

REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION
REGARDING THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL'S
"REPORT ON THE DISCREPANCIES BETWEEN FEDERAL AND NEW
YORK STATE WAIVER OF ATTORNEY-CLIENT PRIVILEGE RULES"

April 8, 2014

The Commercial and Federal Litigation Section (the "Section") has reviewed the "Report on the Discrepancies between Federal and New York State Waiver of Attorney-Client Privilege Rules" (the "Report") (attached as Exh. A) prepared by the New York State-Federal Judicial Council (the "Council"), which seeks to harmonize certain aspects of federal and New York State practice with respect to questions of the scope of waiver resulting from intentional or inadvertent disclosure of communications protected by the attorney-client privilege or as attorney work product. Specifically, the Report calls for adoption of provisions analogous to (i) Federal Rule of Evidence 502(a) and (b) (which set a standard for assessing the scope of waiver resulting from the intentional and inadvertent waiver of privileged or protected information), and (ii) a modified version of Federal Rule of Civil Procedure 26(b)(5)(B) (which provides an interim procedure for preventing the circulation or use of inadvertently produced information that is claimed to be privileged, while giving the recipient an opportunity to test the claim of privilege). In general, the Section agrees with the policies underlying the Report's recommendations, and further agrees with many of Report's specific recommendations. As described below, however, the Section recommends that such amendments be modified in several respects before final approval.

In preparing its Report, the Council did not write on an empty slate. As the Report notes, in 2007 the Section released a report opposing the adoption of FRE 502(a) by the federal courts (while at the same time favoring the proposed FRE 502(b)). See N.Y. State Bar Ass'n Commercial and Fed. Litig. Section, *Report on Proposed Federal Rule of Evidence 502*, Feb. 15, 2007. After FRE 502 was adopted, the Association's Committee on Civil Practice Law and Rules (the "Standing Committee") proposed an amendment that would have substantially incorporated the language of FRE 502 as a new Section 4549 of the CPLR (attached as Exh. B). In November 2010, the Section issued a report approving the general goals of the Standing Committee's proposal, but noting several concerns about the wording of the Standing Committee's proposal (attached as Exh. C). As that report observed,

"Rule 502 was enacted to promote continuity in the procedures for evaluating the effect of a waiver of privilege, most particularly with respect to questions of subject matter waiver and when an inadvertent disclosure will be deemed to operate as a waiver. Rule 502 does not itself govern whether a communication qualifies as privileged; in the federal courts, that is governed by Rule 501 (which, in turn, looks to state law in those instances where state law provides the rule of decision as to an element of a claim or defense). Rule 502 does, however, set out a rule of procedure applicable in federal courts regarding the effect of a disclosure of a privileged communication, and the extent to which such a disclosure may operate as a waiver of privilege of undisclosed communications.

Because a waiver of privilege in one proceeding may be operative in other proceedings (whether or not related), there are clear benefits to harmonizing the rules governing subject matter waiver and treatment of inadvertent disclosures in both federal and state proceedings, since congruent treatment of these issues in both court systems will generally give litigants and courts a greater degree of certainty and predictability regarding the effect of a disclosure of privileged information. While the principles embodied in Rule 502 are similar to those followed by the New York courts, the adoption of a rule along the lines of the proposed CPLR 4549 would help ensure that questions of waiver will be evaluated in the

same way, regardless of whether the disclosure occurs in a federal or state proceeding. For these reasons, the Section believes such a rule would be a valuable addition to the CPLR.

In the Section's view, these comments remain valid today. In so concluding, we recognize that this position is in some tension with our earlier opposition to the adoption of FRE 502(a) itself. The Section's position in 2007 was based primarily on a concern that the proposed federal rule did not adequately distinguish between the standards applicable to waiver of attorney-client privilege and the substantially narrower waiver principles applicable to attorney work product. This was certainly a valid concern when FRE 502 was simply a proposal, not a rule. However, in the years since FRE 502 was adopted, we are unaware of any significant problems that have emerged in the application of that rule to questions of waiver of work product – indeed, if anything, FRE 502 has probably resulted in a narrowing of the application of subject matter waivers generally. Moreover, as we implicitly recognized in 2010, the adoption of FRE 502 has changed the landscape, and the enactment of a state rule to work in tandem with the existing federal rule should provide litigants with greater predictability in assessing both the risks of intentional waivers and the consequences of inadvertent waivers in any situation where the same privileged information is or may be at issue in both federal and state litigation. For these reasons, the Section agrees that there is a valid place in New York procedural law for an analogue to FRE 502.

The Section further agrees that the costs and risks of handling privileged communications in discovery (and particularly large-scale electronic discovery) will be ameliorated by the adoption of a counterpart to Fed. R. Civ. P. 26(b)(5)(B). Prior to the enactment of the New York Rules of Professional Conduct, City Bar Formal Opinion 2003-4 served a similar function, as it counseled that an attorney who received a communication that the attorney knew or should have known was inadvertently transmitted was ethically obligated to notify the sender of the transmission and return or destroy the subject material (with limited exceptions to permit the recipient to present the material for *in camera* review). However, that opinion was based on ABA Opinion 92-368; and subsequent changes to Rule 4.4 of the ABA Model Rules of Professional Conduct led to the withdrawal of ABA Opinion 92-368. After the adoption of a substantially similar rule in New York (*see* Rule 4.4(b) of the New York Rules of Professional Conduct), City Bar Formal Opinion 2003-04 was effectively withdrawn as well. *See* City Bar Formal Opinion 2012-1. Thus, at this time, the New York Rules of Professional Conduct require only that an attorney who knows or should know that a communication was inadvertently transmitted *notify* the sending party of the transmission, leaving the sending party to whatever remedy they can obtain by agreement or by seeking a protective order. While in many instances counsel will simply agree to return or destroy the material in question, the absence of a clear state rule presents risks of satellite litigation over claims of waiver, as well as risks of potential disqualification if the receiving counsel is found to have made inappropriate use of their adversary's privileged communications.

As the Council's Report notes, New York courts have repeatedly recognized that, so long as a litigant took reasonable measures to preserve the confidentiality of privileged communications, the inadvertent production of privileged material will generally not be deemed a waiver. Given this existing case law, we believe that adoption of a rule comparable to Fed. R. Civ. P. 26(b)(5)(B) would contribute significantly to the goals of reduction of discovery costs and predictability in assessing risks that might result from inadvertent disclosures. We disagree, however, with those portions of the Council's proposal that would incorporate the ethical requirements formerly imposed by City Bar Formal Opinion 2003-4 into New York procedural law. We do so in part because of a reluctance to blur the lines between ethical obligations and discovery procedures. Moreover, we think adoption of the procedure currently found in Rule 26(b)(5)(B) (which permits a producing party, upon learning that a privileged document was inadvertently produced, to require the receiving party to return, destroy, or sequester the document), when combined with the notice obligation presently imposed by the current Rule 4.4(b), strikes a better balance of the rights and obligations of the parties, and avoids imposing undue risk of sanctions on the receiving party – who may, in many instances, not immediately recognize the significance of a document or have legitimate questions as to whether it was inadvertently produced.

While the Section favors the goals of the Council's Report – as well as those of the earlier proposal by the Standing Committee – we have a number of concerns regarding the language proposed by each entity. Those concerns are summarized generally below. The attached Exhibit D sets forth the Section's proposed revisions to the Section 502 proposal; Exhibit E shows changes made from the Standing Committee Proposal. The attached Exhibit F shows the Section's proposed revisions to the Rule 25(b)(5)(B) proposal; Exhibit G shows changes made from the Council's proposal.

Comments on the Council's Proposed Adaptation of FRE 502

(1) In general, we submit that the proposed amendment should conform to and work within the structure of the existing terminology found in the CPLR – specifically, by incorporating references to the CPLR provisions that codify the privilege and protections at issue. The Council's proposed amendment does not attempt to do this. However, the Standing Committee's proposed language does refer to the relevant CPLR provisions (CPLR §§ 3101(c), 3101(d)(2), and 4503); the Section's proposed alternative language follows the Standing Committee's proposal in that respect. Because the Section's proposed language includes specific statutory references to the CPLR provisions codifying the protections at issue, we do not recommend adoption of the definitions of “attorney-client privilege” and “work-product protection” contained in the Council's proposal.

(2) Section (b)(3) of the Council's proposal includes a reference to the proposed analogue of Federal Rule 26(b)(5)(B). In the Section's view this cross-reference is unnecessary. As adopted by the federal courts, Section (b)(3) requires, as a condition for finding that an inadvertent disclosure does not constitute a waiver, the producing party must have “promptly [taken] reasonable steps to rectify the error, including (if applicable) notifying the party receiving the material of the claim of privilege and the basis for its assertion.” A cross-reference to the Council's proposed analogue to Federal Rule 26(b)(5)(B) would add nothing further to the requirements imposed on the producing party, and inclusion of such a cross-reference could give rise to confusion and misinterpretation of the statute.

(3) The Council's proposal apparently does not call for enactment of analogues to Sections (c) through (e) of FRE 502, although the Council's report does note that some states have enacted similar provisions. By contrast, the Standing Committee's proposal includes provisions comparable to FRE 502(c)-(e). In the Section's view, these provisions strengthen the overall proposal and make clearer the ways in which it is intended to operate in tandem with the federal rule; thus, our recommended language includes these provisions with little change.

Comments on the Standing Committee's Proposed Adaptation of FRE 502

(4) The Standing Committee's version purports to state the rule applicable in any federal or state proceeding. *See, e.g.*, Standing Committee proposal, Section 502(a) (“Where material protected by Section 3101(c), 3101(d)(2), or 4503 of this Chapter is disclosed, and such disclosure waives such privilege or protection, the waiver extends to an undisclosed communication or information *in a federal or State proceeding* if [listing the requirements of subsections (1)-(3)]” (emphasis added)). However, while FRE 502 looks to state law for certain purposes, FRE 502(f) expressly provides that “this rule [*i.e.* FRE 502 as a whole] applies even if state law provides the rule of decision.” Moreover, under FRE 502(d), a ruling of a federal court as to whether a disclosure amounts to a waiver has binding effect in subsequent proceedings, regardless of whether they take place in federal or state court. As a result, to the extent that the Standing Committee's proposed CPLR 4549 purports to govern the result of a disclosure that takes place in a federal proceeding, the rule may run afoul of the Supremacy Clause. The Section's proposed rewording eliminates the problematic language.

(5) As noted in comment (1) above, in the Section's view, the amendment should refer specifically to the CPLR provisions codifying the privileges and protections at issue (*i.e.* CPLR Sections 3101(c), 3101(d)(2), and 4503). However, we think the waiver standards codified by this rule should also apply in situations in which a New York State court is confronted with a dispute involving a claim of privilege arising under the laws of another jurisdiction. Accordingly, the Section's proposed language clarifies that sections (a) and (b) apply to disclosures of material "protected by Section 3101(c), 3101(d)(2), or 4503 of this Chapter (*or comparable privileges under the laws of other jurisdictions*).” Conversely, in the Section's view, in actions governed by the CPLR, the same waiver procedures should apply regardless of whether the substantive claims at issue are governed by the laws of another jurisdiction. Our proposed Section (g) is added to clarify this.

(6) FRE 502 provides the procedure for determining the effect of a disclosure of privileged information in federal judicial and administrative proceedings. Extending the results of a Rule 502 analysis to administrative proceedings is beneficial, because otherwise parties that predictably engage in both judicial and administrative proceedings would not know whether federal administrative agencies would respect the waiver determinations made by a federal district court. The Section's intent in proposing its alternative language is that the references to specific CPLR provisions in Sections (a) and (b) should be understood to mean that these waiver principles apply in any judicial and agency proceeding in which the CPLR is applicable. Section (c) of the Section's alternative proposal further specifies that a finding made by a State court as to whether a disclosure will result in a waiver will be binding (to the extent relevant) in any other judicial or agency action or proceeding to which the CPLR applies.

(7) The Standing Committee's proposed Section (e) follows the corresponding Section (e) of FRE 502 in providing that an agreement between the parties as to the effect of a disclosure "is binding only on the parties to the agreement, unless it is incorporated into a court order." We approve of the concept and proposed language of this section. We note, for clarity, that we understand this rule to permit a court to issue such an order *prospectively* – for example, as part of a confidentiality order permitting the parties to enter into such agreements in circumstances where, in the course of discovery, immediate access to the court is not available or is otherwise impractical. Such advance authorization may enable counsel to more readily resolve disputes as to the applicability of privilege or work product protection to particular documents or communications in the not infrequent circumstance where counsel would be willing to disclose an arguably privileged (but inconsequential) communication, provided that such a disclosure would not give rise to a claim of waiver.

(8) Section (a) of the Standing Committee's proposal refers to circumstances where a disclosure waives a "privilege or protection" that might otherwise arise under the CPLR Sections 3101(c), 3101(d)(2), or 4503; Section (b)(2) similarly refers to "privilege or protection." However, Section (b)(3) of the Standing Committee's proposal refers only to "privilege" without referencing "protection". We see no reason for the inconsistency, and our recommended language includes a reference to "protection" in Section (b)(3) as well.

Comments on the Council's Proposed Adaptation of Fed. R. Civ. P. 26(b)(5)(B)

As noted above, the Section generally agrees with the proposal to adopt language comparable to Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure, but we do not agree with those portions of the proposal that would include either the ethical obligation presently imposed by Rule 4.4(b) of the New York Rules of Professional Conduct or the more robust affirmative obligations formerly imposed on a receiving party under City Bar Formal Opinion 2003-4. As a result, the Section's proposed alternative language primarily tracks the relevant provisions of Rule 26(b)(5)(B), with three exceptions:

(i) we have modified the text to refer to CPLR Sections 3101(c), 3101(d)(2), and 4503 (or comparable provisions under the laws of other jurisdictions);

(ii) we have added language to clarify that, once a producing party notifies the receiving party of the inadvertent disclosure, the receiving party shall not read the communication in question. This provision is intended to apply prospectively from the receipt of notice. It would, of course, still permit the receiving party to examine the document to confirm non-privileged information such as the identity of the author, sender, and recipient(s);

(iii) we have changed the reference in Rule 26(b)(5)(B) to submissions “under seal” to refer to submissions “*in camera*,” to avoid any suggestion that such a submission should or must be filed with the clerk of the court.

The Council’s proposal does not include a suggestion as to where to place the proposed amendment (in the CPLR or otherwise). The Section’s proposal calls for the provision to be added as a new subsection (e) to CPLR 3122 (“Objection to Disclosure, inspection, or examination; Compliance”).

Conclusion

For the reasons stated, the Commercial And Federal Litigation Section (1) APPROVES, in concept, the proposals of the New York State-Federal Judicial Council and the Association’s Standing Committee on Civil Practice Law and Rules to amend New York law to include a provision similar to Rule 502 of the Federal Rules of Evidence, and (2) APPROVES, in concept, the proposal of the New York State-Federal Judicial Council to amend New York law to include a provision similar to Rule 26(b)(5)(B), but (3) DISAPPROVES the specific wording of such proposals to the extent provided herein, and instead (4) RECOMMENDS adoption of the alternative language proposed herewith.

Prepared by: The CPLR Committee of the
Commercial And Federal Litigation Section
James Bergin and Tom Bivona, Co-Chairs

EXHIBIT D

THE COMMERCIAL & FEDERAL LITIGATION SECTION'S PROPOSAL FOR A NEW SECTION 4549 OF THE CPLR

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1: The civil practice law and rules is amended by adding a new section 4549 to read as follows:

Attorney-Client Privilege, Material Prepared in Anticipation of Litigation and Work Product; Limitations on Waiver

(a) Scope of Waiver. Where material protected by Section 3101(c), 3101(d)(2) or 4503 of this Chapter (or comparable privileges or protection under the laws of other jurisdictions) is disclosed, and such disclosure waives such privilege or 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) they ought in fairness to be considered together.

(b) Inadvertent disclosure. A disclosure of material protected by Section 3101(c), 3101(d)(2) or 4503 of this Chapter (or comparable privileges or protection under the laws of other jurisdictions) does not operate as a waiver 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) notifying the party receiving the material of the claim of privilege or protection and the basis for its assertion.

(c) When a disclosure is made in a judicial or agency action not governed by this Chapter, or an arbitration, and is not the subject of an order concerning waiver, the disclosure does not operate as a waiver in a judicial action governed by this Chapter if the disclosure:

- (1) would not be a waiver under this rule if it had been made in a judicial action

governed by this Chapter or

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

(d) Controlling effect of a court order. In a judicial action governed by this Chapter, a court may order that the privilege or protection is not waived by a disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other judicial or agency action in which Section 3101(c), 3101(d)(2) or 4503 of this Chapter apply.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a judicial or agency action subject to this Chapter is binding only on the parties to the agreement, unless it is incorporated into an order of the court or agency in which the action takes place.

(f) Nothing in this section shall affect or alter the law with respect to waiver of any privilege not described in subdivision (a) or waiver by means other than disclosure.

(g) Section 4549 applies to judicial actions governed by this Chapter even if the substantive law of another jurisdiction provides the rule of decision therein.

§ 2. This act shall take effect immediately.

EXHIBIT F

THE COMMERCIAL & FEDERAL LITIGATION SECTION'S PROPOSAL FOR A NEW SUBSECTION 3122(e) OF THE CPLR

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1: The civil practice law and rules is amended by adding a new subsection (e) to section 3122 to read as follows:

(e) If information produced in disclosure is subject to a claim of privilege or of protection under Section 3101(c), 3101(d)(2) or 4503 of this Chapter (or comparable privileges under the laws of other jurisdictions), 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 of such a claim shall not read the information; shall promptly return, sequester, or destroy the specified information-and any copies it has; shall not use or disclose the information until the claim is resolved; and shall take reasonable steps to retrieve the information if the party disclosed it before being notified. The receiving party may promptly present the information to the court in camera for a determination of the claim. The producing party must preserve the information until the claim is resolved.