NYSBA

Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #4

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Technology and the Legal Profession.

In August 2020, the Committee on Technology and the Legal Profession adopted a report on Federal Rule of Evidence 502. Congress enacted this Rule in 2008 with the intent to establish a uniform procedure throughout all United States Courts to address the then-growing problem of inadvertent waiver of attorney-client privilege or work product protection.

The Rule, in a nutshell, provides that an inadvertent disclosure made in a federal proceeding or to a federal office or agency does not operate as a waiver in a federal or state proceeding if the person who inadvertently produced the information satisfies three conditions:

(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.

The report recommends that the Administrative Board of the Courts adopt an equivalent to Rule 502, commenting that the Rule, if enacted, would minimize or eliminate costly and time-consuming disputes about waiver of attorney-client privilege and work product protection. The report further notes that Rule 502 has been adopted by several states, including New Jersey, and has a “counterpart of sorts” in the Rules of the Commercial Division of the New York State Supreme Court.

This report was posted for comment in January 2020 and will be presented at the January 28 meeting by committee co-chair Hon. Ronald J. Hedges (ret.).

PROPOSAL TO CONSIDER WHETHER NYSBA SHOULD RECOMMEND THAT ALL NEW YORK COURTS ADOPT THE EQUIVALENT OF FEDERAL RULE OF EVIDENCE 502

SUBMITTED BY THE TECHNOLOGY AND THE LEGAL PROFESSION COMMITTEE OF THE NEW YORK STATE BAR ASSOCIATION

Introduction. In 2008, Congress enacted Federal Rule of Evidence 502 (the "Rule" or "rule").[1] This rule was and is intended to establish a procedure uniform throughout all United States Courts to address a growing problem: inadvertent waiver of the attorney-client privilege or work product protection.

The essence of Rule 502 is to provide that an inadvertent disclosure made in a federal proceeding or to a federal office or agency does not operate as a waiver in a federal or state proceeding if the person who inadvertently produced the information satisfies three conditions:

> (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 ....

See Rule 502(b). Rule 502 also addresses the scope of intentional waiver of privilege or work product protection, but intentional waiver is a secondary focus and has not been materially affected by the

[1] Most provisions of the Federal Rules of Evidence are adopted by the Judicial Conference of the United States with approval by the United States Supreme Court, subject to modification or veto by Congress, but the Rules Enabling Act (made famous to lawyers and law students via the Erie Doctrine) requires that rules of evidence pertaining to privilege must be affirmatively enacted by Congress.

explosion of electronic stored information – commonly called "ESI" – in both personal and business settings.)

Rule 502 has been adopted by a number of states including, most recently, New Jersey (effective July 1, 2020), and has a counterpart of sorts in the Rules of the Commercial Division of the New York Supreme Court. Adoption of an equivalent to Rule 502 statewide in New York would benefit plaintiffs as well as defendants, would benefit individuals as well as entities, and would enable courts and litigants throughout New York to minimize or eliminate costly and time-consuming disputes about waiver of attorney-client privilege and work product protection in the circumstances covered by the rule.

For the reasons discussed below, the Technology and the Legal Profession Committee of the New York State Bar Association ("NYSBA") urges NYSBA to consider whether to recommend that New York civil and criminal courts should adopt an equivalent of Rule 502.

Rule 502. As noted about, Rule 502 was enacted into law in 2008. Here is the text of the rule:

> 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.

(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).

(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 provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The Explanatory Note on the rule, which was prepared by the Federal Judicial Conference Advisory Committee on Evidence Rules (revised Nov. 28, 2007), describes the purpose of Rule 502 (with emphasis added):

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

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

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

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately

disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. *See* Rule 502(b). 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.

The language concerning subject matter waiver—"ought in fairness"—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

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

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

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multifactor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it 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. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent

inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to 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.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. §1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See also Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be 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 is enforceable in other proceedings. *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. *See 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"). The rule provides a party with a predictable protection from a court order—predictability that is needed to allow the party to plan in advance 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.

Under subdivision (d), a federal court may order that disclosure of privileged or protected information "in connection with" a federal proceeding does not result in waiver. But subdivision (d) does not allow the federal court to enter an order determining the waiver effects of a separate disclosure of the same information in other proceedings, state or federal. If a disclosure has been made in a state proceeding (and is not the subject of a state-court order on waiver), then subdivision (d) is inapplicable. Subdivision (c) would govern the federal court's determination whether the state-court disclosure waived the privilege or protection in the federal proceeding.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

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

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

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

Subdivision (g). ***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) ("work product protection extends to both tangible and intangible work product").

[During the legislative process by which Congress enacted legislation adopting Rule 502 (Pub. L. 110–322, Sept. 19, 2008, 122 Stat. 3537), the Judicial Conference agreed to augment its note to the new rule with an addendum that contained a "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence." The Congressional statement can be found on pages H7818–H7819 of the Congressional Record, vol. 154 (September 8, 2008).]

States That Have Adopted Rule 502 In Whole Or Part. A number of states have adopted Rule 502 in whole or in part. These are: Arizona, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, New Jersey, Vermont, Virginia, and Washington. Those states that have not adopted Rule 502 in whole have omitted adoption of Rule 502(d), which allow courts to enter non-waiver orders.

The latest state to adopt an equivalent to Rule 502 is New Jersey, which incorporated the language of Rule 502 into New Jersey Rule of Evidence 530(c). *See* https://njcourts.gov/notices/2020/n200701a.pdf. A law firm described the change in an Internet alert entitled *New Jersey Amends Evidence Rules in Response to Rise of E-Discovery (July 6, 2020):*

> Rule 530 now includes a new paragraph (c) that addresses disclosure of communications or information covered by the attorney-client privilege or work-product protection. New paragraph (c) addresses disclosures made during: (1) state proceedings or to state

agencies or offices; (2) inadvertent disclosures; (3) disclosures made in another forum's proceeding (state or federal); (4) the controlling effect of a court's order; and (5) the controlling effects of party agreements.

For intentional disclosures in a state proceeding or to a state office or agency, the amendment provides that the waiver of the attorney-client or work-product doctrine shall also extend to *undisclosed* communications in a state proceeding if it concerns the same subject matter as the intentional disclosure such that they "ought in fairness to be considered together." N.J.R.E. 530(c)(1)(A)-(C).

For inadvertent disclosures in the same proceedings, the amendment provides that such disclosures do not constitute a waiver of the privilege where the holder of that privilege took reasonable steps to prevent its disclosure and promptly took action to rectify the error. N.J.R.E. 530(c)(2)(A)-(C).

The amendments to Rule 530 also extend these principles to such disclosures made in other forums and those sought to be introduced in New Jersey courts. N.J.R.E. 530(3).

The amendments also create far-reaching implications for court orders concerning disclosures before New Jersey courts. New Jersey courts may now order that where the privilege or protection is not waived by disclosure connected with the litigation pending, the disclosure *also* does not constitute a waiver in any other federal or state court. N.J.R.E. 530(c)(4).

Rule 530 now mirrors Federal Rule of Evidence 502 by providing a safe harbor for clients and attorneys who inadvertently disclose privileged information. New Jersey courts may now consider ample federal case law interpreting the inadvertent disclosure rule. Specifically, in determining whether the privilege was waived, federal courts have considered the reasonableness of the precautions taken, the time taken to rectify the error, the scope of the inadvertent disclosure, and the overriding considerations of fairness. Thus, although New Jersey courts now recognize this safe harbor, the protection is far from absolute because the facts underlying the disclosure will be evaluated in a similar manner to the analysis under federal case law.

Rule 530(c)(4) may prove particularly important to litigants employing confidentiality orders to limit the costs of privilege review, specifically in cases involving electronic discovery. Rule 530(c)(4) tracks Federal Rule of Evidence 502(d). Federal courts throughout the country remain divided on the issue of whether a Rule 502(d) confidentiality order entered in one case is enforceable in other proceedings. Thus, the utility of such confidentiality orders in New Jersey courts may be severely limited if it is determined that they provide no protection outside the particular matter in which the order is entered. [Emphasis added.]

https://www.duanemorris.com/alerts/new_jersey_amends_evidence_rules_response_to_rise_ediscovery_0720.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

What New York Has Done. New York has not adopted an equivalent to Rule 502. However, Rule 202.70 in the Rules of the Commercial Division of the New York Supreme Court has done so, at least in part. Rule 11-g of the Commercial Division Rules ("Proposed Form of Confidentiality Order"), provides:

> The following procedure shall apply in those parts of the Commercial Division where the justice presiding so elects:
>
> > (a) For all commercial cases that warrant the entry of a confidentiality order, the parties shall submit to the Court for signature the proposed stipulation and order that appears in Appendix B to these Rules of the Commercial Division.
> >
> > (b) In the event the parties wish to deviate from the form set forth in Appendix B, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
> >
> > (c) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall utilize the text set forth in Appendix E to these Rules of the Commercial Division. In the event the parties wish to deviate from the language in Appendix E, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.
> >
> > (d) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules.

Rule 11-g[c] refers to Appendix E ("Commercial Division Privilege Clawback Provision"), which provides:

> In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed") the Parties agree as follows:
>
> > a. to implement and adhere to reasonable procedures to ensure Documents Reviewed that are protected from disclosure pursuant to CPLR 3101(c), 3101(d)(2) and 4503 ("Protected Information") are identified and withheld from production.

b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

c. upon request by the Producing Party for the return of Protected Information inadvertently produced the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

Recommendation to NYSBA. We litigate and produce documents to the federal government in a world of increasing volumes, varieties, and velocity of electronically stored information ("ESI"). As the Explanatory Note to Rule 502 described, these characteristics increase the risk of inadvertent production of ESI in response to requests for production of information relevant to a particular action, whether civil or criminal.

Rule 502 should not be viewed in a "zero sum" context in which one side's gain is the opposing side's loss. Rather, Rule 502 benefits all parties by protecting attorney-client privilege and work product materials, and by reducing the expense and delays of discovery battles when materials covered by privilege or work product protection are inadvertently disclosed during litigation.

Nor should Rule 502 be viewed as presumably favoring corporations and other business entities rather than individuals. It is true that business entities today typically have enormous volumes of relevant and discoverable ESI that Rule 502 would protect against inadvertent disclosure, but individual also often possess or control large quantities of ESI (for example, electronic communications between a client and her attorneys, or among her attorneys) that might be inadvertently produced. Likewise, Rule 502 does not favor defendants over plaintiffs, or vice versa. It bestows benefits on all parties, as well as on the Courts and our system of justice as a whole.

And, regardless, collateral disputes between parties about inadvertent waiver consume resources of litigants, their attorneys, and courts that might not yield rulings favored by the producing or a receiving party that sought a ruling on waiver.

All these factors weigh in favor of adoption of a New York equivalent of Rule 502. NYSBA should consider whether to recommend that New York Courts adopt an equivalent to Rule 502. The Committee on Technology and the Legal Profession urges NYSBA to undertake that consideration.