Manufacturing, Ltd. V. Apotex, Inc.*, 2008 WL 5070465 (S.D. Ind. 2008) (when Rule 502(d) establishes its own standards of waiver independent from Rule 502(b), waiver issue will be governed by terms of order; here disclosing party complied with terms of confidentiality order; no waiver).

<sup>39</sup>See Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence (Cong. Rec. H7818, Sept. 8, 2008): [Subdivision (d)] “does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information.”

<sup>40</sup>See § 5:33, *supra*.

Eighth Circuit: *U.S. v. Shyres*, 898 F.2d 647, 757 (8th Cir. 1990) (privilege not waived by voluntary disclosure to government in connection with grand jury investigation).

distinguished from selective waiver. Under such an order, particularly if no privilege review is required, an adversary may in the course of discovery receive documents that are subject to claims of privilege or work-product immunity. The receiving party may claim waiver or use this material in litigation, and by receiving this material the door is not opened to access by third parties. The mere disclosure of this information may have value in settling a case. For this reason allowing such selective disclosure is useful and helps the system function fairly and efficiently. This is likely to be particularly true in governmental enforcement actions where the disclosure of such privileged material may help the the government agency assess the conduct or culpability of a party and facilitate dismissal or settlement of a claim. Such use of the material should not be viewed as involving selective waiver and should not be viewed as prohibited by Rule 502.

Disclosures in state proceedings. Rule 502(c) address disclosures made in state court proceedings. The disclosure does not operate as a waiver in a federal proceeding as long as the disclosure (1) would not be a waiver under Rule 502 if it had been made in a federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred.” The ACN to Rule 502(c) states that the Committee elected to have courts “apply the law that is most protective of privilege and work product”:

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