Final Version, Rule 502, April 13, 2007

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

2 The following provisions apply, under the circumstances set out, to disclosure of a communication
3 or information protected by an attorney-client privilege or as work product.

4 **(a) Scope of a waiver.** — If the disclosure is made in a federal proceeding or to a federal office
5 or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an
6 undisclosed communication or information in any federal or state proceeding only if
7 (1) the waiver is intentional;
8 (2) the disclosed and undisclosed communication or information concern the same subject
9 matter; and
10 (3) they ought in fairness to be considered together.

11 **(b) Inadvertent disclosure.** — If the disclosure is made in a federal proceeding or to a federal
12 office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
13 (1) the disclosure is inadvertent;
14 (2) the holder of the privilege or work-product protection took reasonable steps to prevent
15 disclosure; and
16 (3) the holder took reasonable and prompt steps to rectify the error, including (if
17 applicable) following Fed. R. Civ. P. 26(b)(5)(B).

18 **(c) Controlling effect of court orders.** — A federal court may order that the privilege or work-
19 product protection is not waived by disclosure connected with the litigation pending before the court. The
20 order governs all persons and entities in all federal or state proceedings, whether or not they were parties
21 to the litigation.

22 **(d) Controlling effect of party agreements**. — An agreement on the effect of disclosure is
23 binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

24 **(e) Definitions**. — In this rule:
25 1) "attorney-client privilege" means the protection that applicable law provides for
26 confidential attorney-client communications; and
27 2) "work-product protection" means the protection that applicable law provides for
28 tangible material or its intangible equivalent, prepared in anticipation of litigation or for trial.

29 **(f) Federal or state law as the rule of decision.**— Notwithstanding Rule 501, this rule applies
30 even if state law provides the rule of decision.

31 **(g) State proceedings.** — Notwithstanding Rules 101 and 1101, this rule applies to state

proceedings, under the circumstances set out in the rule.

(h) Disclosures made in a state proceeding. — When the disclosure is made in a state proceeding, is not the subject of an order of the state court, and the disclosed communication or information is offered in a federal proceeding, the disclosure is not a waiver if it:

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

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

Committee Note

This new rule has two major purposes:

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

2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privilege~~d~~ and work product would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the

62 attorney-client privilege or work product protection. Parties to litigation need to know, for
63 example, that if they exchange privileged information pursuant to a confidentiality order, the court's
64 order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in
65 a state court then the burdensome costs of privilege review and retention are unlikely to be
66 reduced.

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

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

77 The rule governs only certain waivers by disclosure. Other common-law waiver doctrines
78 may result in a finding of waiver even where there is no disclosure of privileged information or work
79 product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice
80 of counsel defense waives the privilege with respect to attorney-client communications pertinent
81 to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer
82 malpractice constituted a waiver of confidential communications under the circumstances). The rule
83 is not intended to displace or modify federal common law concerning waiver of privilege or work
84 product where no disclosure has been made.

85 **Subdivision (a).** The rule provides that a voluntary disclosure in a federal proceeding or
86 to a federal office or agency, if a waiver, generally results in a waiver only of the communication
87 or information disclosed; a subject matter waiver (of either privilege or work product) is reserved
88 for those unusual situations in which fairness requires a further disclosure of related, protected
89 information, in order to protect against a selective and misleading presentation of evidence to the
90 disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987)
91 (disclosure of privileged information in a book did not result in unfairness to the adversary in a
92 litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of*
93 *America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work
94 product limited to materials actually disclosed, because the party did not deliberately disclose
95 documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to
96 situations in which a party intentionally puts protected information into the litigation in a selective,
97 misleading and unfair manner. It follows that an inadvertent disclosure of protected information can
98 never result in a subject matter waiver. See Rule 502(b).The rule rejects the result in *In re Sealed*

99 *Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during
100 discovery automatically constituted a subject matter waiver.
101
102 The language concerning subject matter waiver — "ought in fairness" — is taken from Rule
103 106, because the animating principle is the same. A party that makes a selective, misleading
104 presentation that is unfair to the adversary opens itself to a more complete and accurate
105 presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106,
106 completing evidence was not admissible where the party's presentation, while selective, was not
107 misleading or unfair).

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

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

120 The rule opts for the middle ground: inadvertent disclosure of protected communications
121 or information in connection with a federal proceeding or to a federal office or agency does not
122 constitute a waiver if the holder took reasonable steps to prevent disclosure and also took
123 reasonable and prompt steps to rectify the error. This position is in accord with the majority view
124 on whether inadvertent disclosure is a waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574,
125 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.,* 145 F.R.D. 626, 637
126 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D.
127 Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing
128 premises. On the one hand, a communication or information covered by the attorney-client privilege
129 or work product protection should not be treated lightly. On the other hand, a rule imposing strict
130 liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and
131 retention, especially in cases involving electronic discovery.

132 The rule applies to inadvertent disclosures made to a federal office or agency, including
133 but not limited to an agency that is acting in the course of its regulatory, investigative or enforcement

134 authority. The consequences of waiver, and the concomitant costs of pre-production privilege
135 review, can be as great with respect to such disclosures as they are in litigation.

136 Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103,
137 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal.
138 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver– the
139 reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the
140 extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test,
141 because it is really a set of non-determinative guidelines that vary from case to case. The rule is
142 flexible enough to accommodate any of those factors. Other relevant considerations include the
143 number of documents to be reviewed and the time constraints for production. Depending on the
144 circumstances, a holder that uses advanced analytical software applications and linguistic tools may
145 be found to have taken "reasonable steps" to prevent disclosure of protected communications or
146 information. Efficient systems of records management implemented before litigation will also be
147 relevant.

148 The rule does not require the producing party to engage in a post-production review to
149 determine whether any protected communication or information has been produced by mistake.
150 But the rule does require the producing party to follow up on any obvious indications that a
151 protected communication or information has been produced inadvertently.
152
153 The rule is intended to apply in all federal court proceedings, including court-annexed and
154 court-ordered arbitrations.

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

162 **Subdivision (c).** Confidentiality orders are becoming increasingly important in limiting the
163 costs of privilege review and retention, especially in cases involving electronic discovery. *See*
164 *Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear
165 of the consequences of waiver "may add cost and delay to the discovery process for all sides" and
166 that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a
167 'nonwaiver' agreement, which they can adopt as a case-management order."). But the utility of
168 a confidentiality order in reducing discovery costs is substantially diminished if it provides no
169 protection outside the particular litigation in which the order is entered. Parties are unlikely to be
170 able to reduce the costs of pre-production review for privilege and work product if the

consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

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

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

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection in a separate litigation from a finding of waiver by disclosure, the agreement must be made part of a court order.

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

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

206 **Subdivision (f).** The costs of discovery can be equally high for state and federal causes
207 of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether
208 the claim arises under state or federal law. Accordingly, the rule applies to state causes of action
209 brought in federal court.

210 **Subdivision (g).** The protections against waiver provided by Rule 502 must be applicable
211 when disclosures of protected communications or information in federal proceedings are
212 subsequently offered in state proceedings. Otherwise the holders of protected communications and
213 information, and their lawyers, could not rely on the protections provided by the Rule, and the goal
214 of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve
215 any potential tension between the provisions of Rule 502 that apply to state proceedings and the
216 possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by
217 Rules 101 and 1101.

218 **Subdivision (h).** Difficult questions can arise when 1) a disclosure of a communication or
219 information protected by the attorney-client privilege or as work product is made in a state
220 proceeding, 2) the communication or information is offered in a subsequent federal proceeding on
221 the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws
222 are in conflict on the question of waiver. The Committee determined that the proper solution for
223 the federal court is to apply the law that is most protective of privilege and work product. Where
224 the state law is more protective (such as where the state law is that an inadvertent disclosure can
225 never be a waiver), the holder of the privilege or protection may well have relied on that law when
226 making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law
227 of waiver could impair the state objective of preserving the privilege or work-product protection
228 for disclosures made in state proceedings. On the other hand, where the federal law is more
229 protective, applying the state law of waiver to determine admissibility in federal court is likely to
230 undermine the federal objective of limiting the costs of discovery.

231 The rule does not address the enforceability of a state court confidentiality order in a
232 federal proceeding, as that question is covered both by statutory law and principles of federalism
233 and comity. *See* 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same
234 full faith and credit in every court within the United States . . . as they have by law or usage in the
235 courts of such State . . . from which they are taken."). *See also* 6 MOORE'S FEDERAL PRACTICE
236 § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495,
237 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state
238 confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus,
239 a state court order finding no waiver in connection with a disclosure made in a state court
240 proceeding is enforceable under existing law in subsequent federal proceedings.