NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

Report on the Discrepancies between Federal and New York State Waiver of Attorney-Client Privilege Rules

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Prepared by a Subcommittee of the Advisory Group to the New York State-Federal Judicial Council

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The key differences between Federal Rule of Evidence 502 and the New York rules are the focus of this report, with emphasis on 502(a) scope of waiver and 502(b) inadvertent disclosure. This report examines why the Federal and New York approach toward waiver should become more aligned and why New York State would benefit from adopting a rule akin to Federal Rule of Civil Procedure 26(b)(5)(B), which concerns the steps an attorney is required to take after being informed that confidential information has been disclosed in discovery. Our aim is to encourage a consistent set of standards that litigants and counsel can rely on by creating a more predictable legal framework for addressing these issues.

As attorneys, clients and judges are well aware, the looming possibility of disclosing attorney-client privileged or work-product protected material during the course of discovery is a source of great concern. It raises a number of salient issues: will the waiver force the production of other documents that relate to the same subject matter as the disclosed matter? Will an inadvertent disclosure waive privilege? In response to these and other considerations inherent in large scale productions of electronically stored information ("ESI"), Federal Rule of Evidence 502 was enacted in 2008. The purpose of Rule 502 was to address the longstanding disputes about the effect of certain disclosures of communications protected by the attorney-client privilege or as work product and to respond to the widespread complaint that litigation costs necessary to protect against waiver had become prohibitive due to the concern that any disclosure, however innocent or minimal, could operate as a subject matter waiver of all

protected communications or information.[1] Rule 502, which limits the consequences of disclosure of attorney-client communications and attorney work product, was heralded as providing predictability and cost savings for all parties in litigation. Although the Federal courts have continued to grapple with these issues even after the Rule's enactment, Rule 502 nevertheless provides a workable standard that is worthy of incorporation into the New York approach toward waiver.

FEDERAL RULE OF EVIDENCE 502

Federal Rule of Evidence 502 provides, in relevant part:

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

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

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding 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 to be considered together.

[1] FED. R. EVID. 502 advisory committee's note.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).[2]

The two parts of Rule 502 this report focuses on, sections (a) and (b), work in conjunction to create a framework for dealing with the disclosure of attorney-client privileged or work-product protected material.[3] In practice, if a disclosure occurs, the first logical step is to review Rule 502(b) and determine whether the disclosure is "inadvertent." It is noteworthy to mention, and we will come back to this point later in this report, that Federal Rule of Civil Procedure 26(b)(5)(B) is, per the terms of the statute, relevant to analysis of Rule 502(b). If the three factors set forth in Rule 502(b) establish that the disclosure does not operate as a waiver, then there is no need to review the terms of Rule 502(a), which determines what would have been the scope of a waiver. If a waiver however is established under the factors set forth in Rule 502(b), then resort to Rule 502(a) governs the scope of that waiver, and there is a presumption that the waiver does not extend to "undisclosed communication or information" unless the factors in Rule 502(a) are present.

[2] FED. R. EVID. 502 (a) and (b).

[3] Although Federal Rule of Evidence 502 contains additional subsections, we have chosen to focus only on (a) and (b) at this time.

SCOPE OF WAIVER

FEDERAL LAW

Federal Rule of Evidence 502(a)[4] states: "When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding 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 to be considered together."[5]

The enactment of Rule 502(a) eliminated the specter of broad and damaging subject matter waivers, and subsequent interpretations of this section by courts have been consistent with that result. As a starting point, the Advisory Committee that developed the statutory proposal observed that "a subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure 'ought in fairness' to be required in order to protect against a misrepresentation that might arise from the previous disclosure.[6] The Advisory Committee notes to Rule 502(a) state that the intentional disclosure must be made in a "selective, misleading, and unfair manner."[7] In fact, the "ought in fairness" language was taken from Federal Rule of Evidence 106—the "rule of completeness"—because the animating principle was the same: under both Rules 106 and 502(a), a party that makes a misleading presentation

[4] Federal Rule of Evidence 502 ("Attorney-Client Privilege and Work Product; Limitations on Waiver") states that "(T)he following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection." FED. R. EVID. 502.

[5] FED. R. EVID. 502(a).

[6] Report from Advisory Committee to Standing Committee, May 15, 2007, at 3, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/2007-05-Committee_Report-Evidence.pdf.

[7] FED. R. EVID. 502 advisory committee's note.

that is unfair to an adversary opens itself to a more complete and accurate presentation.[8] As one court observed, "[t]he intent of Rule 502(a) was to curtail prior waiver doctrine significantly, limiting subject matter waiver to situations in which a litigant discloses protected information to obtain an advantage in the case, and then invokes the privilege to 'deny its adversary access to additional materials that could provide an important understanding of the privileged materials.'"[9]

What constitutes "same subject matter" is, in essence, a fact-based analysis. While some courts have declined to find a subject matter waiver unless the aforementioned "sword vs. shield" approach was taken,[10] others have determined that this element is not dispositive.[11] What is clear is that Rule 502(a) disfavors broad subject matter waivers, and the concept of fairness limits the scope of waiver.[12] As the court in *Mills v. Iowa* noted, "by requiring a fairness analysis, Congress recognized that there is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties permitting or prohibiting further disclosures."[13] In general, the smaller the amount of privileged information disclosed, the

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[8] *Id.*

[9] *Martin v. State Farm Mut. Auto. Ins. Co*, 3:10-CV-0144, 2011 WL 1297819, at *6 (S.D.W.Va. Apr. 1, 2011).

[10] *See, e.g., United States v. Treacy*, No. S2 08 CR366(JSR), 2009 WL 812033, at *2 (S.D.N.Y. Mar. 24, 2009) (no waiver where disclosure was not used as both sword and shield); *Coleman v. Sterling*, No.09-CV-1594 W(BGS), 2011 WL 2005227, at *3 (S.D. Cal. May 23, 2011) (finding subject matter waiver where summary report of investigation was disclosed and affirmatively used in litigation).

[11] *Bear Republic Brewing Co. v. Central City Brewing Co*., 275 F.R.D. 43, 48-49 (D. Mass. 2011) ("The Advisory Committee Note is not the law, the rule is. . . . It would follow from this body of law that all that is required is that the disclosure be "intentional" as provided in Rule 502(a)(1) and that the additional requirement set forth in the Advisory Committee Notes that the disclosure be made in a 'selective, misleading and unfair manner' is not controlling."); *Mills v. Iowa*, 285 F.R.D 411, 416 (S.D. Iowa 2012) ("While a party's disclosure of privileged matter 'in a selective, misleading and unfair manner' is certainly relevant to the fairness inquiry, it is not essential under the plain language of the rule.").

[12] *Mills*, 285 F.R.D at 416.

[13] *Id.* (internal citations omitted).

narrower the scope of the waiver.[14] A survey of cases analyzing Rule 502(a) reveals that courts have not defined with certainty the boundaries for determining when an undisclosed communication must be produced where it concerns the same subject matter that was disclosed. For the most part, courts have found that documents pertaining to the same circumstances as the disclosed privileged material, including how and at whose direction the material was made or sent, constitute the "same subject matter" for which privilege "ought in fairness" to be waived as well.[15]

What is eminently clear is that Rule 502(a) rejects the idea that subject matter waiver is required whenever there is any disclosure.[16] Instead, Rule 502(a) creates a presumption against subject matter waiver, allowing a court to impose subject matter waiver only in intentional instances of disclosure where fairness so requires.

NEW YORK STATE LAW

In New York, the scope of waiver is governed by the common law because there is no particular provision in the CPLR addressing this topic. As Professor Michael J. Hutter pointed out in a New York Law Journal column, New York courts have reached somewhat different results regarding the question of when a disclosure of attorney-client privileged or work product

[14] *QBE Ins. Corp v. Jorda Enterprises, Inc.,*. 286 F.R.D. 661, 666 (S.D. Fl.2012) (court reasoned that where privileged information was elicited from many attorneys and involved comprehensive reports and memoranda, scope of waiver would be substantial; on the other hand, if only a "two-sentence e-mail" was disclosed, subject matter would be "narrow and discrete").

[15] *See, e.g., Bear Republic Brewing Co.,* 275 F.R.D. at 49-50; *Arizona ex rel. Goddard v. Frito-Lay, Inc.* 273 F.R.D. 545 (U.S.D.C Mar. 7, 2011).

[16] FED. R. EVID. 502 advisory committee's note ("The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir 1989) which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver").

material will waive the privilege for related subject matter.[17] Only a handful of decisions discuss the issue, and there is no Court of Appeals precedent. A few courts have followed what is referred to as the "traditional approach," which adopts a broad view of subject matter waiver, holding that any voluntary disclosure of privileged or protected material constitutes a waiver of privilege as to all other matter on the same subject. [18] This kind of broad waiver is precisely what Rule 502(a) was intended to eliminate. A competing New York State decision holds that this expansive reading of waiver undermines the purpose of the attorney-client privilege and that waiver should apply only to the document at issue,[19] an outcome which more closely mirrors Rule 502(a) and the trend in Federal courts.

INADVERTENCE

FEDERAL LAW

Federal Rule of Evidence 502(b) states: "When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."[20] The rule itself does not define what constitutes "reasonable steps," and there

[17] Michael J. Hutter, *Scope of Waiver Effected by Disclosure of Attorney-Client Privileged Matter*, N.Y.L.J., Aug. 2, 2012, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202565642119.

[18] *See Matter of Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 109 (Sup. Ct. N.Y. Cnty. 2003); *AMBAC Indemn. v. Bankers Trust*, 151 Misc. 2d 334, 340-341 (Sup. Ct. N.Y. Cnty. 1991); *Matter of Baker*, 139 Misc. 2d 573, 576 (Surr. Ct. Nassau Cnty. 1988).

[19] *Charter One Bank v. Midtown Rochester*, 191 Misc. 2d 154, 163-164 (Sup. Ct. Monroe Cnty. 2002).

[20] FED. R. EVID. 502(b).

have been some differences in the interpretation of "reasonableness" for the purposes of Rule 502(b).[21] The Advisory Committee note takes into account the various factors for reasonableness that federal courts looked to prior to the enactment of Rule 502. For example, "the precautions taken, the time to rectify the error, the scope of the discovery, the extent of the disclosure and the overriding issue of fairness."[22] The Advisory Committee note further explains that Rule 502(b) "is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production."[23]

Federal courts have varied somewhat with respect to the level of pre- and post-production effort necessary to constitute "reasonable steps" under Rule 502(b). Issues include reliance on outside document review vendors, use of keyword searches to locate potentially privileged information, the size of a production, the deadline for a production, and document retention policies."[24] Judge Paul Grimm, one of the judges principally responsible for drafting Rule 502, notes that because one of the two major purposes of Rule 502 was to reduce the cost of pre-

[21] Liesa L. Richter, *Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502*, 81 FORDHAM L. REV 1669, 1672 (2013).

[22] FED. R. EVID. 502(b) advisory committee's note.

[23] *Id.*

[24] *See, e.g. Heriot v. Byrne*, 257 F.R.D. 645 (N.D. Ill. 2009) (holding that plaintiffs should not be penalized for errors of its document review vendor, and they had no duty to re-review documents after providing them to a vendor); *Felman Production, Inc. v. Industrial Risk Insurers*, No. 3:09-0481, 2010 WL 294477 (S.D. W.Va. July 23, 2010) (finding that, where approximately 30 percent of more than one million documents were inadvertently disclosed and thousands of attorney-client protected communications were produced, the "ridiculously high number" of irrelevant materials and large volume of privileged communications demonstrated a lack of reasonableness); *S.E.C. v. Badian*, No. 06 Civ. 2621 (LTS)(DFE), 2009 WL 222783, at *4 (S.D.N.Y. Jan. 26, 2009) (privilege waived as to 260 documents inadvertently produced by Rhino, a nonparty, when there was no evidence that it took precautions to prevent production and delayed seeking return of documents for five years); *Rhoads Industries Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008) (noting that, when using keyword searching for privilege review, proper quality-assurance testing or lack thereof is a factor in considering whether precautions have been reasonable).

production review of ESI, it is crucially important that reviewing courts be receptive to the use of search and information retrieval methods that facilitate pre-production review of ESI via computer-based analytical methods, rather than the far more labor-intensive and expensive process of having lawyers review each document.[25] It is also critical to take action quickly upon learning that privileged materials have been produced, and courts have made clear that the important determination is not how long it took to discover the inadvertent production, but how quickly the producing party reacted once this discovery occurred.[26]

Here, it is worthwhile to note that Rule 502(b)—unlike the New York approach—provides a specific example of what represents a reasonable post-production step, that is, "following Federal Rule of Civil Procedure 26(b)(5)(B)," if applicable.[27] Rule 26(b)(5)(B) addresses the handling by a recipient of inadvertently produced privileged documents after the producing party provides notice of the mistaken production. Upon receipt of notice, the receiving party is obliged to "promptly return, sequester, or destroy the specified information and any copies it has; [and] must not use or disclose the information until the claim is resolved."[28] Rule 26b(5)(B) also provides that if the receiving party has already disclosed information before being notified of the claim of privilege, it must take reasonable steps to retrieve the information. Although the Rule 502(b) analysis is, basically, a fact-intensive inquiry which may vary on a

[25] Paul W. Grimm, Lisa Yurwit Begrstrom, & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII RICH. J. L. & TECH. 8, 36-37 (2011).

[26] *Relion, Inc. v. Hydra Fuel Cell Corp*., No. CV 06-607-HU., 2008 WL 5122828 (D. Or. Dec. 4, 2008) (waiver where plaintiff did not assert inadvertent waiver until four months after it had produced emails); *Clarke v. J.P. Morgan Chase & Co*., No. 08 Civ. 02400 (CM)(DF), 2009 WL 970940 (S.D.N.Y. Apr. 10, 2009) (waiver where defendant waited more than two months after discovering disclosure to assert privilege).

[27] FED. R. EVID. 502(b)(3).

[28] FED. R. CIV. P. 26(b)(5)(B).

case-by-case basis, the added step of compliance with Rule 26(b)(5)(B) gives litigants and lawyers concrete guidance as to what factors into the reasonableness determination.

NEW YORK STATE LAW

New York's approach to inadvertent waiver of attorney-client privilege is dictated by common law, which is, fortunately, virtually uniform on this issue. New York State courts have consistently held that an inadvertent disclosure does not automatically result in waiver; rather, a party can avoid a finding of waiver by showing that: (1) the party had no intention to disclose the document and took reasonable steps to prevent any disclosure; (2) the party promptly took reasonable steps to rectify its mistake upon discovery of the disclosure; and (3) the party in possession of the document will not be prejudiced if it cannot use the matter.[29] The New York approach to inadvertent waiver is substantially similar Rule 502(b), though it explicitly includes the issue of whether the party that received the document will be prejudiced.

New York courts have ruled that in order for litigants to avoid waiver, there must be pre- and post-production procedures in place to screen for potential disclosures of privileged or protected matter. In New York, as in the Federal courts, cases addressing the reasonableness of steps taken have looked to the number of documents to be reviewed, the time frame for responding to the discovery request, how much is at stake in the litigation, and the resources of the party establishing the procedure.[30]

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[29] *Manufacturers & Traders Trust v. Servotronics*, 132 A.D. 2d 392, (4th Dept. 1987); *New York Times v. Lherer McGovern Bovis*, 300 A.D. 2d 169, 172 (1st Dept. 2002); *AFA Protective Sys. v. City of New York*, 13 A.D.3d 564, 565 (2d Dept. 2004); *McGlynn v. Grinberg*, 172 A.D. 2d 960 (3d Dept. 1991); *see also* Michael J. Hutter, *Inadvertent Waiver of Attorney-Client Privilege in N.Y. Courts*, N.Y.L.J., Oct. 4, 2012, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202573573016.

[30] *See Bras v. Atlas Constr.*, 153 A.D. 2d 914 (2d Dept. 1989) (screening procedure was inadequate where it only involved removal of communications between counsel and client); *Delta Fin. v. Morrison*, 12 Misc. 3d 807, 810-

BRIDGING THE WAIVER GAP

We believe that making the New York approach to waiver more consistent with Rule 502 would help create greater predictability for litigants and lawyers involved in large-scale e-discovery productions. New York would benefit from the expanded body of case law that tracking Rule 502 would provide, and Rule 502's framework would fit within New York's existing law. In addition, although State and Federal law are already in virtual explicit alignment on the question of what constitutes inadvertence, there is some conflicting State law on the scope of waiver question. We can identify no useful policy reasons that would dictate against greater congruence between the New York and Federal rules; on the contrary, as noted previously, New York case law concerning inadvertent waiver is already consistent with Rule 502. Although it is not always incumbent on State courts to create balance through comity, this is a situation where the potential benefits to litigants warrant action.

Specifically, we recommend that New York codify a rule of evidence that adopts the terminology of Rule 502(a) and (b). Because we are concerned with matters of inadvertent waiver and the scope of waiver, this report focuses specifically only on sections 502(a) and (b), but we note that other states which have adopted Rule 502-type procedures have included, with some modifications, sections (c), (d), (e), and (g) of Rule 5012 as well.[31] The changes we have proposed for a new state statute—Attorney-Client Privilege and Work Product; Limitations on

811 (Sup Ct. Nassau Cnty. 2006) (sufficient screening process).

[31] *See, e.g.* Ark. R. Evid. 502; La. C. Evid. art. 502; Ariz. R. Evid. 502; Iowa R. Evid. 5.502; Wash. E. R. 502; Ind. R. Evid. 502; Tenn. R. Evid. 502; Ill. R. Evid. 502. Rule 502(f) concerns certain matters unique to the Federal court system which do not apply in State Court proceedings.

Waiver Rule—are immaterial insofar as they are intended solely to make Rule 502 apply in a state context, and we therefore do not elaborate on those changes here.[32]

We also submit that New York would benefit from the added protection of a codified rule akin, but not identical, to Federal Rule of Civil Procedure 26(b)(5)(B). We recommend, however, that New York modify Rule 26(b)(5)(B) in certain respects, as addressed further below. These modifications, in part, draw upon the work of the New York State Bar Association Committee on Attorney Professionalism's 2011 Proposed Rule of Professional Conduct 4.4(b), although we recognize that Rule 26(b)(5)(B) and the New York equivalent are not rules of professional conduct.[33] Nonetheless, the subject matter of both Rule 26(b)(5)(B) and Rule 4.4(b) are similar; namely, what are an attorney's obligations after receiving the inadvertent

[32] *See* Annex 1 to this report for a blackline of the text of the proposed New York Attorney-Client Privilege and Work Product; Limitations on Waiver Rule in contrast to Federal Rule of Evidence 502.

[33] The New York State Bar Association Committee, in 2011, proposed a new Rule of Professional Conduct in response to their view that the current Rule 4.4(b) inadequately protects client confidential information. Letter from Marion Hancock Fish, Chair, NYSBA Comm. on Attorney Professionalism, to Joseph E. Neuhaus, Chair, NYSBA Comm. on Standards of Attorney Conduct (July 20, 2011); *see also* James M. Altman, *Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism*, NYSBA JOURNAL, Nov./Dec. 2010, at 20.

production of arguably confidential material.[34] We clarify the substantive modifications we made to Federal Rule 26(b)(5)(B) in turn.[35]

First, we modified the term "trial preparation material" in the first sentence of Federal Rule 26(b)(5)(B) to "work product material," a definition that is more compatible with the CPLR as well as the proposed New York Attorney-Client Privilege and Work Product; Limitations on Waiver proposal. Second, we changed the introductory language of Rule 26(b)(5)(B) in the second sentence from "[a]fter being notified, a party must" to "[a] party who receives notification, or a party who receives information in connection with the representation of a client and knows or reasonably should know that the information was inadvertently sent, shall." The modification—which we adopted in part from New York Rule of Professional Conduct 4.4(b)—alters what triggers an obligation to comply with the rule from one strictly based on receipt of notice from an adversary to one which also looks to whether the receiving attorney had reason to know that produced material is confidential. Third, we struck, for the sake of clarity and brevity, certain language which we thought was superfluous. Thus, we changed the phrase "promptly . . . destroy the specified information and any copies it has" to "promptly . . . destroy the

[34] We acknowledge the on-going questions this issue raises in the context of New York's Rule of Professional Conduct. By way of brief background, following the lead of the American Bar Association, the New York City Bar had concluded that New York ethics rules, then silent on the subject, required attorneys who received inadvertently produced materials to follow a procedure closely analogous to Rule 26(b)(5)(B). ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992); Ass'n of the Bar of the City of New York, Formal Op. 2003-04 (2003). Thereafter, the rules of professional conduct were amended and the current rule only requires a receiving party under those circumstances to "promptly" notify the sender that potentially privileged material was received. New York Rules of Professional Conduct Rule 4.4(b); Model Rules of Professional Conduct Rule 4.4(b). Because the current rule does not require anything further, both the ABA and the City Bar subsequently withdrew their earlier opinions that a receiving party is required to do more. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-437 (2005); Ass'n of the Bar of the City of New York, Formal Op. 2012-1 (2012). We address this matter, as do the Federal Rules of Civil Procedure, as a substantive rule of discovery because, putting aside the ethical consequences of attorney behavior, greater clarity is desirable at the State level on how this situation should be handled by attorneys and currently there is an absence of controlling guidance.

[35] *See* Annex 2 to this report for a blackline of the proposed Modified Rule 26(b)(5)(B) in contrast to Federal Rule of Civil Procedure 26(b)(5)(B).

information" because the word "specified" is not necessary in context and the reference to "any copies" does not really apply to "information" (one has copies of documents, but not information). Fourth, we changed the phrase "for a determination of the claim" to "for a determination of whether the information is privileged or protected as work product material." This proposed terminology is intended to reduce confusion about what the phrase "the claim" actually refers to. All of the other changes we propose are stylistic in nature.

PROPOSED STATUTE AND RULES FOR NEW YORK

This report proposes the adoption or enactment of a statute or rule that sets forth the following:

Attorney-Client Privilege and Work Product; Limitations on Waiver

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

(a) Disclosure Made in a Proceeding or to a State Office or Agency; Scope of a Waiver. When the disclosure is made in a proceeding or to a state office or agency and waives the attorney-client privilege or work-product protection, 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) the disclosed and undisclosed communications or information ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a proceeding or to a state office or agency, the disclosure does not operate as a waiver in a proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedures set forth in [statutory reference to New York's version of federal Rule 26(b)(5)(B)].

(c) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law, including but not limited to CPLR 3101(c), provides for materials prepared in anticipation of litigation or for trial.

Modified Rule 26(b)(5)(B) for New York

If information produced in discovery is subject to a claim of privilege or of protection as work product material, as defined in the Attorney-Client Privilege and Work Product; Limitations on Waiver Rule, the party making the claim may notify any party that received the information of the claim and the basis for it.

A party who receives notification, or a party who receives information in connection with the representation of a client and knows or reasonably should know that the information was inadvertently sent, shall not read the information, or if the party has already begun to do so, shall stop reading the information; shall promptly return, sequester, or destroy the information; shall not use or disclose the information; and shall take reasonable steps to retrieve the information if the party disclosed it before being notified or reasonably knowing that the information was inadvertently sent. A party who receives information in connection with the representation of a client and knows or reasonably should know that the information was inadvertently sent, shall, in addition to the aforementioned requirements, notify the author or sender of the information of its receipt. The receiving party may promptly present the information to the court under seal for a determination of whether the information is privileged or protected as work product material. The producing party must preserve the information until the claim is resolved.

NEW YORK STATE BAR ASSOCIATION'S COMMERCIAL AND FEDERAL LITIGATION SECTION REPORT

We find worthy of mention that in 2007, the New York State Bar Association's Commercial and Federal Litigation Section published a report in response to then-proposed Rule

502.[36] With regard to the scope of waiver question, the Section opposed adoption of Rule 502(a). As to inadvertence, however, the Section supported the adoption of Rule 502(b) and endorsed the position that the inadvertent production of privileged or protected information should not automatically be considered a waiver of privilege. Having considered the Section's commentary, we nevertheless recommend that New York's approach to waiver should follow both Rule 502(a) and 502(b) because, notwithstanding the Section's views, since the publication of that report, there has been an emerging consensus that the benefits of the Rule 502 approach outweigh its disadvantages. In fact, as of the time of this report, a number of states—Arkansas, Louisiana, Arizona, Iowa, Washington, Indiana, Tennessee and Illinois[37]—have adopted rules equivalent to Rule 502 for use in their state courts, and the trend is likely to continue. Recently, in addition to a Rule 502 equivalent, Illinois also adopted a procedural rule modeled on Federal Rule of Civil Procedure 26(b)(5)(B)[38] – something we likewise support.

CONCLUSION

This report emphasizes that New York State would benefit from a predictable, uniform set of standards under which parties can determine the consequences of a disclosure, whether voluntary or inadvertent, of a communication or information covered by attorney-client privilege and work product doctrine. Eliminating unnecessary differences between Federal and State

[36] N.Y. State Bar Ass'n Commercial and Fed. Litig. Section, *Report on Proposed Federal Rule of Evidence 502*, Feb. 15, 2007.

[37] *See* Ark. R. Evid. 502; La. C. Evid. art. 502; Ariz. R. Evid. 502; Iowa R. Evid. 5.502; Wash. E. R. 502; Ind. R. Evid. 502; Tenn. R. Evid. 502; Ill. R. Evid. 502.

[38] Ill. Sup. Ct. R. 201(p) ("If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified each receiving party must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must also preserve the information until the claim is resolved.").

approaches toward waiver would achieve this end and the codification of New York's rules would create valuable guidance in an area where there are still varying degrees of uncertainty.

ANNEX 1

Attorney-Client Privilege and Work Product; Limitations on Waiver

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

(a) Disclosure Made in a ~~Federal~~ Proceeding or to a ~~Federal~~State Office or Agency; Scope of a Waiver. When the disclosure is made in a ~~federal~~ proceeding or to a ~~federal~~**state** office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information ~~in a federal or state proceeding~~ only if:

(1) the waiver is intentional;

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

(3) ~~they~~**the disclosed and undisclosed communications or information** ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a ~~federal~~ proceeding or to a ~~federal~~**state** office or agency, the disclosure does not operate as a waiver in a ~~federal or state~~ proceeding if:

(1) the disclosure is inadvertent;

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

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following ~~Federal~~**the procedures set forth in [statutory reference to New York's version of federal** Rule ~~of Civil Procedure~~ 26 (b)(5)(B)**]**.

(c) ~~Disclosure Made in a State Proceeding.~~ ~~When the disclosure is made in a state proceeding and is not the subject of a state court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:~~

~~(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.~~

~~(d) Controlling Effect of a Court Order.~~ ~~A federal court may order 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.~~

~~(e) Controlling Effect of a Party Agreement.~~ ~~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.~~

~~(f) Controlling Effect of this Rule.~~ ~~Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.~~**~~(g)~~ Definitions.** In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law**, including but not limited to CPLR 3101(c),** provides for ~~tangible material (or its intangible equivalent)~~**materials** prepared in anticipation of litigation or for trial.

ANNEX 2

Modified Rule 26(b)(5)(B) for New York

~~*Information Produced.*~~ If information produced in discovery is subject to a claim of privilege or of protection as ~~trial-preparation material~~**work product material, as defined in the Attorney-Client Privilege and Work Product; Limitations on Waiver Rule**, the party making the claim may notify any party that received the information of the claim and the basis for it. ~~After being notified, a party must~~

A party who receives notification, or a party who receives information in connection with the representation of a client and knows or reasonably should know that the information was inadvertently sent, shall not read the information, or if the party has already begun to do so, shall stop reading the information; shall promptly return, sequester, or destroy the ~~specified~~ information ~~and any copies it has; must~~**; shall** not use or disclose the information ~~until the claim is resolved; must~~**; and shall** take reasonable steps to retrieve the information if the party disclosed it before being notified~~; and~~ **or reasonably knowing that the information was inadvertently sent. A party who receives information in connection with the representation of a client and knows or reasonably should know that the information was inadvertently sent, shall, in addition to the aforementioned requirements, notify the author or sender of the information of its receipt. The receiving party** may promptly present the information to the court under seal for a determination of ~~the claim.~~**whether the information is privileged or protected as work product material.** The producing party must preserve the information until the claim is resolved.