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Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick

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Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick

Henry S. Noyes*

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"The inadvertent production of a privileged document is a specter that haunts every document intensive case."¹

"It is hard to imagine a greater waste of money than paying a lawyer \$250 an hour to look at recipes, notices of the holiday party, and NCAA Final Four pool entries while doing a privilege review."²

I. Introduction

For more than ten years, practitioners, courts, and the federal rulemakers have struggled with the problems posed by discovery of electronic information. The proliferation of email and electronic documents has substantially increased the volume of information that attorneys must cull through to meet their discovery obligations in even the simplest case. In 2006, the Federal Rules of Civil Procedure were amended to address the cost and burden of e-discovery.³ One issue that these e-discovery amendments did not address, however, was the cost and burden incurred by attorneys to review documents before producing them in discovery to ensure that they do not contain attorney-client privileged communications or attorney work product protected information. Federal Rule of Evidence 502 is the last piece of the e-discovery puzzle. This new rule quietly takes the first steps toward federalization of two areas of law that have traditionally been subject to state regulation: the law governing waiver of the attorney-client privilege and the law governing an attorney's duties of professional conduct.

The two quotes above highlight the difficult choice faced by every party and attorney involved in document intensive litigation—to review or not to review. Rule 502 was enacted to reduce the risk of forfeiting the attorney-client privilege or the attorney work product protection during discovery.⁴ The rule

1. *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479–80 (E.D. Va. 1991).

2. John M. Facciola, *Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure*, 2 FED. CTS. L. REV. 57, 64 (2007). The Honorable John M. Facciola is a United States Magistrate Judge in the United States District Court for the District of Columbia.

3. See FED. R. CIV. P. 16(b) (covering the details of a scheduling order that includes provisions for handling electronic discovery); see also AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE at 3, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (discussing the need to address issues involved in electronic discovery).

4. See SEPTEMBER 2007 SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 31 [hereinafter SEPTEMBER 2007 RULES COMMITTEE REPORT], available at <http://www.uscourts.gov/rules/Reports/ST09-2007.pdf> ("The

relieves the parties of the cost and burden of conducting an exhaustive review of information that will be produced in discovery by protecting them against waiver by inadvertent disclosure of privileged information.⁵ Rule 502 contains four principal provisions.⁶ The first provision codifies the view of the majority of courts that inadvertent disclosure of privileged or protected information ordinarily does not waive the privilege or protection.⁷ The second provision limits the scope of a privilege waiver in most instances to the disclosed document, rather than to all documents dealing with the same subject matter as the disclosed document.⁸ The fourth provision permits parties in a federal proceeding to enter into an agreement that disclosure of privileged or protected information by one party to another shall not constitute a waiver for purposes of that proceeding.⁹

proposed new rule is intended to reduce the risk of forfeiting the privilege or protection so that parties need not scrutinize information produced in discovery as much as they now do."). Although this Article uses the term "waiver," I use that term to encompass both a waiver of the privilege and a forfeiture of the privilege. A waiver involves a known privilege that a party intentionally relinquishes. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."). A privilege is forfeited when a party fails to assert it in circumstances that require the assertion of the privilege. *See United States v. Salerno*, 505 U.S. 317, 323 (1992) (discussing when a privilege may be forfeited); *see also Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997) ("We assume that like other privileges, the investigatory privilege can be 'waived' not only in the sense of a voluntary surrender, but also in the sense of forfeiture."); 1 MCCORMICK ON EVIDENCE § 93 (5th ed. 2003 Supp.) ("Finding waiver . . . where the forfeiture of the privilege was not subjectively intended . . . is consistent with the view . . . that the essential function of the privilege is to protect a confidence which, once revealed by any means, leaves the privilege with no legitimate function to perform.").

5. *See* FED. R. EVID. 502(b) (describing how inadvertent disclosure may not operate as a waiver); *see also* S. REP. NO. 110-264, at 1-2 (2008), *available at* http://www.uscourts.gov/rules/S_Rep_110-264.pdf (explaining the costs and risks involved in extensive discovery, exhaustive review, and inadvertent production of privileged documents).

6. *See generally* FED. R. EVID. 502; SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 31 ("Proposed new Rule 502 contains four main provisions."). The full text of FRE 502 is set out in the Appendix, *infra*.

7. *See* FED. R. EVID. 502(b) (describing how inadvertent disclosure may not operate as a waiver); *see also* SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 31 ("The first [provision] codifies the majority view and protects a party from waiving a privilege if privileged or protected information is disclosed inadvertently.").

8. *See* FED. R. EVID. 502(a) (describing the scope of waiver); *see also* SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 31 ("The second [provision] protects a party from waiving a privilege covering all documents dealing with the same subject matter as a document that was disclosed.").

9. *See* FED. R. EVID. 502(e) (detailing the controlling effect of a party agreement); *see also* SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 31 ("The fourth [provision] provides that parties in a federal proceedings can enter into a confidentiality agreement providing for mutual protection against waiver in that proceedings, binding only the parties.").

This Article focuses on the third principal provision, which "is the heart of the new rule."¹⁰ Rule 502(d) provides:

(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.¹¹

This new rule of evidence permits a federal court to issue an order that protects against waiver of the attorney-client privilege or the work product protection despite a party's voluntary, and even intentional, disclosure of such protected or privileged information. This is a radical change in the law of privilege. If Congress and the rulemakers are correct, production of documents without reviewing them for privilege may soon become the dominant practice in large commercial litigation.

In order to be effective, however, entry of an order must relieve the Producing Party's attorneys of their state-imposed professional responsibility obligation to review their client's confidential information before production.¹² Rule 502(d) also must normalize the ethical obligations of the attorney who is the recipient of such a production. This Article identifies and considers the significant (and unforeseen) practical consequences of breaching the protective zone that has previously existed surrounding the states' operation of their own court systems, state rules of procedure, and state rules of professional responsibility.

Part II assesses prior attempts to federalize the law of privilege and notes that these attempts were rejected out of concern for comity, issues of federalism, and the autonomous operation of state courts and state litigation systems.¹³ Part II then considers the history and purpose of Rule 502 and the related e-discovery amendments to the Federal Rules of Civil Procedure.

10. MINUTES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE MEETING OF JUNE 11–12, 2007 at 44 [hereinafter JUNE 11–12 RULES COMMITTEE MINUTES], available at <http://www.uscourts.gov/rules/Minutes/ST06-2007-min.pdf> (statement of Professor Daniel Capra, Reporter for the Advisory Committee on Evidence Rules); see also Kristine L. Roberts, *President Signs Bill Creating New Evidence Rule*, LITIGATION NEWS ONLINE (Sept. 2008), available at http://www.abanet.org/litigation/litigationnews/2008/september/article_legislation.html ("Rule 502(d) 'is the lynchpin for making the rule function'"); *id.* ("Gregory P. Joseph . . . past chair of the Section, says [502(d) is] the 'most critical piece' of the legislation.").

11. FED. R. EVID. 502(d).

12. For ease of reference, I refer to the party who produces documents or otherwise discloses information in a federal proceeding as the "Producing Party" and the party who receives such documents or information as the "Receiving Party."

13. See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501 App. 101[1][b], at 501 App. 23 (Joseph M. McLaughlin & Matthew Bender eds., 1997)

The history of Rule 502 reveals that Congress enacted Rule 502 as an exercise of its Commerce Clause authority.¹⁴ Part III concludes that Rule 502 is not a permissible exercise of Congress's Commerce Clause authority because it regulates activity that is not "economic in nature." Rather, Rule 502 regulates the States' and the state courts' ability to govern their own proceedings—for example, to determine what evidence is admissible in a state court proceeding on a state law cause of action between litigants who are residents of the forum state.¹⁵ This regulation of noneconomic, intrastate activity is not a necessary part of some larger regulatory scheme by which Congress regulates interstate economic activity, and it is therefore outside the scope of Congress's Commerce Clause power. The operation of state courts, the rules of privilege governing state law causes of action, and the rules of professional responsibility are traditional areas of state sovereignty.¹⁶ Part IV concludes that Rule 502 is constitutional only if it is a valid exercise of Congress's Article III authority to ordain and establish the "inferior" courts, bolstered by the Necessary and Proper Clause.¹⁷

Part V considers whether Rule 502 violates the Due Process Clause¹⁸ by making federal court orders binding on the whole world. This Article concludes that entry of a Rule 502(d) order violates the Due Process Clause in certain instances because the order will bind nonparties without giving these nonparties notice and an opportunity to be heard.¹⁹ It also raises significant constitutional questions regarding the authority of a federal court to enter a

(discussing the criticism and resistance resulting from the perceived refusal to honor the state system of privileges and how that goes against the principles of federalism).

14. See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

15. See FED R. EVID. 502(d) (describing how a federal court may order that the privilege not be waived and that a disclosure is not a waiver in any other federal or state proceeding).

16. See Matthew T. Rollins, *Examination of the Model Rules of Professional Conduct Pertaining to the Marketing of Legal Services in Cyberspace*, 22 J. MARSHALL J. COMPUTER & INFO. L. 113, 127 (2003) ("It is well established that the responsibility of regulating the practice of law is an important governmental function that has historically been reserved to the sovereign states.").

17. See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States.").

18. See U.S. CONST. amend. V (setting forth the right to due process of law).

19. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (citations omitted).

discretionary order that controls state courts by precluding them, in state court actions brought by strangers to the federal court litigation, from applying state law to determine what evidence is relevant and admissible in their search for truth.

Part VI identifies several significant questions and problems raised by application of Rule 502(d) that are not resolved by reference to the Rule, the Advisory Committee Notes, the rulemaking history, or the legislative history surrounding the rule. Does Rule 502(d) preempt state rules of professional responsibility that require an attorney to guard a client's secrets at all costs? What limits are there on use of information that is disclosed pursuant to a Rule 502(d) order? Does Rule 502(d) simply shift responsibility for conducting privilege review (and the cost and burden of that review) from the Producing Party to the Receiving Party? May a federal court enter an order with retroactive effect—to put the waiver genie back in the privilege bottle? In analyzing these issues, this Article concludes that Rule 502(d) may be worthless because clients (and attorneys) will be so fearful of the adverse consequences of disclosing clients' private information (even if the privilege is maintained) that they will refuse to disclose documents without first doing a full review of the documents for information that is privileged, protected, confidential, or nonresponsive. Alternatively, if Rule 502(d) preempts state rules of professional responsibility governing client confidences, it will significantly diminish the importance of confidential communications between attorney and client because such information will be regularly disclosed during discovery.

II. The History and Purpose of Federal Rule of Evidence 502

A. Prior Attempts to Federalize the Law of Privilege

Federalization of state privilege law has been considered numerous times—both during enactment of the original Federal Rules of Evidence and since the rules were enacted—but always rejected.²⁰ At each stage in the process, Congress and the rulemakers expressed concern for the relationship between state courts and federal courts and the states' interest in establishing

20. See *infra* notes 36–41 and accompanying text (discussing the multiple attempts to federalize state privilege law and how federalism issues repeatedly led to the rejection of such attempts).

and controlling both the substance and procedure of their respective courts, particularly the introduction of evidence.²¹

The Federal Rules of Evidence were first adopted in 1975.²² The work that led to adoption of the Federal Rules of Evidence was the result of many years of inquiry and investigation and a number of fits and starts. In 1958, the Judicial Conference of the United States approved the creation of the Committee on Rules of Practice and Procedure and its five advisory rules committees.²³ After initial study and input from practitioners, the Special Committee on Evidence recommended to the Standing Committee on Rules of Practice and Procedure in 1963 that the Standing Committee form an advisory committee tasked with drafting formal Rules of Evidence that would be uniform throughout the federal court system.²⁴ The Advisory Committee on Rules of Evidence was appointed in 1965 and began its work that year.²⁵ The very first meeting of the Advisory Committee on Evidence Rules was "devoted to considering the manner in which the Committee should go about its task, plus the dimensions of the task itself, *particularly as it may be affected by problems arising out of the state-federal relationship.*"²⁶

The Advisory Committee's work led to the Proposed Federal Rules of Evidence, which were released as a "Preliminary Draft" in 1969,²⁷ revised in

21. See *infra* notes 36–41 and accompanying text (discussing how Congress and the rulemakers frequently showed deference to the state courts when it came to establishing the rules for such courts, particularly evidentiary rules).

22. See *generally* Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

23. See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON, D.C. SEPTEMBER 17–19, 1958, at 6–7, *available at* http://www.uscourts.gov/rules/Minutes/1958-09-ST-JC_approves_ST_Comm_Adv_Comm.pdf ("After a full discussion the Conference approved the following recommendations of the Committees: (1) That a standing Committee on Rules of Practice and Procedure be created, . . . (2) That five advisory committees be created . . .").

24. See FINAL REPORT OF THE SPECIAL COMMITTEE ON EVIDENCE TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2–3 (Jan. 1963), *available at* <http://www.uscourts.gov/rules/Reports/EV01-1963.pdf> ("[A]n advisory committee [is] to be formed to go forward with the tasks of drafting such rules [of evidence] . . . , which would be uniform throughout the Federal court system.").

25. See Letter from Edward Cleary, Reporter, to the Honorable Albert B. Maris, Chairman, Committee on Rules of Practice and Procedure 1 (Aug. 30, 1966), *available at* <http://www.uscourts.gov/rules/Reports/EV08-1966.pdf> ("The Committee was appointed in the spring of 1965 and held its first meeting in June.").

26. *Id.* (emphasis added); see also 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 4.2.1.c, at 155 (2002) (considering the extent to which federal courts ought to apply state privilege law).

27. See *generally* Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161 (1969). This Preliminary Draft included rules

1971,²⁸ then approved by the Supreme Court.²⁹ In Article V of the Proposed Rules, the Advisory Committee recommended codifying the law of privilege.³⁰ Article V would have established nine express (and exclusive) privileges.³¹ Article V also would have included specific rules addressing "Waiver of Privilege by Voluntary Disclosure"³² and "Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege."³³ Article V was intended to apply in all federal cases, including those in which the federal court was sitting in diversity jurisdiction and therefore applying substantive state law.³⁴

The Supreme Court transmitted the Proposed Rules of Evidence to Congress on February 5, 1973.³⁵ The Supreme Court's submission of the Proposed Rules of Evidence to Congress was very controversial, with most of the controversy surrounding the testimonial privileges in Article V.³⁶ The

governing "Waiver of Privilege By Voluntary Disclosure" and "Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege." *Id.* at 280–81. Preliminary Draft Rule 5-11 provided: "A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter." *Id.* And Preliminary Draft Rule 5-12 provided: "Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege." *Id.*

28. See generally Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates, 51 F.R.D. 315 (1971).

29. See generally Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

30. See *id.* at 230–61 (providing proposed rules 501–513, which, if adopted, would have codified the law of privilege).

31. See *id.* at 234–58 (providing proposed rules 502–510, which, if adopted, would have expressly established nine federal privileges).

32. See *id.* at 258–59 (providing proposed rule 511, which stated that privilege is waived if "the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication").

33. See *id.* at 259–60 (providing proposed rule 512, which stated that "[e]vidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege").

34. See *id.* at 194 (providing proposed rule 101, which set forth the scope and applicability of the proposed rules); *id.* at 347–54 (providing proposed rule 1101, which further defined the scope and applicability of the proposed rules); IMWINKELRIED, *supra* note 26, § 4.2.1.c (discussing the applicability of state privilege law in federal court).

35. See 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5006, at 193–94 (1977) ("Supreme Court's order of promulgation authorized transmission to Congress . . . [on] February 5, 1973.").

36. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 773–79 (2002) ("[Fifty] percent of

proposal "triggered a veritable 'crisis' in the rulemaking process, straining relations between the federal judiciary and Congress."³⁷ In a rare move, Congress rejected Article V in its entirety.³⁸ Among the substantial objections raised by members of Congress were the following: the proposed rules impinged on state-created substantive rights,³⁹ the proposed rules should require federal courts to apply state law on privilege when sitting in diversity jurisdiction because the law on privilege affects substantive state policy,⁴⁰ and the proposed rules should require federal courts to apply state law on privilege even in federal question cases because "failure to recognize the existence of a [state-created] privilege could have an adverse impact on a relationship privileged under state policy and law."⁴¹

In place of Article V, Congress enacted Federal Rule of Evidence 501.⁴² Rule 501 provides that federal courts should develop and recognize testimonial privileges "governed by the principles of [federal] common law as they may be interpreted by the courts of the United States in the light of reason and experience."⁴³ This federal law of privilege governs in federal criminal cases and in federal civil cases in which there are federal question claims.⁴⁴ State law

the complaints . . . related to the section on privileges.' . . . [T]he arguments against the privilege rules were more frequent and more vehement.") (citations omitted).

37. Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 48 (2006).

38. See *id.* at 47–52 ("As enacted, the [Federal Rules of Evidence] . . . omitted all the specific privileges rules proposed by the judiciary in draft Article V."); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87–93 (2003) ("Congress . . . rejected Article V in its entirety.").

39. See COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-52, at 3–4 (1974) (describing how the state-created substantive rights were being impinged).

40. See IMWINKELRIED, *supra* note 26, § 4.2.2.b (discussing the "large number of witnesses [who] took up the theme that . . . federal courts ought to apply state privileges, since privileges affect substantive social policy"); WEINSTEIN & BERGER, *supra* note 13, § 501 App. 101[1][b] (discussing "expressed concern that Rule 501 . . . would 'freeze the law of privilege in the Federal Court,' eliminating the 'flexibility' the courts previously had") (citations omitted).

41. Broun, *supra* note 36, at 775–76; see also *id.* at 776 n.51 (gathering sources supporting the proposition that federal courts should apply state privilege laws).

42. FED. R. EVID. 501.

43. *Id.*

44. *Id.*; see also H.R. REP. NO. 93-1597, at 4 (1974) (Conf. Rep.) (stating that in "nondiversity jurisdiction civil cases, federal privilege law will generally apply"); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 177, at 280–81 (2d ed. 1994 & Supp. 2007) (discussing cases holding that federal testimonial privileges govern even when there are federal and state claims in a single action).

of privilege governs those cases in which a federal court sits in diversity jurisdiction and therefore applies substantive state law.⁴⁵

In late 1998, the Evidence Rules Committee revisited the issue of whether to codify the various privileges.⁴⁶ In the light of substantial disagreement on whether such a proposal would be productive, the Chair appointed a subcommittee to study the issue.⁴⁷ The Committee's decision to act was largely driven by the likelihood that Congress would codify the federal common law of privilege on a piecemeal, case-by-case basis.⁴⁸ The Committee "determined that an overriding look at the privileges in the context of the rulemaking process is a far better way of proceeding than is a patchwork legislative treatment."⁴⁹ The Committee's overriding look focused on studying the codification of the federal common law of privilege as applicable in federal courts.⁵⁰ Federalization of state privilege law was not on the table.⁵¹

Although the Federal Rules of Evidence address the issue of privilege, Congress and the rulemakers had always been careful not to impinge on the substantive state law of privilege. The history of the Federal Rules of Evidence is marked by an abiding concern with comity, issues of federalism, and respect for the autonomous operation of state courts and state litigation systems. Rule 502 marks the first step in federalizing the law of privilege.

45. See FED. R. EVID. 501 ("[Where] State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.").

46. See DECEMBER 1, 1998 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 6, available at <http://www.uscourts.gov/rules/Reports/EV12-1998.pdf> ("The Evidence Rules Committee once again discussed whether it should attempt to propose a codification of the privileges.").

47. See *id.* ("The Chair designated a subcommittee to consider whether a proposed codification of the privileges would be a worthwhile project.").

48. See *id.* (noting how the Evidence Rules Committee was discussing an attempt to propose a codification of the privileges in light of Congressional activity in that area); MAY 1, 1999 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 10 [hereinafter MAY 1999 EVID. COMM. REPORT], available at <http://www.uscourts.gov/rules/Reports/EV05-1999.pdf> ("The Committee, not[ed] that Congress has expressed an interest in codifying privileges on a case-by-case basis.").

49. MAY 1999 EVID. COMM. REPORT, *supra* note 48, at 10.

50. See DECEMBER 1, 1999 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 2, available at <http://www.uscourts.gov/rules/Reports/EV12-1999.pdf> (describing the goal of codifying the federal common law of privileges for adoption by the federal courts).

51. See MAY 1, 2001 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 4, available at <http://www.uscourts.gov/rules/Reports/EV5-2001.pdf> (noting that the proposal would still require federal courts to "apply the state law of privilege in cases where the state law provides the rule of decision").

B. The Cost and Burden of Reviewing Documents for Privilege

Federal Rule of Evidence 502 is largely a reaction to the cost and burden of large scale discovery in commercial litigation. During the discovery phase of federal court litigation, the parties often gather and produce large quantities of documents in response to document requests.⁵² Attorney-client privileged information is beyond the permissible scope of discovery.⁵³ Attorney work product is not beyond the scope of permissible discovery, but it is protected from discovery absent a special and substantial showing.⁵⁴ In order to respond to these document requests, the attorneys for the Producing Party gather potentially responsive documents and review them to ensure that they do not contain privileged or work product protected information. The attorneys for the Producing Party also will avoid producing documents containing privileged or work product protected information because disclosure is likely to waive the privilege and the protection.⁵⁵ This is true regardless of whether the Receiving Party agrees not to disclose the documents to anyone else.⁵⁶

Despite the significant incentives for attorneys to avoid production of privileged or work product protected information, such disclosures inevitably (and inadvertently) happen in some cases.⁵⁷ There are basically three approaches that state and federal courts take when assessing the effect of

52. See FED. R. CIV. P. 34 (allowing litigants to request a broad variety of materials from opponents). Documents also may be requested in conjunction with a deposition and pursuant to a subpoena. See FED. R. CIV. P. 30(b)(2), 45(c)(2) (requiring party deponents to produce items listed in a subpoena duces tecum at the deposition).

53. See FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.").

54. See FED. R. CIV. P. 26(b)(3) (stating that attorney work product includes "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)"). Such information may be discovered if the requesting party establishes that the information is otherwise discoverable and makes a showing that "it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.*

55. See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1424 (3d Cir. 1991) (stating that voluntary disclosure of purportedly privileged material to a third party has long been held to amount to a waiver of the privilege).

56. See *id.* at 1427–28 (declaring that disclosure of privileged material to a third party waives the privilege, even if the third party assures confidentiality); see also *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 478–79 (S.D.N.Y. 1993) (finding that a nonwaiver agreement was not binding on a third party in another civil action).

57. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 267–68 (D. Md. 2008) (holding that attorney client privilege was waived by inadvertent disclosure of privileged documents despite Producing Party's attorney's use of keyword searches to locate and remove potentially privileged documents).

inadvertent disclosure of privileged or protected material: (1) an "intent required" approach whereby the inadvertent disclosure does not constitute a waiver—even with respect to the disclosed information—absent the Producing Party's intent to make a disclosure; (2) a strict liability approach whereby inadvertent disclosure waives the privilege regardless of the level of care taken to protect against disclosure; and (3) a middle road approach whereby inadvertent disclosure *may* waive the privilege depending upon the circumstances, primarily considering (a) the level of care taken to protect against disclosure and (b) the promptness of efforts to provide notice of the disclosure and efforts to retrieve the documents.⁵⁸ The fear of every attorney is that inadvertent production of a single privileged document will lead to a finding of waiver of privilege for that document *and* for every other privileged document on the same subject matter.

The review of documents for privileged or protected information has become increasingly important because the advent of email and electronic storage of documents has drastically multiplied the number of documents that are generated by litigants.⁵⁹ In turn, the need to review these documents to

58. See 8 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE CIV. 2d § 2016.2 (1994) (describing the disparate approaches taken by courts regarding waiver by inadvertent disclosure); see also Memorandum from Ken Broun, Consultant, to Advisory Committee on Evidence Rules 4–6 (October 12, 2005), available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2005-11.pdf> (collecting and discussing cases that illustrate the three basic approaches courts have taken with regard to inadvertent disclosure); Julie Cohen, Note, *Look Before You Leap: A Guide to the Law of Inadvertent Disclosure of Privileged Information in the Era of E-Discovery*, 93 IOWA L. REV. 627, 633–41 (2008) (discussing the three principal approaches to dealing with inadvertent disclosure). See generally John T. Hundley, Annotation, *Waiver of Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. FED. 153 (2005) (analyzing the approaches taken by federal courts regarding inadvertent disclosure and waiver of privilege); John T. Hundley, Annotation, *Waiver of Privilege By Inadvertent Disclosure—Federal Law*, 51 A.L.R.5th 603 (1997) (discussing the approaches taken by state courts regarding inadvertent disclosure and waiver of privilege). Even those courts that are the strongest proponents of the strict accountability doctrine of privilege waiver leave the door open to avoid a finding of waiver when the disclosure is compelled by court order. See *Transamerica Computer Co. v. Int'l Bus. Machs. Corp.*, 573 F.2d 646, 650–51 (9th Cir. 1978) (finding an inadvertent production of a limited number of privileged documents was not a waiver of privilege because the production was "compelled" as a result of the extraordinary circumstances of the accelerated discovery proceedings); see also *Hopson v. Mayor of Balt.*, 232 F.R.D. 228, 244–46 (D. Md. 2005) (declaring that in situations where less than a full privilege review is possible given the extent of the requested material, compliance with a court order compelling production will not result in a waiver of privilege or work product claim).

59. See S. REP. NO. 110-264, at 1 (2008), available at http://www.uscourts.gov/rules/S_Rep_110-264.pdf (describing the dramatic increase in the cost of discovery due to the increased use of e-mail and electronic record keeping); SEPTEMBER 2005 SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22–23 [hereinafter SEPTEMBER 2005 RULES COMM. REPORT], available at <http://www.uscourts.gov/>

protect against the waiver of the attorney-client privilege and attorney work product protection has dramatically increased litigation costs.⁶⁰ If even a single privileged document is inadvertently produced during discovery, the Producing Party may have waived the privilege for that document and any other documents that relate to the same subject matter.⁶¹

Take a very *simple* case with 10,000 pages of documents that are responsive to a reasonable set of document requests. Those documents must be reviewed by an attorney to ensure that they do not contain any privileged or work product protected information. Assume that the first year associate who will conduct the document review is billed out at \$150 per hour. If the average document takes five seconds to review, the document review will take the associate approximately fourteen hours to complete. Putting aside any knotty privilege issues that will need to be run up the chain to more senior (and therefore higher billing) attorneys and the creation of a privilege log, by a very conservative estimate the document review will cost the responding party at least \$2,100. If the number of documents is 1,000,000 pages,⁶² the document review would cost the responding party at least \$210,000.⁶³ These "simple"

rules/Reports/ST09-2005.pdf (discussing the need for changes to discovery rules because of the increased volume of electronically stored information). The Rules Committee report states:

Electronically stored information is characterized by exponentially greater volume than hard-copy documents. Commonly cited current examples of such volume include the capacity of large organizations' computer networks to store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and to receive 250 to 300 million e-mail messages monthly.

Id.

60. See S. REP. NO. 110-264, at 1–2 (2008) (highlighting the danger of inadvertent disclosure to litigants).

61. See *id.* at 2 (stating that a court may find that inadvertent production of a single document amounts to a waiver, not only of that document, but also of all other material relating to the same subject).

62. A standard box holds approximately 5,000 pages of printer paper. A document production of 1,000,000 pages of documents involves about 200 boxes. This is not considered an unusually large document production in commercial litigation. "Even relatively small cases can potentially implicate hundreds of thousands of pages of electronically stored information residing on business information systems that plausibly could be viewed as relevant for discovery purposes under Rule 26 of the Federal Rules of Civil Procedure . . ." Kristine L. Roberts & Mary S. Diemer, *Rule of Evidence 502: Impact on Protective Orders and Subject Matter Waiver*, LITIG. NEWS (American Bar Ass'n, Chi., Ill.), Winter 2009, at 10 (quoting Kent A. Lambert, co-chair of the American Bar Association Litigation Section's Pretrial Practice and Discovery Committee).

63. A recent case involved the use of search terms to narrow the "unmanageable" universe of electronically stored information ("ESI") to a more manageable total document production of 1,400,000 pages. See *generally* Spieker v. Quest Cherokee, L.L.C., No. 07-1225-EFM, 2008 WL 4758604 (D. Kan. Oct. 30, 2008). The court noted that a "reputable third-party vendor"

scenarios assume that the only information contained in a document is visible when reviewed in hard copy. The reality is that most electronic documents contain metadata and other invisible, but very valuable information. If a significant percentage of the production consists of such electronically stored information, the document review might take two or three times as long, with a corresponding increase in cost.

Once the document review is complete, the Producing Party will produce the responsive, nonprivileged, nonprotected documents. Because the risk of waiving the privilege or protection is so great, this encourages the Producing Party to assert "extravagant claims of privilege."⁶⁴ These dubious assertions of privilege and protection often lead to significant attorney time being spent by the producing and the receiving attorneys meeting and conferring regarding the privileged documents and, in many cases, engaging in motion practice to resolve these disputes. Thus, the overall costs incurred to maintain the privilege or work product protection are "often wholly disproportionate to the overall costs of the case."⁶⁵

C. Nonwaiver Agreements

In response to the increasing costs of privilege review and the risks of failing to conduct a thorough privilege review, it has become common for parties to enter into nonwaiver agreements.⁶⁶ A typical nonwaiver agreement

would charge \$82,500 to process the ESI for review and an estimate of an additional \$38,500 to copy the ESI information in TIFF format so that it could be reviewed and coded. *Id.* at *1. Defendant's counsel estimated that the cost to conduct "privilege and relevance" review would be at least \$250,000. *Id.*

64. 154 CONG. REC. H7819 (daily ed. Sept. 8, 2008) (statement of Rep. King) ("The fear of waiver also leads to extravagant claims of privilege."); MINUTES OF THE NOVEMBER 14, 2005 MEETING OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 2, *available at* <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-04.pdf> ("Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege.").

65. S. REP. NO. 110-264, at 2 (2008).

66. *See* Memorandum from Rick Marcus to Advisory Committee on Civil Rules 42-43 (Sept. 15, 2003) [hereinafter 2003 Marcus Memo], *available at* <http://www.kenwithers.com/rulemaking/civilrules/marcus091503a.pdf> (citing *Walsh v. Seaboard Sur. Co.*, 184 F.R.D. 494, 495 (D. Conn. 1999) as an example of a case in which the parties entered into a take-back arrangement without the court's imprimatur). Rule 29 of the Federal Rules of Civil Procedure expressly approves agreements that modify the usual rules of discovery. FED. R. CIV. P. 29. Other agreements that modify the Federal Rules of Civil Procedure are generally enforceable as between the parties to the agreement. *See generally* Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579 (2007).

would allow the Producing Party "to 'take back' inadvertently produced privileged materials if discovered within a reasonable period" without having waived the attorney-client privilege or the attorney work product protection.⁶⁷ The parties to this type of nonwaiver agreement often submit their agreement to the court and request that the court enter it as an order.

Providing for non-waiver of attorney-client privilege and work product protection, both in agreements among the parties, and then in court orders is a fact of life in large litigations today—particularly commercial litigations. Such provisions are commonly found in confidentiality agreements that are submitted to the court that I regularly approve, and so ordered, they occur in cases involving substantial discovery. Indeed it would be uncommon in large cases not to see such a provision in a confidentiality order.⁶⁸

Most courts honor and approve agreements *between the parties to a litigation* that production of privileged and/or work product protected information would not waive the privilege or work product protection *as between those parties*.⁶⁹

67. See *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("[M]any parties to document-intensive litigation 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 privileged documents."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446, at 81 (2004) (describing the use of take-back agreements to protect producing parties from the most serious consequences of inadvertent disclosure); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES (SECOND EDITION): BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Comment 10.a (June 2007), available at http://www.thesedonaconference.org/content/misc/Files/TSC_PRINCP_2nd_ed_607.pdf (describing the use of "claw-back" agreements); *id.* Comment 10.d (describing the use of "quick peek" agreements).

68. *Advisory Committee on Evidence Rules: Hearing on Proposal 502*, at 2 (Apr. 24, 2006) [hereinafter *Hearing on Proposal 502*] (testimony of the Honorable John G. Koeltl), available at http://www.lexisnexis.com/applieddiscovery/lawlibrary/EV_Hearing_April_2006.pdf; see also *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008) (finding that attorney client privilege and attorney work product protection was waived where party initially sought nonwaiver agreement, then abandoned that request and voluntarily produced the documents in discovery despite awareness of possibility of inadvertent disclosure of privileged and protected information).

69. See *Hopson v. Mayor of Balt.*, 232 F.R.D. 228, 234–35 (D. Md. 2005) (collecting cases in which courts have approved nonwaiver agreements between parties, but cautioning of the dangers inherent in this practice); *In re Bridgestone/Firestone, Inc.*, 129 F. Supp. 2d 1207, 1219 (S.D. Ind. 2001) (declaring that in the event a privileged document is inadvertently produced, the Producing Party may request that it be returned and such disclosure will not be deemed a waiver of privilege). But see *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (refusing to give effect to an agreement that production of privileged information would not waive privilege because such an agreement may "lead to sloppy attorney review and improper disclosures that could jeopardize clients' cases"); *In re Columbia/HCA Healthcare Corp.*, 192 F.R.D. 575, 577–78 (M.D. Tenn. 2000) (holding that an agreement to produce documents without waiving privilege is invalid); *Ciba-Geigy Corp. v.*

Where the agreement purports to limit waivers as to third parties, however, courts have been reticent to honor such agreements.⁷⁰ Even when entered as an order of the court, the legal effect of a nonwaiver agreement is uncertain.⁷¹ Courts are not permitted to selectively apply the law of evidence or to alter it by local rule, thus "it is hard to justify a discovery order that purports to have the effect of altering the law of waiver."⁷²

Sandoz Ltd., 916 F. Supp. 404, 411–12 (D.N.J. 1995) (finding that the Producing Party had failed to take reasonable precautions to protect against inadvertent disclosure and therefore waived privilege, notwithstanding an agreement between parties).

70. See *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1426–27 (3d Cir. 1991) (holding that an agreement between litigant and the Department of Justice that documents produced in response to DOJ investigation would not waive privilege does not preserve the privilege against a different entity in an unrelated civil action); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 847 (8th Cir. 1988) (finding that disclosure of protected material to an adversary undermined its confidentiality, waiving the privilege with regard to third parties, despite an agreement between the original litigants); *Griffith v. Davis*, 161 F.R.D. 687, 699–700 (C.D. Cal. 1995) ("[W]aiver occurs despite any agreement by the parties that the information disclosed will remain confidential as against the rest of the world."); *Atari Corp. v. Sega of Am.*, 161 F.R.D. 417, 420 (N.D. Cal. 1994) (stating that voluntary disclosure of privileged material to an adverse party waives that privilege as to third parties, despite confidentiality agreements between the parties); *Bowne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) (finding that a nonwaiver agreement between parties in one case was not applicable to a third party in another case).

71. See *Victor Stanley*, 250 F.R.D. at 255 n.3 (discussing the dangers inherent in using nonwaiver agreements); *Mitchell v. Exide Techs.*, No. 04-2303-GTV-DJW, 2004 WL 2823230, at *1 (D. Kan. Dec. 8, 2004) (refusing to enter a stipulated protective order and noting that "the parties are reminded that orders of a court are binding on parties to the case and cannot bind non-parties; thus, any provision within a proposed protective order stating otherwise is inaccurate"); *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 287–88 (D.D.C. 2002) (holding that attorney work product protection was waived where documents were disclosed to adversaries in prior litigation notwithstanding that such documents were subject to a confidentiality and protective order that provided that the production of such documents would not constitute a waiver of any privilege or protection); *Hartford Fire Ins. Co. v. Guide Corp.*, 206 F.R.D. 249, 259 (S.D. Ind. 2001) (refusing to enter the parties' stipulated protective order that purported to protect against the waiver of privilege because parties could not bind third parties nor restrict their ability to challenge the terms of the order); CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, *reprinted in* 2003 Marcus Memo, *supra* note 66, at 42–43 ("The law is presently murky on whether such agreements do the job, and whether a court order makes a difference in effectuating such agreements.").

72. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5507, at 579 (1986); *see also Hearing on Proposal 502, supra* note 68, at 6–7 (testimony of the Honorable John G. Koeltl) (expressing the need for a change in the rules to provide parties with the ability to agree to nonwaiver and to provide the courts with the ability to adopt controlling orders); CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, *reprinted in* 2003 Marcus Memo, *supra* note 66, at 42–43 (commenting on the desirability of rule changes in the discussion of inadvertent production and waiver of privilege).

The issues raised by inadvertent disclosure of privileged and protected information (and the use of these nonwaiver agreements) are among the most common litigation issues faced by lawyers, judges, and parties who must conduct or respond to significant discovery.⁷³

D. Proposal to Amend the Federal Rules of Civil Procedure

The U.S. Judicial Conference Advisory Committee on Civil Rules (the "Civil Rules Advisory Committee") proposed language to amend Rule 26(b) to address the burden and costs associated with attorney review of documents produced in discovery to protect against inadvertent production of attorney-client privileged communications or attorney work product protected information.⁷⁴ Although these changes were first proposed in 2004, the "privilege waiver problem ha[d] been on the [Discovery] Subcommittee's agenda for a long time"⁷⁵ The significant cost and burden of conducting a

73. See *Hopson*, 232 F.R.D. at 244–46 (discussing the unresolved issues relating to privilege review and nonwaiver agreements). The court stated:

[T]his case highlights significant unresolved issues relating to the nature of privilege review that must be performed by a party producing electronically stored information, whether non-waiver agreements entered into by counsel to permit post-production assertion of privilege are permissible, as well as the application of principles of substantive evidence law related to the waiver of privilege by inadvertent production. These issues, among the most talked about by lawyers, judges, and the parties who are affected by their resolution, have yet to be fully developed by the courts.

Id. at 231–32.

74. See Memorandum from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to the Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 1 (Aug. 3, 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> (describing the meetings and recommendations of the Advisory Committee, including proposed amendments to several rules regarding the discovery of electronically stored information); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 11 (Aug. 3, 2004), [hereinafter PROPOSED E-DISCOVERY AMENDMENTS], available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> (discussing the distinctive features of electronically stored material that give rise to the need for the proposed amendment).

75. CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, reprinted in 2003 Marcus Memo, *supra* note 66, at 24; see also MAY 21, 2003 REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 10, available at <http://www.uscourts.gov/rules/Reports/CV5-2003.pdf> (describing work on e-discovery issues and stating that the Discovery Subcommittee was "[r]eviving a long-simmering and more general project to consider protection against inadvertent privilege waiver—the risks of inadvertent waiver may be multiplied by some forms of computer-based discovery").

full privilege review was first raised with the Discovery Subcommittee of the Advisory Committee on Civil Rules in January 1997.⁷⁶ The Discovery Subcommittee solicited comments and opinions on the subject at various meetings and, in January 1998, it developed two alternative proposals to amend Rule 34(b).⁷⁷ The Discovery Subcommittee offered the following two proposals (both of which would have added new language to Rule 34(b)) to the Civil Rules Advisory Committee in March 1998:

On agreement of the parties, a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an order is entered, it may provide that such initial examination is not a waiver of any privilege.

On agreement of the parties, a court may order that a party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege. The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under this paragraph (b).⁷⁸

These proposals typify the two main types of agreements used by litigants to head off the problem of privilege waiver: "claw-back" agreements and "quick peek" agreements.⁷⁹ Under the quick peek agreement, the parties agree that the

76. See CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, reprinted in 2003 Marcus Memo, *supra* note 66, at 36 (stating that the problem of wasting time reviewing enormous amounts of documents to look for privileged material was first brought before the Subcommittee in 1997).

77. See *id.* at 36–38 (citing the significant interest in the privilege waiver as justification for the Committee to take up the issue).

78. *Id.* at 39.

79. See BARBARA J. ROTHSTEIN ET AL., MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 14–15 (Fed. Jud. Ctr. 2007), available at <http://www.uscourts.gov/rules/eldsckpt.pdf> (stating that parties enter into quick-peek and claw-back agreements to minimize the risk of waiver, and describing what those agreements entail); Laura Catherine Daniel, Note, *The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against Their Codification In The Federal Rules of Civil Procedure*, 47 WM. & MARY L. REV. 663, 666 (2005) ("Parties are increasingly entering into clawback and quick-peek arrangements, which denecessitate a traditional privilege review."); THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, Comment 10.d (Jan. 2004), available at <http://www.thosedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf> (describing claw-back and quick-peek agreements and their increased use); THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 42 (Dec. 2007), available at <http://www.thosedonaconference.org/content/miscFiles/TSC>

Producing Party may produce responsive documents without first reviewing them for privileged or protected information, but specifically reserves and preserves the right to assert the privilege.⁸⁰ The Receiving Party then reviews the documents and selects the documents it wishes to have copied.⁸¹ At this point, the Producing Party carefully reviews this (much narrower) universe of documents that will be formally copied and produced and withholds any documents that are privileged or protected.⁸² Under the claw-back agreement, the Producing Party reviews the documents for privileged or protected information, but the parties "agree to a procedure for the return of privileged or protected information that is inadvertently produced within a reasonable time of its discovery."⁸³

The Civil Rules Advisory Committee studied the problem for an additional five years and considered whether to address, in a rule, the issues that litigants had been addressing with nonwaiver agreements. The Committee expressed particular concern for problems with privilege review in cases involving discovery of electronically stored information.⁸⁴

In August 2004, the Civil Rules Advisory Committee ultimately published for public comment a package of "e-discovery amendments" that did not address the issue of nonwaiver agreements.⁸⁵ Nor did the proposal address the issue of nonwaiver orders.⁸⁶ Instead, the Advisory Committee's proposal would have permitted a party who produced privileged information without intending to waive the privilege to request its return by the other party.⁸⁷

Glossary_12_07.pdf (defining "quick-peek").

80. See ROTHSTEIN ET AL., *supra* note 79, at 14–15 (describing quick peek agreements).

81. *Id.*

82. *Id.*

83. *Id.*

84. See SEPTEMBER 2005 RULES COMM. REPORT, *supra* note 59, at 27 ("The volume of the information and the forms in which it is stored may make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur."). Compare Henry S. Noyes, *Is E-Discovery so Different that it Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585, 617 (2005) (suggesting that electronically stored information may be easier to search and to identify authors and recipients of the information), with *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 257 (D. Md. 2008) (stating that keyword searches may be both over- and under-inclusive).

85. See PROPOSED E-DISCOVERY AMENDMENTS, *supra* note 74, at 8–10, 12–14 (commenting on a package of "e-discovery amendments" without addressing nonwaiver agreements).

86. *Id.*

87. *Id.* at 7–8; see also Noyes, *supra* note 84, at 646–47 (describing how the proposed amendments addressed belated assertions of privilege).

Among other issues, the Civil Rules Advisory Committee was concerned that it lacked power to enact changes to the rules that would affect privilege law and the federalism issues raised by rule changes that would govern privilege law, which has historically been left to the states to address.⁸⁸

The e-discovery amendments to the Federal Rules of Civil Procedure took effect on December 1, 2006.⁸⁹ Federal Rule of Civil Procedure 26 was amended to specify a procedure for resolving disputes regarding privileged or protected information that is produced during discovery.⁹⁰ The amended rule requires that the information be returned to the Producing Party, sequestered, or destroyed until a court can resolve the dispute.⁹¹ The Advisory Committee Notes make clear, however, that the amended rule does not address whether production during discovery waives the privilege or protection.⁹² That decision has been made—and must continue to be made—by courts applying established principles.⁹³

E. Proposal to Amend the Federal Rules of Evidence

In 2006, Representative Jim Sensenbrenner (then Chairman of the House Judiciary Committee) requested that the Judicial Conference study and propose a new federal rule of evidence that would address the problem of privilege waiver and the related rise in discovery costs.⁹⁴ The Evidence Rules Committee prepared a draft Rule 502 and related Committee Note and circulated these proposals to various federal judges, state and federal officials,

88. See DRAFT MINUTES OF JUNE 17–18, 2004 MEETING OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 25, available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2005-01.pdf> ("[P]rivilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.").

89. See Order Amending the Federal Rules of Civil Procedure (Apr. 12, 2006), available at <http://www.supremecourtus.gov/orders/courtorders/frcv06p.pdf> (ordering the electronic discovery amendments to Rules 16, 26, 33, 34, 37, and 45 to take effect on December 1, 2006).

90. See FED. R. CIV. P. 26(b)(5)(B) (prescribing the procedure for dealing with production of purportedly privileged and otherwise protected material during discovery).

91. See *id.* ("After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved.").

92. See *id.* advisory committee's note (stating that the rule does not address whether privilege or protection is waived by production).

93. See *id.* ("The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.").

94. See S. REP. NO. 110-264, at 4 (2008) (discussing the history of the proposed rule to protect privilege in the face of rising discovery costs).

practicing attorneys, and academics for comment.⁹⁵ The Evidence Rules Committee then held a "mini-hearing" on proposed Rule 502 at the Fordham University School of Law.⁹⁶ After making minor modifications, the Evidence Rules Committee unanimously approved proposed Rule 502 and released it for public comment on August 10, 2006.⁹⁷

The Evidence Rules Committee received seventy-three written comments on proposed Rule 502⁹⁸ and held two public hearings at which the Committee heard from more than twenty witnesses.⁹⁹ After making minor amendments, the Evidence Rules Committee voted unanimously in favor of proposed Rule 502, as amended.¹⁰⁰ The Evidence Rules Committee's decision was driven by its conclusion that the review of documents for privileged and protected material was too expensive and too time-consuming. The Committee found that the current federal common law governing waiver of attorney-client privilege and work product protection was problematic because "significant amounts of time and effort are expended during litigation to preserve the privilege, even when many of the documents are of no concern to the

95. See MAY 15, 2007 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 [hereinafter MAY 2007 EVIDENCE RULES COMM. REPORT], available at http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf (describing the comment and drafting process for the proposed draft Rule 502).

96. See generally *Hearing on Proposal 502*, *supra* note 68. The transcript of the mini-hearing and related materials are also available at <http://www.uscourts.gov/rules/advcomm-conference.html>.

97. MAY 15, 2006 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3 [hereinafter MAY 2006 EVIDENCE RULES COMM. REPORT], available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf; see also Memorandum from the Comm. on Rules of Practice and Procedure to the Bench, Bar, and Public 1 (Aug. 10, 2006), available at http://www.uscourts.gov/rules/Memo_Bench_Bar_and_Public_2006.pdf (notifying the public and the profession that proposed Rule 502 is available for comment).

98. See 2006 Evidence Rules Comment Chart, http://www.uscourts.gov/rules/2006_Evidence_Rules_Comments_Chart.htm (last visited Mar. 24, 2009) (compiling the comments received by the Evidence Rules Committee in 2006) (on file with the Washington and Lee Law Review).

99. The Evidence Rules Committee held hearings in Scottsdale, Arizona, on January 12, 2007 and New York City on January 29, 2007. Transcripts for both hearings are available online. See http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf (providing a transcript of the Scottsdale hearing); <http://www.uscourts.gov/rules/2007-01-29-Evidence-Minutes-Transcript.pdf> (providing a transcript of the New York hearing).

100. See MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95, at 5 ("After considering and approving these changes, the Evidence Rules Committee voted unanimously in favor of . . . Proposed Rule 502 as amended from the version issued for public comment.").

Producing Party."¹⁰¹ When responding to document requests, the Producing Party must review all of the documents carefully to ensure that none of the documents contain privileged or protected information. The Committee therefore concluded that a rule that protected against waiver of the privilege or protection would make discovery "more efficient and less costly."¹⁰²

Early drafts provided that Rule 502 would apply uniformly in state and federal proceedings, regardless of where the initial disclosure was made.¹⁰³ Thus, the rule would protect against a disclosure of attorney-client communications first made in a state court proceeding, even when the communication or information was then subsequently offered in a state proceeding and even if the state would otherwise have found a waiver.¹⁰⁴ The Judicial Conference's Committee on Federal-State Jurisdiction raised concerns that such a rule would constitute a "substantial limitation on the authority of state courts to govern their own proceedings."¹⁰⁵ Likewise, the Conference of

101. *Id.* at 2.

102. *Id.*; see also Draft Cover Letter from the Judicial Conference to the U.S. Congress on Proposed Rule 502, at 5 [hereinafter Draft Cover Letter], available at http://www.uscourts.gov/rules/Reports/2007-05-Committee_Report-Evidence.pdf ("Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery.").

103. See Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Comm. on Evidence Rules 17 (Mar. 22, 2006) [hereinafter Broun & Capra 2006 Memo], available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-04.pdf> (noting that the success of a rule governing inadvertent waiver depends on its applicability in both state and federal proceedings, and stating that the rule, as then proposed, was intended to be binding in all courts); see also DRAFT MINUTES OF COMMITTEE ON RULES OF PRACTICE AND PROCEDURE MEETING OF JUNE 22–23, 2006, at 38 [hereinafter 2006 DRAFT RULES COMM. MEETING MINUTES], available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-11.pdf> (noting that the original version of proposed FRE 502 "had a greater effect on state court activity and sought to control state law and state rules on waiver").

104. See Draft Cover Letter, *supra* note 102, at 3 ("The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made.").

105. Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 262–63 (2006) (quoting Letter from the Honorable Howard D. McKibben, Chair, Comm. on Fed.-State Jurisdiction of the Judicial Conf. of the U.S., to the Honorable David F. Levi, Chair, Judicial Conf. Standing Comm. on Rules of Practice and Procedure [hereinafter McKibben Letter] (June 21, 2006) (on file with author)); see also 2006 DRAFT RULES COMM. MEETING MINUTES, *supra* note 103, at 38 (discussing the Committee on Federal-State Jurisdiction's complaint that the proposed rule's effect on state courts was "too broad" and noting that the rule was subsequently amended to cover "only activity occurring in federal court"). The Committee on Federal-State Jurisdiction is charged with analyzing proposed statutory and rule changes that might affect state courts and to "[s]erve as the conduit for communication on matters of mutual concern between the federal judiciary and state courts and their support organizations such as the National Center for State Courts, the Conference of Chief Justices, and the State Justice

State Chief Justices objected "that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are initially made in state proceedings—and even where the disclosed material is then offered in a state proceeding (the so-called 'state to state' problem)." ¹⁰⁶

In response to these concerns, the Advisory Committee narrowed proposed Rule 502. The resulting rule regulated disclosures that were first made at the federal level—whether subsequently offered in state or federal proceedings—but did not regulate disclosures that initially occurred in state court. ¹⁰⁷ The Advisory Committee's narrowing of Rule 502 did not, however, negate all federalism concerns. ¹⁰⁸ As enacted, Rule 502(d) permits a federal court to issue an order permitting intentional disclosure of privileged information in a federal proceeding without waiving the privilege and makes that order binding on nonparties involved in state court actions, as well as the state courts themselves. ¹⁰⁹

[T]he [Judicial Conference's] Federal-State Jurisdiction Committee ultimately reserved judgment even on the pared down version of Rule 502

Institute." Jurisdictional Statements: Jurisdiction of Committees of the Judicial Conference of the United States, http://www.uscourts.gov/judconf_jurisdictions.htm#FederalState (last visited Jan. 30, 2009) (on file with the Washington and Lee Law Review). The Chair has stated:

[The Committee is] involved in that part of the doctrine of 'federalism' that considers the proper role of the federal courts relative to the states and, particularly, the state courts. Our Committee proceeds from the premise that state courts play an essential role in our justice system ably handling questions of both state and federal law.

Committee Protects Federal Courts, Recognizes Unique Nature of State Courts, Interview of The Honorable Frederick P. Stamp, Jr., <http://www.uscourts.gov/ttb/oct02ttb/interview.html> (last visited Jan. 30, 2009) (on file with the Washington and Lee Law Review).

106. Draft Cover Letter, *supra* note 102, at 3; *see also* S. REP. NO. 110-264, at 4 (2008) (noting that the Advisory Committee had to address the federalism concerns expressed by the Conference of State Chief Justices).

107. *See* S. REP. NO. 110-264, at 3–4 (stating that the narrowed version of the rule applied only to disclosures first made at the federal level, whether subsequently offered at either state or federal proceedings).

108. *See* N.Y. STATE BAR ASS'N COMMERCIAL & FED. LITIG. SECTION, REPORT ON PROPOSED FEDERAL RULE OF EVIDENCE 502, at 21–22 (Feb. 13, 2007), *available at* <http://www.uscourts.gov/rules/EV%20Comments%202006-EV-069.pdf> (concluding that the rule is constitutional, but stating "[t]hat the Rule may be constitutional, however, does not make it good policy. As detailed below, federalism concerns remain . . .").

109. *See* Resolution 1 Regarding Waiver Of Attorney Client Privilege and Work Product, Conference of Chief Justices (Aug. 2, 2006), *available at* <http://ccj.ncsc.dni.us/FederalismResolutions/resol1WaiverAttorney-ClientPrivilege.html> ("[P]roposed Rule 502 may conflict with principles of federalism by providing that confidentiality orders by federal courts would bind persons or entities in state proceedings.").

as released for public comment. Some members of the Federal-State Jurisdiction Committee expressed concern that "requiring all states to adhere to a uniform rule based upon the treatment of disclosures in the course of federal litigation may undermine the traditional control that state courts have exercised over the application of waiver rules."¹¹⁰

The Advisory Committee also heard significant complaint during the public comment period that the purpose of the rule would be frustrated "if states were not bound by a uniform federal rule on privilege waiver."¹¹¹ Parties and their attorneys would be afraid that a state court would determine that the privilege had been waived under state law, even though the Federal Rules would find no waiver.¹¹² The Advisory Committee concluded that the failure to include "state to state" protection raised valid concerns, but it decided not to act on them, instead suggesting that Congress should consider whether to legislatively extend the rule to cover the "state to state" problem.¹¹³

Ultimately, both the Advisory Committee on Evidence Rules and the Standing Committee on Rules of Practice and Procedure "recommended that proposed Rule 502 be transmitted directly by the Judicial Conference to Congress for its consideration with a recommendation that it adopt the rule."¹¹⁴ In recommending enactment of Rule 502, the Standing Committee referred explicitly to concern over reducing the costs of litigation: "The proposed new rule facilitates discovery and reduces privilege-review costs by limiting the circumstances under which the privilege or protection is forfeited, which may happen if the privileged or protected information or material is produced in discovery."¹¹⁵

110. Broun & Capra, *supra* note 105, at 264 n.309 (quoting McKibben Letter, *supra* note 105, at 3). Some members of the Committee "took the position that state courts should be free to determine what constitutes a waiver, even when the waiver occurred in an earlier federal proceeding." McKibben Letter, *supra* note 105, at 3.

111. Draft Cover Letter, *supra* note 102, at 4.

112. *See id.* ("[P]arties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.")

113. *See id.* (noting that the comments "raised a legitimate concern," but ultimately deciding to leave their resolution to Congress).

114. SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 32. Professor Kenneth Broun, who serves as a consultant on privileges to the Judicial Conference Advisory Committee on Evidence Rules, and Professor Daniel J. Capra, who serves as Reporter to that Committee, published an article supporting the enactment and adoption of proposed Rule 502. *See generally* Broun & Capra, *supra* note 105. The article represents, of course, the views of Professors Broun and Capra, not the views of the Standing Committee or the Advisory Committee.

115. SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 31.

F. Congressional Action on Federal Rule of Evidence 502

Because Rule 502 alters the substantive law of evidentiary privilege, it must be approved by Act of Congress.¹¹⁶ The Evidence Rules Committee "anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause."¹¹⁷ On behalf of the Judicial Conference of the United States, the Honorable Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure, submitted proposed Rule 502 to the Judiciary Committees of the Senate and the House of Representatives and recommended that Congress adopt and enact the proposed rule.¹¹⁸

On December 11, 2007, Senator Patrick Leahy, Chair of the Senate Judiciary Committee, introduced Senate Bill 2450, which sought to add Rule 502 to the Federal Rules of Evidence.¹¹⁹ The Senate Judiciary Committee reported favorably on the bill, approved it by unanimous consent and recommended its passage.¹²⁰ On February 27, 2008, Senate Bill 2450 passed the Senate without amendment by unanimous consent.¹²¹

In his remarks before the Senate introducing the bill, Senator Leahy stated:

Mr. President, today I hope we pass a bipartisan bill that will go a long way in reducing the costs of litigating disputes in our civil justice system. This bill creates a new Federal Rule of Evidence regarding electronic disclosure of privileged material that would limit the consequences of inadvertent

116. See 28 U.S.C. § 2074(b) (2006) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress."); Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to the Honorable Patrick J. Leahy and the Honorable Arlen Specter 1 (Sept. 26, 2007) [hereinafter 2007 Rosenthal Letter], available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf ("[R]ules governing evidentiary privileges must be approved by an Act of Congress."). "[A] privilege rule proposed through the rulemaking process cannot bind state courts . . ." FED. R. EVID. 502 advisory committee's note.

117. MAY 15, 2006 REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES app. at 5, available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>.

118. See 2007 Rosenthal Letter, *supra* note 116 (submitting proposed Rule 502 to the Senate Judiciary Committee with the recommendation that Congress adopt it); Letter from Lee H. Rosenthal, Chair, Committee On Rules of Practice and Procedure, to The Honorable John Conyers, Jr. and the Honorable Lamar Smith 1 (Sept. 26, 2007), available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf (submitting proposed Rule 502 to the House Judiciary Committee with the recommendation that Congress adopt it).

119. See S. REP. NO. 110-264, at 4 (2008) ("On December 11, 2007, Chairman Leahy introduced S. 2450.").

120. See *id.* at 5 ("[T]he Judiciary Committee considered the legislation [and] approved it by unanimous consent. The Committee reported the bill to the full Senate without amendment.").

121. See 154 CONG. REC. S1317-19 (daily ed. Feb. 27, 2008) (recording the Senate's debate regarding and passage of Senate Bill 2450).

disclosure. The new rule would provide predictability and uniformity in a discovery process that has been made increasingly difficult with the growing use of e-mail and other electronic media. This legislation contains the full text of Judicial Conference recommendations and is supported by all sectors of the legal community.¹²²

The Senate Report accompanying Senate Bill 2540 noted: "Importantly, the bill respects federal-state comity [I]t does not apply to any disclosure made in a state proceeding that is later introduced in a subsequent state proceeding."¹²³

Proposed Federal Rule of Evidence 502 then awaited action before the House of Representatives. Numerous constituencies contacted the House Judiciary Committee to express their support for the rule and to urge Congress to act.¹²⁴ On July 24, 2008, Representative Sheila Jackson-Lee introduced House Bill 6610, a bill adding Rule 502 to the Federal Rules of Evidence.¹²⁵ The House of Representatives suspended its rules and passed Senate Bill 2450 on September 8, 2008.¹²⁶ In her introductory remarks, Representative Jackson-Lee emphasized that the legislation was necessary "to address a growing

122. *Id.* at S1317 (statement of Sen. Leahy).

123. S. REP. NO. 110-264, at 3 (2008).

124. Letters of support came, for example, from the American Bar Association Committee on Governmental Affairs, the American Bar Association Section of Litigation, and the Association of Corporate Counsel. *See* Letter from Denise A. Cardman, Acting Director, Am. Bar Ass'n Gov't Affairs Office, to Comm. on the Judiciary, U.S. House of Representatives (Mar. 21, 2008), available at http://www.abanet.org/poladv/letters/attyclient/2008mar21_fre502govtaffh_1.pdf (expressing the ABA Governmental Affairs Office's support for proposed Rule 502); Letter from Judith A. Miller, Chair, Am. Bar Ass'n Section of Litigation, to Comm. on the Judiciary, U.S. House of Representatives (Mar. 21, 2008), available at http://www.abanet.org/poladv/letters/attyclient/2008mar21_fre502litsech_1.pdf (expressing the ABA Section of Litigation's support for proposed Rule 502); Letter from Susan Hackett, Senior Vice President and General Counsel, Ass'n of Corp. Counsel, to Comm. on the Judiciary, U.S. House of Representatives (Dec. 10, 2007), available at <http://www.acc.com/vl/public/ACCPolicyStatement/loader.cfm?csModule=security/getfile&pageid=16197> (stating the ACC's "strong support of legislation that would enact Proposed Federal Rule of Evidence 502").

125. H.R. 6610, 110th Cong. (2008). During its consideration in the House Judiciary Committee, the committee members raised a number of questions regarding interpretation of proposed Rule 502. *See* 154 CONG. REC. H7818 (daily ed. Sept. 8, 2008) (statement of Rep. Jackson-Lee) (noting that the House Judiciary Committee raised "questions . . . regarding the scope and contours of the effect of the proposed rule"). The Judicial Conference answered these questions satisfactorily, without having to revise the language of proposed Rule 502. *Id.* Upon the request of the House Judiciary Committee, the Judicial Conference "agreed to augment the explanatory note" in order to clarify the Rule's application and interpretation. *Id.*; *see also id.* at H7818-19 (providing the full text of the revised "Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence").

126. *See* 154 CONG. REC. H7820 (daily ed. Sept. 8, 2008) ("[T]he rules were suspended and the Senate Bill was passed.").

problem that is adding inordinate and unnecessary burden, expense, uncertainty, and inefficiency to litigation."¹²⁷

President Bush signed Senate Bill 2450 into law on September 19, 2008.¹²⁸ Federal Rule of Evidence 502 applies to "all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on such date of enactment."¹²⁹

III. Commerce Clause Power

The Evidence Rules Committee anticipated that Congress's power to enact Rule 502 would derive, if at all, from its authority under the Commerce Clause.¹³⁰ Congress may exercise its Commerce Clause authority to regulate three categories of activity:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress'[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.¹³¹

127. *Id.* at H7817 (statement of Rep. Jackson-Lee).

128. *See* Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (2008) (enacting Federal Rule of Evidence 502).

129. FED. R. EVID. 502.

130. *See* MAY 2006 EVIDENCE RULES COMM. REPORT, *supra* note 97, at 9 ("It is . . . anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause."). Professors Spencer and Bellia have each written that Congress's authority to regulate the operation of state courts must derive, if at all, from the Commerce Clause. *See* Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 951 (2001) (noting that Congress has tried to justify its regulation of state courts by invoking "its power to regulate commerce"); A. Benjamin Spencer, *Anti-Federalist Procedure*, 64 WASH. & LEE L. REV. 233, 265-73 (2007) (discussing the various ways in which Congress oversteps its authority in regulating the procedures of state courts). In a 2003 article, Professor Glynn argued that federalizing the entirety of the law of attorney-client privilege was permissible pursuant to Congress's Commerce Clause power. *See* Glynn, *supra* note 38, at 65 (stating that Congress can preempt state law with a federalized attorney-client privilege pursuant to its authority under the Commerce and Supremacy Clauses). During the Rules Committee hearings on proposed Rule 502, Professor Glynn testified that "Congress's power to enact Rule 502, as a preemptive statute, would require that Congress act under its Commerce Clause power, rather than just under its Article 3 power, bolstered by the necessary and proper clause." *Hearing on Proposal 502*, *supra* note 68, at 69.

131. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

This Part concludes that Congress likely exceeded its Commerce Clause authority when it enacted Rule 502. Rule 502 does not regulate either of the first two categories of activity. Rule 502 pertains to neither the channels of interstate commerce nor the instrumentalities of commerce or persons or things in commerce.¹³² Therefore, in order for Congress to have proper authority under the Commerce Clause, Rule 502 must regulate the third category of activity—that which substantially affects interstate commerce. Rather than regulating permissible economic activity, however, Rule 502 intrudes upon the exercise of state sovereignty in an area of the law that is traditionally subject to state regulation and is not part of a larger commercial activity that is regulated by Congress.¹³³

Rule 502 does not regulate economic activity—it regulates the *states'* ability to determine what evidence is discoverable and what evidence is admissible.¹³⁴ Rule 502 is a federal directive that removes from state legislatures and state courts the power to determine the proper balance between the discoverability and admissibility of concededly relevant evidence, on the one hand, and the need to protect certain privileged relationships despite the need for such evidence, on the other.¹³⁵ The Federal Rules of Evidence provide that state law on privilege applies in federal cases based on diversity jurisdiction.¹³⁶ Rule 502 does not replace state law with federal law in this regard. Federal courts will continue to look to state law to determine whether a privilege attaches. Rule 502 leaves up to the state courts the determination whether information is attorney-client privileged or work product protected when its use is relevant in a state court action involving a state law cause of action.¹³⁷ Yet in some cases, Rule 502 removes from the states the ability to

132. See *infra* Part III.A (arguing that neither of the first two categories of activity that can be commercially regulated by Congress are implicated by Rule 502).

133. See *infra* Part III.B (arguing that Rule 502 is not a commercial regulation falling within *Lopez's* third category of commercial activity that can be constitutionally regulated by Congress pursuant to its Commerce Clause power).

134. See *infra* Part III.B (describing why the regulation of evidentiary rules and privileges is not a regulation of economic activity and arguing that Rule 502 impedes on the right of states to set their own evidentiary rules).

135. See *infra* notes 283–89 and accompanying text (noting the ways in which Rule 502 infringes upon state sovereignty, including by precluding states from making localized "value judgments" that form the basis for their laws on privileges).

136. See FED. R. EVID. 501 ("[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.").

137. See FED. R. EVID. 502 advisory committee's note ("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.").

determine when the privilege or protection has been waived by disclosure and the evidence is therefore admissible in a state court action involving a state law cause of action.¹³⁸

A. Rule 502 Does Not Regulate "The Use of the Channels of Interstate Commerce" nor Does It Regulate "The Instrumentalities of Interstate Commerce, or Persons and Things in Interstate Commerce"

In *Pierce County v. Guillen*,¹³⁹ the Supreme Court approved Congress's exercise of its Commerce Clause power to regulate the admission of evidence in state court actions involving state law causes of action.¹⁴⁰ At first glance, *Guillen* appears to support the constitutionality of Rule 502. On closer examination, however, *Guillen*'s lessons are inapplicable. The Supreme Court upheld the statute at issue in *Guillen* because it was enacted by Congress to improve safety in the channels of commerce and to increase protection for the instrumentalities of interstate commerce—concerns reasonably within the first two categories of regulable activity.¹⁴¹ Rule 502, on the other hand, has nothing to do with the channels of commerce, the instrumentalities of interstate commerce or persons and things in commerce. *Guillen* involved the Hazard Elimination Program, a federal program that requires state and local governments, as a condition on the receipt of federal highway funds, to periodically conduct detailed evaluations of the safety of their roads.¹⁴² More specifically, 23 U.S.C. § 152 requires states and municipalities to "undertake thorough evaluation[s] of [their] public roads" in order to compile information regarding existing hazards and recommend potential safety enhancements.¹⁴³

138. See FED. R. EVID. 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with litigation pending before the court—in which event the disclosure is also not a waiver in *any other federal or state proceeding.*") (emphasis added).

139. See *Pierce County v. Guillen*, 537 U.S. 129, 146–47 (2003) (upholding, as a proper exercise of Congress's Commerce Clause authority, a federal statute that protected certain highway safety information from evidentiary discovery and admission).

140. *Id.*; see also Lynn A. Baker, *Lochner's Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727, 738 (2005) (discussing *Guillen* in detail); Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1501–02 (2004) (same).

141. See *Guillen*, 537 U.S. at 132–33 (defining the issue as whether it was "a valid exercise of Congress'[s] authority under the Constitution" to protect from discovery and admission certain evidence derived from "federal highway safety programs").

142. *Id.* at 133.

143. *Id.* Under the statute, state or local governments are required to:

[C]onduct and systematically maintain an engineering survey of all public roads to

Shortly after enactment of the Hazard Elimination Program, the Secretary of Transportation reported to Congress that states were concerned about the program's lack of confidentiality protections.¹⁴⁴ In particular, states feared an increased risk of liability, arguing that their reports would be discovered and used against them in litigation to establish their awareness of hazardous conditions at accident sites.¹⁴⁵ Given the States' concerns, the United States Department of Transportation worried that states would not be "forthcoming and thorough in their data collection efforts," and "recommended the adoption of legislation prohibiting the disclosure of information compiled in connection with the [Hazard Elimination] Program."¹⁴⁶

In response to these concerns, Congress enacted 23 U.S.C. § 409, which protects from discovery or admission into evidence the accident reports and traffic safety information compiled by state and local governments.¹⁴⁷ Congress subsequently amended the statute in 1991 and 1995 to clarify that the protection extended to pretrial discovery¹⁴⁸ and that it included information "collected," as well as information "compiled," pursuant to the Hazard Elimination Program.¹⁴⁹ These limitations on the discoverability and evidentiary use of such information were intended to apply even where a lawsuit was filed in a state court, involved only parties who were residents of that state, and was based entirely on a state law cause of action.¹⁵⁰

The underlying action at issue in *Guillen* was a state law tort action brought in Washington state courts by the wife of Ignacio Guillen (who died in

identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

Id. (quoting 23 U.S.C. § 152(a)(1) (2006)).

144. *Id.* (citing H.R. Doc. No. 94-366, at 36 (1976)).

145. *Id.* at 134.

146. *Id.*

147. *See id.* at 134–36 (describing the initial meaning and subsequent amendment of 23 U.S.C. § 409).

148. *See id.* at 134 (citing the Intermodal Surface Transportation Efficiency Act of 1991, § 1035(a), 105 Stat. 1978, which expressly made the statute applicable to pretrial discovery). *See generally* Intermodal Surface Transportation Efficiency Act of 1991, 23 U.S.C. § 409 (2006).

149. *See Pierce County v. Guillen*, 537 U.S. 129, 134 (2003) (citing the National Highway System Designation Act of 1995, § 323, 109 Stat. 591, which added the phrase "or collected" after the word "compiled" in the statute). *See generally* National Highway System Designation Act of 1995, 23 U.S.C. § 409 (2006).

150. *See Guillen*, 537 U.S. at 143–46 (embracing a broad interpretation of § 409).

an automobile accident) against defendant County of Pierce for negligence in failing to install proper traffic controls at an intersection.¹⁵¹ Plaintiff had challenged the constitutionality of the federal attempts to regulate admission of evidence in state court actions. The Washington Supreme Court held that the § 409 privilege was unconstitutional because it exceeded Congress's authority under the Commerce Clause.¹⁵² Specifically, that court "concluded that § 409 was not an 'integral part' of the regulation of the federal-aid highway system and, thus, could not be upheld under *Hodel v. Indiana*, 452 U.S. 314 [(1981)]."¹⁵³ The Washington Supreme Court noted that recent U.S. Supreme Court decisions recognized a "fundamental respect for state sovereignty"¹⁵⁴ and concluded that the Constitution did not grant Congress "power to intrude upon the exercise of state sovereignty in so fundamental an area of the law as the determination by state and local courts of the discoverability and admissibility of state and local materials and data relating to traffic and accidents on state and local roads."¹⁵⁵

The U.S. Supreme Court disagreed and held that Congress acted properly in regulating "the use of the channels of interstate commerce" and "the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities."¹⁵⁶ The Court's analysis of the specific facts at issue consisted of a single paragraph in which the Court concluded:

Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of § 152 [here, increasing the states and local governments' risk of liability,] would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and ultimately, greater safety on our Nation's roads. Consequently, both the original § 409 and the 1995 amendment can be viewed as legislation aimed at improving safety in the channels of commerce and increasing

151. *Id.* at 137.

152. *Id.* at 139.

153. *Id.* The Washington Supreme Court also found that the statute was not a proper exercise of Congress's authority under the Spending and the Necessary and Proper Clauses of Article I of the United States Constitution. *Id.* Because the U.S. Supreme Court ultimately held that Congress had authority to enact § 409 under the Commerce Clause, it did not decide whether it "could also be a proper exercise of Congress's authority under the Spending Clause or the Necessary and Proper Clause." *Id.* at 147 n.9.

154. *Guillen v. Pierce County*, 31 P.3d 628, 653 (Wash. 2001).

155. *Id.* at 655.

156. *Pierce County v. Guillen*, 537 U.S. 129, 146–47 (2003). In *Guillen*, the Court cited and quoted its decision in *United States v. Lopez*, 514 U.S. 549, 558 (1995). *Id.* *Lopez* is discussed *infra* Part III.B.2.

protection for the instrumentalities of interstate commerce. As such, they fall within Congress'[s] Commerce Clause power.¹⁵⁷

The Supreme Court did not address the question of whether the discoverability and evidentiary use of certain information was economic activity or some sort of economic endeavor.¹⁵⁸ Nor did the Supreme Court address whether the Hazard Elimination Program was a valid exercise of Congress's Commerce Clause power to regulate activity that substantially affects interstate commerce.¹⁵⁹

Rule 502 is unlike the statutes at issue in *Guillen* because Rule 502 plainly does not regulate the use of "the channels of interstate commerce" nor does it regulate the "instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities."¹⁶⁰ *Guillen* addressed statutes that protect the collection of safety data that is used to help keep the roadways open and safe and to permit the states and the federal government to make informed decisions about (and thereby increase protection for) roads and highways.¹⁶¹ Therefore, the Court reasonably concluded that the federal statute improved safety in the channels of commerce and increased protection for the instrumentalities of interstate commerce.¹⁶² Rule 502 can only be sustained as an exercise of Congress's Commerce Clause powers if it regulates activities that substantially affect interstate commerce.

157. *Guillen*, 537 U.S. at 147.

158. See *United States v. Morrison*, 529 U.S. 598, 611 (2000) (stating that for Congress to regulate an activity under the Commerce Clause, it must be some sort of economic activity or endeavor).

159. See *supra* note 157 and accompanying text (explaining the Court's reasoning in *Guillen*); see also *supra* note 131 and accompanying text (discussing the three categories of activity that Congress can properly regulate under the Commerce Clause—one being activity that substantially affects interstate commerce).

160. *Guillen*, 537 U.S. at 146–47.

161. *Id.* at 147. "Congress could reasonably believe that adopting [the statutes] would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.*

162. See *id.* (concluding that the statutes would lead to better safety on the roads—channels of interstate commerce—upon which the instrumentalities of interstate commerce are used).

B. Rule 502 Does Not Regulate Activity that Substantially Affects Interstate Commerce

1. Congress Sought to Enact Rule 502 Pursuant to Its Authority to Regulate Activity that Substantially Affects Interstate Commerce

Rule 502(d) focuses on disclosure of attorney-client privileged or attorney work product protected information of any type, wherever it occurs. It is not limited to privileged or protected information that relates to instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce.¹⁶³ The statements in the rulemaking record and in the legislative record support a conclusion that Congress understood that Rule 502 must be sustained (if it all) as an exercise of Congress's authority to regulate activity that substantially affects interstate commerce.¹⁶⁴

The Evidence Rules Committee took up the issues covered by Rule 502 at the behest of Congress¹⁶⁵ and considered whether Congress had the power under the Commerce Clause to effect changes in the rules of evidence in state courts.¹⁶⁶ The Committee Note to proposed Rule 502 actually contained an explicit reference to the Commerce Clause as the source of legislative authority

163. Cf. *Morrison*, 529 U.S. at 608 ("[The government] seek[s] to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) ("Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."); see generally FED. R. EVID. 502.

164. See *infra* notes 168–71 and accompanying text (discussing Congress's need to convince those who would review the rule during the public comment period that Rule 502 was a proper exercise of its commerce clause power).

165. See S. REP. NO. 110-264, at 4 (2008) (noting that the Judicial Conference referred the task of drafting a proposed rule and deciding its scope to the Advisory Committee on Evidence Rules).

166. See ADVISORY COMMITTEE ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 24–25, 2006, at 54, available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-11.pdf> (stating that the committee had an expert testify about his opinion on Congress's power to enact Rule 502 under the commerce clause).

There may be situations in which state proceedings are so localized that they do not affect interstate commerce, and in those cases a "federalized" waiver rule may be problematic. We chose, however, not to carve out those proceedings in the rule, for at least two reasons: 1) They may not exist; you don't have to go far to affect interstate commerce in a litigation; and 2) If they do exist, they are hard to describe.

for the rule.¹⁶⁷ The Committee included the reference to provide notice to those who reviewed the rule during the public comment period to explain why Congress "could possibly believe it had the authority to promulgate not only a rule of privilege but also a rule that binds state as well as federal courts."¹⁶⁸ The Committee Note compared Rule 502 to the recently enacted Class Action Fairness Act ("CAFA").¹⁶⁹ Congress enacted CAFA pursuant to its authority to regulate activity that substantially affects interstate commerce and Congress made specific findings that abuse of the class action device substantially and negatively affected commerce.¹⁷⁰

Statements in the Senate Report that accompanied Rule 502 reveal Congress's reasoning that making the discovery process more efficient and cost-effective was the motivating factor behind the Rule.¹⁷¹ In contrast to the

167. See MAY 2006 EVIDENCE RULES COMM. REPORT, *supra* note 97, at 9 (discussing Rule 502's enactment). The Report states:

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C. § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause.

Id. The Committee Note reference to the Commerce Clause was subsequently removed and the final version of the Rule and the accompanying Committee Note does not specify the source of the legislative authority. See FED. R. EVID. 502 (stating nothing about the Commerce Clause or the source of legislative authority to enact Rule 502); see also Broun & Capra 2006 Memo, *supra* note 103, at 34–35 ("[T]he above paragraph in the Committee Note is intended to serve a (perhaps temporary) notice function that arguably is necessary given the unique provenance of the rule.").

168. Broun & Capra 2006 Memo, *supra* note 103, at 34–35. Professor Timothy Glynn argued in a 2002 Article that federalizing the entirety of the law of attorney client privilege was permissible pursuant to Congress's Commerce Clause power. See generally Glynn, *supra* note 38. During the hearings on proposed Rule 502, Professor Glynn testified that "Congress's power to enact Rule 502, as a preemptive statute, would require that Congress act under its Commerce Clause power, rather than just under its Article 3 power, bolstered by the necessary and proper clause." *Hearing on Proposal 502*, *supra* note 68, at 69. After the period of public comment, the Committee removed the reference to the Commerce Clause because the Committee Note was intended as "a guide for practitioners and the courts' and not an explication of the authority for promulgating the rule." Broun & Capra 2006 Memo, *supra* note 103, at 34. The rulemakers believed that Congress must speak for itself on the issue of Congressional power to enact Rule 502. *Id.*

169. See Broun & Capra 2006 Memo, *supra* note 103, at 34–35 (comparing rule 502 to the Class Action Fairness Act, which relies on the Commerce Clause to regulate state class actions); see also MAY 2006 EVIDENCE RULES COMM. REPORT, *supra* note 97, at 9 (same).

170. See Class Action Fairness Act of 2005 § 2(a)(2), 28 U.S.C. § 1711 (2006) (finding that abuses of the class action device have "adversely affected interstate commerce" and undermine "the free flow of interstate commerce").

171. See S. REP. NO. 110-264, at 1–2 (2008) ("Outdated law affecting inadvertent disclosure coupled with the stark increase in discovery materials has led to dramatic litigation

specific findings in CAFA, however, neither Rule 502 nor the accompanying Senate Report mention commerce (interstate or otherwise), and they make no findings regarding the effects on interstate commerce of waiver of privilege, disclosure of privileged information, or the burden and cost of privilege review.¹⁷²

2. *The Current Analytical Framework for Assessing the Exercise of Commerce Clause Power over Activity that Substantially Affects Interstate Commerce*

The analytical framework for assessing the exercise of Congress's Commerce Clause power over activity that substantially affects interstate commerce derives from three recent Supreme Court decisions: *United States v. Lopez*,¹⁷³ *United States v. Morrison*,¹⁷⁴ and *Gonzales v. Raich*.¹⁷⁵

In *Lopez*, the Supreme Court assessed Congress's power to enact the Gun-Free School Zones Act of 1990 (GFSZA), which made it a federal criminal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁷⁶ The Court held that the GFSZA was unconstitutional because it violated the Commerce Clause.¹⁷⁷

In assessing Congress's actions as a regulation of activity that substantially affects interstate commerce, the Court first noted that the GFSZA contains "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."¹⁷⁸ Such a

cost increases."); *see also id.* at 2 ("[T]he costs of privilege review are often wholly disproportionate to the overall cost of the case.").

172. *See generally id.* (failing to mention interstate commerce in the report).

173. *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun Free School Zones Act was not a constitutional use of Congress's power under the Commerce Clause).

174. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the Violence Against Women Act was not a constitutional use of Congress's power under the Commerce Clause).

175. *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (holding that the Controlled Substances Act was a constitutional use of Congress's power under the Commerce Clause).

176. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (2006).

177. *See Lopez*, 514 U.S. at 551 (holding that the statute was not a valid exercise of Congress's power under the Commerce Clause).

178. *Id.* at 561; *see also Morrison*, 529 U.S. at 611–12 (noting that the statute in *Lopez* contained "no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce").

requirement likely would have saved the GFSZA by making proof of the jurisdictional prerequisite a necessary element of the offense, thus limiting the scope of the GFSZA. Similarly, the Court noted that Congress had made no legislative findings (and no congressional committee findings) regarding the regulated activity's effect on interstate commerce.¹⁷⁹

The Supreme Court then turned to the task of assessing whether the aggregate impact of possession of firearms in school zones substantially affects interstate commerce. The Supreme Court described its decision in *Wickard v. Filburn*¹⁸⁰ as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"¹⁸¹ In *Wickard*, the Court assessed the constitutionality of a federal statute that allowed the Secretary of Agriculture to establish quotas for wheat production so as to "control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequently abnormally low or high wheat prices and obstructions to commerce."¹⁸² The question in *Wickard* arose because the statute extended federal regulation to production of wheat that was not intended for sale but was, instead, intended solely for consumption and use by the farmer who grew the wheat.¹⁸³ The Court noted that the nature of the wheat production at issue was economic activity because "[h]ome grown wheat . . . competes with wheat in commerce."¹⁸⁴ Even though any individual farmer's production of wheat for home consumption may be trivial, this does not put the production out of Congress's reach because the aggregate impact of many similarly situated farmers is significant.¹⁸⁵

In *Lopez*, the Government urged the Court to assess the aggregate impact of gun possession on interstate commerce. The Government argued:

[P]ossession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the

179. *United States v. Lopez*, 514 U.S. 549, 562–63 (1995) ("[N]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.").

180. *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (holding that Congress may regulate activity that when aggregated has a substantial effect on interstate commerce).

181. *Lopez*, 514 U.S. at 560.

182. *Wickard*, 317 U.S. at 115.

183. *See id.* at 118 (stating that the statute limited the amount of wheat a farmer could grow, even when that wheat was consumed on premises).

184. *Lopez*, 514 U.S. at 561.

185. *See Wickard*, 317 U.S. at 127–28 (stating that Congress may regulate behavior, that if aggregated, could significantly affect interstate commerce).

population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.¹⁸⁶

The Supreme Court rejected the Government's reasoning because, if followed to its fullest extent, it would allow the Government to regulate all human behavior.¹⁸⁷ Although Congress's Commerce Clause power is extensive, it does not permit Congress to "pile inference upon inference" to justify its conclusion that noneconomic, intrastate activity has a substantial effect on interstate commerce.¹⁸⁸

The Supreme Court also considered and rejected the Government's argument that "the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being."¹⁸⁹ This reasoning, if accepted, would allow the government to regulate all activities that affect individual citizens.¹⁹⁰ The Government's reasoning also raised a particular concern because it would permit the exercise of federal power "even in areas such as criminal law enforcement or education where States historically have been sovereign."¹⁹¹

In *United States v. Morrison*, the Supreme Court considered the constitutionality of a portion of the Violence Against Women Act (VAWA),¹⁹² which provided a federal civil remedy for victims of gender-motivated violence.¹⁹³ The Court held that sections of 42 U.S.C. § 13981 were

186. *United States v. Lopez*, 514 U.S. 549, 563–64 (1995) (internal citations omitted).

187. *See id.* at 564 ("The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.").

188. *See id.* at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

189. *Id.* at 564.

190. *See id.* ("Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.").

191. *See id.* (discussing how the Government's arguments could theoretically be extended to allow Congress to regulate any and all individual activity).

192. *See* Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C. (2000)) (providing resources for the investigation and prosecution of violent crimes motivated by gender and establishing civil rights and causes of action for women who are victims of gender motivated violence).

193. *See* 42 U.S.C. § 13981(c) (2000), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000) ("A person . . . who commits a crime of violence motivated by gender . . . shall be

unconstitutional because they exceeded Congress's authority under the Commerce Clause.¹⁹⁴

The Court affirmed the analytical framework set forth in the *Lopez* opinion.¹⁹⁵ Like the activity at issue in *Lopez* (possession of a firearm in a school zone), the Court concluded that gender-motivated crimes of violence are not, in any sense, economic activity.¹⁹⁶ The Court specifically emphasized the "role that the economic nature of the regulated activity plays in our Commerce Clause analysis"¹⁹⁷ and that where the Court has upheld statutes regulating an activity "based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."¹⁹⁸

The Court noted that, in contrast to the GFSZA at issue in *Lopez*, Congress had, with respect to the VAWA, made specific findings regarding the impact of gender-motivated violence on interstate commerce.¹⁹⁹ But the Court held that these findings were not conclusive and were insufficient to sustain the constitutionality of 42 U.S.C.A. § 13981 pursuant to the Commerce Clause.²⁰⁰ The Court expressly rejected Congress's finding that gender-motivated violence affects interstate commerce by deterring people from traveling interstate and from doing business interstate, which, in turn, "diminish[es] national productivity, increase[es] medical and other costs, and decrease[es] the supply of and demand for interstate products."²⁰¹ Following such reasoning, the Court said, "would allow Congress to regulate any crime as long as the nationwide,

liable to the party injured, . . . for recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as the court may deem appropriate.").

194. See *United States v. Morrison*, 529 U.S. 598, 601 (2000) (concluding that "the Commerce Clause does not provide Congress with authority to enact § 13981"). The Court also determined that Congress lacked authority to enact the provision under § 5 of the Fourteenth Amendment. *Id.* at 627.

195. See *id.* at 609–14 (discussing *Lopez* as "modern Commerce Clause jurisprudence" and noting that *Lopez*, as a recent case treating the third category of Commerce Clause regulation, "provides the proper framework for conducting the required analysis of § 13981").

196. See *id.* at 607, 617 (rejecting the reasoning that Congress employed to find that gender-motivated violence affects interstate commerce and stating that intrastate violence is not economic activity).

197. *Id.* at 610.

198. *Id.* at 611.

199. See *id.* at 614 ("In contrast with the lack of Congressional findings that we faced in *Lopez*, § 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families.").

200. See *id.* at 614–15 (noting that "Congress'[s] findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable" and discussing specific problems with accepting Congress's reasoning).

201. *Id.* at 615 (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1803, 1853).

aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."²⁰² It also would permit Congress to invade other areas traditionally subject to exclusive state regulation.²⁰³ The Court held that Congress could not regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," as this type of regulation is the province of the states.²⁰⁴

In *Gonzales v. Raich*, the Supreme Court held that Congress had the authority under the Commerce Clause to prohibit the local cultivation and use of marijuana, even where that cultivation and use complied with California law.²⁰⁵ Specifically, the Court found that Congress validly exercised its Commerce Clause power when it enacted the federal Controlled Substances Act (CSA),²⁰⁶ which makes it a federal crime to manufacture, distribute or possess marijuana.²⁰⁷ The Court so found, despite the fact that California and at least eight other states had subsequently enacted laws authorizing the use of marijuana for medicinal purposes.²⁰⁸

The Court focused its opinion on the economic nature and implications of production, distribution, and consumption of marijuana.²⁰⁹ The Court determined that the regulation of the manufacture, distribution, and possession of marijuana was strikingly similar to the regulation of wheat production in *Wickard v. Filburn*.²¹⁰ "Like the farmer in *Wickard*, respondents are

202. *Id.*

203. *See id.* at 615–16 (discussing how extending Congress's reasoning would allow Congress to regulate "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childbearing on the national economy is undoubtedly significant").

204. *See id.* at 617–19 (rejecting the aggregate effects on interstate commerce approach and noting that "regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").

205. *See Gonzalez v. Raich*, 545 U.S. 1, 7–9 (2005) (finding that Congress had the power to enact the Controlled Substances Act, even where it prohibited actions that were legal under California law).

206. *See* 21 U.S.C. §§ 801–971 (2006) (establishing standards for regulating the manufacture, importation, distribution, and possession of certain controlled substances).

207. *See Raich*, 545 U.S. at 9 ("The CSA is a valid exercise of federal power . . ."). *See generally* 21 U.S.C. §§ 841(a)(1), 844(a) (2000).

208. *See Raich*, 545 U.S. at 5 n.1 (discussing laws in eight states besides California authorizing medicinal marijuana use and noting possible legislation in additional states).

209. *See id.* at 18–21 (discussing Congress's findings on the impact that home grown marijuana will have on supply, demand, consumption, and pricing in the interstate market).

210. *See id.* at 18 ("The similarities between this case and *Wickard* are striking."); *see also Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (finding that Congress had the authority, under the Commerce Clause, to regulate home grown wheat because of its effects on interstate

cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."²¹¹ The Court noted that Congress does not have to make specific or particularized findings regarding a substantial effect on interstate commerce in order to legislate, particularly when, as in the present case, the connection to commerce is "self-evident."²¹² The Court found that the CSA "is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."²¹³ The Court used this finding to support its conclusion that the CSA is constitutional as "a statute that directly regulates economic activity."²¹⁴

Although these cases are, in many ways, hard to reconcile, they indicate that Congress's power to regulate activity that substantially affects interstate commerce is broad but not unlimited. Congress may include in any regulation an express jurisdictional element that requires a case-by-case inquiry to determine whether the subject sought to be regulated actually affects interstate commerce.²¹⁵ In the absence of such a jurisdictional element, the Court looks to see whether the regulated activity, as a general matter, substantially affects interstate commerce.²¹⁶ Congress is not required to make specific legislative findings or congressional committee findings regarding the regulated activity's effect on interstate commerce.²¹⁷ Where Congress makes such findings, however, they are helpful to the Court in "evaluat[ing] the legislative judgment that the activity in question substantially affected interstate commerce, even

commerce).

211. *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005).

212. *See id.* at 21 (noting that "the absence of particularized findings does not call into question Congress'[s] authority to legislate").

213. *Id.* at 26.

214. *Id.*

215. *See, e.g., United States v. Morrison*, 529 U.S. 598, 612 (2000) ("Such a jurisdictional element may establish that the enactment is in pursuance of Congress'[s] regulation of interstate commerce."); *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (discussing how a jurisdictional element that requires a case-by-case inquiry can help demonstrate that a statute has an "explicit connection with or effect on interstate commerce").

216. *See Morrison*, 529 U.S. at 613–17 (noting that the VAWA did not contain a jurisdictional element limiting its application and then proceeding to evaluate whether Congress was correct in concluding that gender-motivated violence, the conduct regulated by the VAWA, substantially affects interstate commerce); *Lopez*, 514 U.S. at 561–62 (noting that § 922 "has no express jurisdictional element" and then undergoing an "independent evaluation of constitutionality under the Commerce Clause" to consider whether the regulated conduct has a substantial effect on interstate commerce).

217. *See Lopez*, 514 U.S. at 562 ("Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.").

though no such substantial effect was visible to the naked eye."²¹⁸ But Congressional findings alone are not sufficient to sustain the exercise of the Commerce Clause power.²¹⁹ The determination of whether activity, such as that regulated by Rule 502, substantially affects interstate commerce in a manner sufficient to satisfy the requirements of the Commerce Clause "is ultimately a judicial rather than a legislative question, and can be settled finally only by [the Supreme] Court."²²⁰ The key inquiry is whether the regulated activity is "economic in nature."²²¹ And the Court looks to the literal dictionary definition of "economics," which means the "production, distribution and consumption of commodities."²²²

In sum, Congress may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."²²³ If the class of economic activities is within the reach of Congress's Commerce Clause power, Congress's reach also may extend to noneconomic activity that is intrastate in nature if it is an essential part of a larger regulatory scheme.²²⁴ Put another way, Congress may regulate noneconomic intrastate activity only if it is "part and parcel of some larger commercial activity regulated by Congress."²²⁵ But Congress may not justify its

218. *Id.* at 563.

219. *See Morrison*, 529 U.S. at 614 ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

220. *Id.*

221. *See id.* at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.") (citing *United States v. Lopez*, 514 U.S. 549, 559–60 (1995) and cases cited therein); *see also id.* at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.") (citing *Lopez*, 514 U.S. at 559–60).

222. *See Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

223. *Id.* at 17 (citations omitted).

224. *See id.* at 23–28 (discussing the circumstances when "comprehensive regulatory statutes may be validly applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce").

225. Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1924 (2007). In his concurrence in *Raich*, Justice Scalia maintains that the power to regulate activities that substantially affect interstate commerce "cannot come from the Commerce Clause alone." *Raich*, 545 U.S. at 34 (Scalia, J., concurring). Justice Scalia argued that Congress's power over "intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* (Scalia, J. concurring). Accordingly, in Justice Scalia's mind, Congress may, consistent with the Commerce Clause and the Necessary and

regulation of noneconomic, intrastate activity "through a remote chain of inferences"²²⁶ or by "pil[ing] inference upon inference" to establish that the regulation has a substantial effect on interstate commerce.²²⁷ Additionally, in recognition of the values of dual sovereignty federalism incorporated in the Constitution, the Court is particularly concerned with attempts by Congress to regulate areas of activity that are traditionally subject to exclusive state regulation.²²⁸

3. *Rule 502(d) Does Not Include a Jurisdictional Element and Congress Made No Finding that Waiver of Privilege in an Action in State Court Affects Interstate Commerce*

Rule 502(d) does not include a jurisdictional element that would ensure, through case-by-case inquiry, that waiver of the particular privilege or protection in question would affect interstate commerce.²²⁹ Absent such a limitation in its scope, this rule must be reviewed to determine whether *as a general matter* it regulates activity that substantially affects interstate commerce.²³⁰ Congress held no hearings and made no findings to assist the Court in determining the effect that waiver of the attorney-client privilege or the work product protection has on interstate commerce.²³¹

Proper Clause, "regulate even those intrastate activities that do not themselves substantially affect interstate commerce" where Congress finds that doing so is "necessary to make a regulation of interstate commerce effective." *Id.* at 34–35 (Scalia, J. concurring).

226. *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (citing *Lopez*, 514 U.S. at 566–67).

227. *See* *United States v. Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."); *see also Raich*, 545 U.S. at 36 (Scalia, J., concurring) (rejecting the argument that "Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences") (citing *Lopez*, 514 U.S. at 564–66; *United States v. Morrison*, 529 U.S. 598, 617–18 (2000)).

228. *See, Morrison*, 529 U.S. at 615–16 (discussing the Court's concern with the possibility that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority").

229. FED. R. EVID. 502; *see also Lopez*, 514 U.S. at 561–62 (discussing statutes that have contained jurisdictional elements requiring a case-by-case inquiry into whether the regulated conduct affects interstate commerce); *Morrison*, 529 U.S. at 611–12 (discussing how a jurisdictional element could have limited the reach of the statute to situations where the conduct in question had an explicit effect on interstate commerce).

230. *See supra* note 216 and accompanying text (noting that where a statute does not contain an explicit jurisdictional provision, courts will evaluate whether the statute regulates activities that have a substantial impact on interstate commerce).

231. *See* S. REP. NO. 110-264, at 3–6 (2008) (discussing the purpose of the bill and the history of the drafting, introduction, and discussion of the bill in the Senate without discussing

4. Rule 502(d) Does Not Regulate Activity that Is "Economic in Nature"

Rule 502(d) does not regulate activity that is economic in nature.²³² In *Raich*, the Court looked to the literal dictionary definition and stated that "[e]conomics' refers to 'the production, distribution, and consumption of commodities.'"²³³ Although the party in question may be producing or possessing a product solely for personal, intrastate use, the inquiry still focuses on whether the production or possession might affect economic competition for the product when the product is generally the type of thing connected with a commercial transaction.²³⁴

Rule 502(d) regulates state courts by restricting their ability to apply state law on waiver of the attorney-client privilege or the attorney work product protection. Waivers of the attorney-client privilege and the attorney work product protection are not commodities, and they are not produced, distributed or consumed—they are not economic activity of individuals.²³⁵

Waiver of the attorney-client privilege by disclosure of the privileged information does not require any "economic activity." Likewise, the protection of the attorney-client privilege, by reviewing documents before producing them in discovery, does not require any economic activity. This is because litigation may involve plaintiffs and defendants who represent themselves and, even when lawyers are involved, there is no market in privileged information. Lawyers review documents to avoid waiving the attorney-client privilege because *state* rules of professional responsibility require them to do so, not because there is a market in which lawyers compete specifically for such services.²³⁶

any potential effects that waiving the attorney-client privilege would have on interstate commerce); SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 32–36 (discussing the evidence and recommendations from the Advisory Committee on Evidence Rules that Congress considered before proposing changes to FRE Rule 502 without mentioning any specific findings regarding the impacts that an attorney-client privilege waiver would have on interstate commerce); *cf. Lopez*, 514 U.S. at 562–63 (noting the absence of express congressional findings that the regulated activity had an effect on interstate commerce).

232. See generally FED. R. EVID. 502.

233. *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

234. See *id.* at 30 (discussing the impact of personal, intrastate use of marijuana on interstate commerce).

235. See *Bellia*, *supra* note 130, at 966 ("Historically, even the most contested exercises of the commerce power have operated directly upon the primary economic activity of individuals rather than upon how disputes arising from that economic activity are litigated.").

236. See *infra* notes 331–35 and accompanying text (discussing how regulation of attorney conduct through rules of professional responsibility has traditionally been a field governed by state law).

As professor Anthony Bellia points out, the Supreme Court has held that a state rule of evidence is not a regulation of commerce, and, consequently, such a rule does not violate the Dormant Commerce Clause.²³⁷ In *Richmond & Allegheny R.R. v. R.A. Patterson Tobacco Co.*,²³⁸ the Court addressed the constitutionality of a Virginia statute providing that railroads were presumptively liable for safe delivery of goods to their ultimate destination, even if that destination was beyond the reach of the railroad's line. This presumption could be overcome if the railroad produced a written release.²³⁹ The railroad challenged the Virginia statute as a regulation of the interstate commerce by Virginia and, therefore, a violation of the Dormant Commerce Clause.²⁴⁰ The Supreme Court rejected the railroad's argument, finding that the statute was a rule of evidence.²⁴¹ The Court stated that "in a latitudinarian sense, any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself . . . this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce."²⁴²

Although the Supreme Court's decision in *Patterson Tobacco* held that a state rule of evidence was not a regulation of interstate commerce, the same conclusion should result when assessing a federal rule of evidence enacted by Congress that controls the admission of evidence in state courts.²⁴³ The constitutional definition of commerce "is the same when relied on to strike

237. See Bellia, *supra* note 130, at 968 ("In 1898, in *Richmond & Allegheny Railroad v. R.A. Patterson Tobacco Co.*, the Court held that a state rule of evidence did not violate the dormant Commerce Clause because it was not a regulation of commerce.").

238. See *Richmond & Allegheny R.R. v. R.A. Patterson Tobacco Co.*, 169 U.S. 311, 315–16 (1898) (concluding that a Virginia statute imposing a duty of safe carriage on a common carrier merely established a rule of evidence and did not violate the Constitution by regulating interstate commerce).

239. See *id.* at 316 ("When a common carrier accepts for transportation anything directed to a point of destination beyond the termination of his own line or route, he shall . . . assume an obligation for its safe carriage . . . , unless . . . such carrier be released or exempted from such liability by contract in writing" (quoting VA. CODE § 1295 (1887))).

240. See *id.* at 313 ("[T]he defendant company . . . claim[ed] that the statute was a regulation of interstate commerce, and therefore in conflict with the Constitution of the United States.").

241. See *id.* at 316 (affirming that the Virginia statute is constitutional because it simply establishes a rule of evidence and does not restrict the right of a common carrier to limit its obligations by contract).

242. *Id.* at 315.

243. See Bellia, *supra* note 130, at 968–69 ("Arguably, if a state rule of evidence is not a regulation of interstate commerce, neither would be the same rule if enacted by Congress.").

down or restrict state legislation as when relied on to support some exertion of federal control or regulation."²⁴⁴

State court litigation is not a commodity.²⁴⁵ For certain, state court litigation "involves economic transactions at two levels: parties typically pay to conduct it, and the remedies sought between the parties typically involve the redistribution of economic values, whether money or something else."²⁴⁶ But this does not make state court litigation "economic" or "commercial" activity within the meaning of the Commerce Clause.

Even if litigants are themselves pursuing economic activity by litigating, federal regulation of state court procedures is one step removed—not regulation of that activity, but regulation of state government regulation of that arguably commercial activity. "Thus, by making procedural law for state courts, Congress regulates not the economic aspects of litigation, but instead regulates the state's regulation of litigation."²⁴⁷

Furthermore, determinations regarding the discoverability and admissibility of relevant evidence and the intentional (and even inadvertent) disclosure of privileged information are "quintessential governmental activit[ies]"²⁴⁸ that fall "squarely within traditional areas of state sovereignty."²⁴⁹ "States open their courts to the resolution of disputes not as a business enterprise, but as a fundamental component of the exercise of their law enforcement authority within their respective jurisdictions."²⁵⁰ Any other conclusion would be inconsistent with multiple lines of decision and reasoning by the Supreme Court. If state court litigation is "economic activity" then Congress could step in today and take over all of state criminal law enforcement based on its Commerce Clause power—activity that the Court has long held within the exclusive realm of the states' core sovereign power to

244. *Id.* (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997)).

245. See Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537, 554–56 (2007) (noting that "[m]ost modern dictionaries[] define the term as referring to a good or product, rather than a service or facet of human behavior"). Jiang further argues that "civil litigation is an activity that targets the exploitation of human services, not the production, distribution and consumption of goods. As a result, such litigation does not constitute an economic activity pursuant to the standard set forth by the majority in *Raich*." *Id.*

246. David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 593 (2004).

247. *Id.*

248. Spencer, *supra* note 130, at 265–66.

249. Berman, *supra* note 140, at 1501–02.

250. Spencer, *supra* note 130, at 265–66.

regulate.²⁵¹ Enforcement of criminal law necessarily requires the availability and use of state courts for prosecution. Prosecution of criminal offenses necessarily requires the use of lawyers, judges, clerks, and staff, all of whom are paid. Prosecution of criminal offenses also required the admission of evidence and the consideration of claims of privilege and work product protection. Requiring some interstate commerce in order to federalize a criminal offense would be redundant.

Similarly, the Supreme Court's decisions regarding the Federal Arbitration Act (FAA)²⁵² would make no sense if the process of state court litigation were itself "economic activity." In *Allied-Bruce Terminix Cos., Inc. v. Dobson*,²⁵³ the Supreme Court assessed the reach of the FAA. Section 2 of the FAA made enforceable a written arbitration agreement evidencing a "transaction involving commerce."²⁵⁴ The Court held that Congress intended the FAA to apply to the fullest extent of its Commerce Clause power and that it therefore applied to any contract that in fact involved interstate commerce.²⁵⁵ The Court later clarified that "Congress's Commerce Clause power 'may be exercised in individual cases without showing any effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'"²⁵⁶ If litigation were itself "economic activity" sufficient to constitute "commerce" or have an aggregate effect on commerce, then there would be no need for the FAA to be limited to "transactions involving commerce."

Professor Timothy Glynn, however, reaches a different conclusion on the issue of whether Rule 502 regulates economic activity. In a 2003 article, he assessed whether Congress may federalize the whole of privilege law and concluded that such action would pass constitutional scrutiny.²⁵⁷ In fact, he

251. See *United States v. Morrison*, 529 U.S. 598, 615–16 (2000) (holding that Congress's Commerce Clause power does not allow it to regulate crime); *United States v. Lopez*, 514 U.S. 549, 561, 561 n.3 (1995) (striking down a federal criminal statute and noting that "[s]tates possess the primary authority for defining and enforcing the criminal law").

252. See *infra* note 323.

253. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (concluding that "the word 'involving,' [in Section 2 of the FAA] signals an intent to exercise Congress' commerce power to the full").

254. 9 U.S.C. § 2 (2006).

255. See *Allied-Bruce*, 513 U.S. at 273–81 (also holding that "involving commerce" would be interpreted as broadly as "affecting commerce").

256. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003) (per curiam) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, (1948)).

257. See Glynn, *supra* note 38, at 156–71 (analyzing Congress's power to federalize privilege and concluding that such federalized privilege would prove constitutional); see also Nolan Mitchell, Note, *Preserving the Privilege: Codification of Selective Waiver and the Limits*

went further and recommended that Congress should enact preemptive privilege legislation that provides uniform privilege protection applicable in both state and federal court proceedings, as well as in arbitrations, administrative proceedings, and legislative proceedings.²⁵⁸ Professor Glynn concluded that Congress had the authority to enact such legislation based on its Commerce Clause power.²⁵⁹

In 2006, Professor Glynn testified before the Advisory Committee on Evidence Rules regarding the constitutionality of Rule 502.²⁶⁰ He concluded that Congress has authority to enact Rule 502 under the Commerce Clause, bolstered by the Necessary and Proper Clause, and that such action would not offend the Tenth Amendment.²⁶¹

Professor Glynn argued that Rule 502 is necessary and appropriate because it minimizes the burden on interstate commerce imposed by varying state laws of privilege.²⁶² This same reasoning, of course, would justify the elimination of all different legal standards imposed by the various states. In other words, in order to minimize the "disparate approaches" to every legal concept and standard, Congress could decide to normalize all state laws on all subjects and mandate that there will be only one law—of contracts, of torts, etc.—in the United States and Congress shall determine what that law is. This position, if accepted, would mean that Congress's authority under the

of Federal Power over State Courts, 86 B.U. L. REV. 691, 694 (2006) (addressing the "more narrow question: may the federal government enact legislation that alters the scope of state privilege law as applied in state court proceedings?").

258. See Glynn, *supra* note 38, at 64 ("Congress . . . should federalize the law of privilege preemptively, creating uniform protection for client confidences that will apply in every proceeding in federal and state court, as well as in arbitration proceedings, administrative hearings, and legislative proceedings.").

259. See *id.* at 157–60 (discussing Congress's Commerce Clause authority to enact federal privilege legislation).

260. See *Hearing on Proposal 502*, *supra* note 68, at 65–75 (presenting the hearing testimony of Professor Timothy Glynn).

261. See *id.* at 69–74 (declaring that Congress has the power to enact Rule 502 pursuant to its Commerce Clause authority).

262. See Glynn, *supra* note 38, at 157 ("While the states have a long tradition of regulating the practice of law, their disparate approaches to the privilege may inhibit and burden the attorney-client relationship, which is a subject of national interest and commerce."). Glynn further notes:

[A]ttorneys provide legal services to clients engaged in activities that may subject them to suit or regulation in different fora, with conflicting privilege rules [that] not only burden interstate commerce . . . but . . . also threaten to discourage the communications that facilitate the legal services on which these activities, legal compliance, and the effective administration of justice depend.

Id. at 159–60.

Commerce Clause is limitless and the United States would have a completely centralized government.²⁶³ Unless by serendipity every state happened to have exactly the same substantive law on every issue, "disparate approaches" would exist justifying Congress to step in and dictate the substantive law of every state.

Under this expansive view of the Commerce Clause power, Congress could step in and dictate the *substantive* law that would apply in every case in which there is a diversity of citizenship because there would be a guarantee of "interstate" (diversity requires citizens of different states, thus all diversity actions are "interstate") "commerce" (*all* litigation has a commercial aspect, thus all litigation "affects commerce").²⁶⁴ The Court, however, has never accepted this view of Congress's reach under the Commerce Clause.²⁶⁵ This vision of an all-powerful federal government with license to dictate uniformity of all laws is contrary to the Constitution's principles of dual sovereignty federalism and would "obliterate the distinction between what is national and what is local in the activities of commerce."²⁶⁶

Professor Glynn also argued that Rule 502 is a valid regulation of activity that substantially affects interstate commerce because the Rule regulates, fosters and protects activity that is economic in nature, "namely commerce between attorneys and clients."²⁶⁷ Even if one goes beyond the subject matter of the dispute and focuses on the "commercial" activity of the practice of law, a significant amount of litigation is done pro bono or even pro se. Nevertheless, it cannot be disputed that an attorney-client relationship often involves economic activity. "Ordinarily, litigants hire lawyers. Often the plaintiff seeks money damages. The court system employs large numbers of people. There is no doubt that a law prescribing economic features of the commercial relationship between attorney and client would be a regulation of economic

263. Cf. *United States v. Morrison*, 529 U.S. 598, 608 (2000) ("[T]he scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended . . . to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually . . . create a completely centralized government.'" (quoting *United States v. Lopez*, 514 U.S. 549, 556-57 (1995))).

264. See *Huber, Hunt & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 25 (11th Cir. 1980) (stating that where parties to a contract are from different states, the performance of the contract in dispute likely entails interstate commerce).

265. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) ("Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.").

266. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

267. *Hearing on Proposal 502, supra* note 68, at 71.

activity."²⁶⁸ But Congress did not regulate the work of lawyers and the review of documents with Rule 502. Instead, it acts to interfere with the states' and the state courts' ability to determine what evidence is admissible in state court proceedings. The determination of whether information is discoverable, admissible, privileged, or stripped of its privilege is not economic or commercial activity. It certainly is not a commodity that is subject to market competition. It is an inherent and indivisible part of the operation of state courts in implementing their state-specific view of what evidence the finder of fact may consider in resolving a dispute based on a state-created cause of action.

The federal government and the state governments have long recognized that each state has the right to regulate lawyers practicing within that state through rules of professional responsibility.²⁶⁹ The supreme courts of each state have inherent power to regulate the practice of law in that state.²⁷⁰ Such regulation does not infringe on the "common market" required by the Commerce Clause.²⁷¹ Instead, it is an essential attribute of state sovereignty.

Professor Kenneth Broun, Consultant to the Advisory Committee on Evidence Rules, noted that Congress's Commerce Clause authority likely would *not* extend to *other* evidentiary privileges—for example, the doctor-patient and the psychotherapist-patient privilege.²⁷² But the extension of Rule 502 to protect against waiver of the doctor-patient privilege would rise or fall based on the same arguments as the attorney-client privilege. Most, but not all, attorney-client relationships are based on an agreement to pay a fee for services. Likewise, so are most doctor-patient relationships. But *waiver* of these

268. Berman, *supra* note 140, at 1505–06 (citations omitted).

269. See *infra* notes 331–35 and accompanying text (discussing the tradition of state law regulating attorney conduct through rules of professional responsibility).

270. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789 n.18 (1975) (stating that the Supreme Court of Virginia has inherent power to regulate the practice of law in Virginia) (citing *Button v. Day*, 132 S.E.2d 292 (1963)); see also *Theard v. United States*, 354 U.S. 278, 281 (1957) (stating that state and federal courts have autonomous control over the lawyers practicing before them); *Saier v. State Bar of Mich.*, 293 F.2d 756, 759 (6th Cir. 1961) (stating that the licensing and regulation of the practice of law is a matter within an individual state's province). See generally *Rollins*, *supra* note 16.

271. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) ("In the Commerce Clause, [the Framers] provided that the Nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.").

272. See *Broun & Capra 2006 Memo*, *supra* note 103, at 22 ("Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one's imagination.").

privileges has nothing to do with any commerce between the attorney and client or the doctor and patient. It is not dependent upon, nor subject to, a commercial relationship. Even where a commercial relationship once existed, the privilege persists after the commercial relationship is long over.

The Reporter for the Advisory Committee acknowledged that "[t]here may also be situations in which state proceedings are so localized that they do not affect interstate commerce, and in those cases a 'federalized' waiver rule may be problematic."²⁷³ The Committee "chose, however, not to carve out those proceedings in the rule, for at least two reasons: 1) They may not exist; you don't have to go far to affect interstate commerce in a litigation; and 2) if they do exist, they are hard to describe."²⁷⁴ It is not too hard to imagine such a circumstance. For example, consider the case of gender-motivated violence—a stalker, a sexual assault or even a rape—that results in one party seeking a temporary restraining order against another party in a civil action. Or consider in that same circumstance a plaintiff who pursues damages in a civil action. The Supreme Court found that a federal civil remedy for victims of gender-motivated violence was unconstitutional because it exceeded Congress's authority under the Commerce Clause.²⁷⁵ The availability of economic damages for civil lawsuits brought pursuant to state law causes of action did not make this "economic activity" that substantially affects interstate commerce.²⁷⁶

273. *Id.* at 23, reporter's cmt.

274. *Id.*; see also N.Y. STATE BAR ASS'N, COMMERCIAL & FED. LITIG. SECTION, REPORT ON PROPOSED FEDERAL RULE OF EVIDENCE 502, at 26 (Feb. 13, 2007), available at <http://www.uscourts.gov/rules/EV%20Comments%202006/06-EV-069.pdf> ("The proposed Rule depends upon the application of interstate commerce authority. There may be cases where such authority is thin, resulting (at the very least) in motion practice to determine whether the federal rule can be applied (and conceivably in rejection of application of the federal rule).").

275. See *United States v. Morrison*, 529 U.S. 598, 601 (2000) (declaring that Congress lacked the constitutional authority under the Commerce Clause to provide a civil remedy for victims of gender motivated violence). As noted above, the argument that state court litigation is "commerce" and therefore Congress can regulate activity that gives rise to a state law cause of action is bootstrapping. If true, Congress could regulate all of tort law because of the "commerce" generated by state courts allowing lawyers to practice there and the Court would have upheld the Violence Against Women Act at issue in *Morrison*.

276. In its Supreme Court brief in *Morrison*, the Government argued that the provision of the Violence Against Women Act that created a private right of action for victims of gender-motivated violence was a permissible exercise of Congress's Commerce Clause powers because it was:

[D]esigned to remedy not only gender-motivated violence itself but also the inadequate existing mechanisms to compensate the victims of such violence for their economic injuries, such as lost earnings, medical expenses, and relocation costs. See, e.g., 1991 S. Rep. 44 (concluding that the fact that "less than 1 percent of all victims have collected damages" against their assailants "belie[s] claims that State laws provide 'adequate' remedies for the victims of these crimes").

In short, the "commerce" that occurs within the litigation process does not turn the subject matter of the dispute into an area of "economic activity." This same reasoning applies to Congressional regulation of state courts under Rule 502(d). Neither the availability of damages in a civil action nor the fees paid to attorneys in some (but not all) cases permits Congress to regulate state courts' adjudication of disputes that arise under state law.

5. Rule 502(d) Regulates Activity that Is Not Part of a Larger Commercial Activity that Is Regulated by Congress but Instead Is Traditionally Subject to State Regulation

Rule 502(d) is likely an impermissible exercise of Congress's Commerce Clause powers because it regulates noneconomic, intrastate activity that is traditionally subject to exclusive state regulation.²⁷⁷ Congress may regulate noneconomic activity only if it is necessary to support the regulation of some larger class of commercial activity that is regulated by Congress.²⁷⁸ But for Rule 502(d), there is no larger commercial activity that is regulated by Congress. Congress does not regulate the practice of lawyers before state courts.²⁷⁹ For example, one can become a member of a state bar and never practice before (or seek admission to) a federal court. Congress also does not regulate the attorney-client privilege, attorney work product protection or waiver thereof in state courts on state law causes of action.

As noted above, Professor Glynn has written and testified that it would be permissible for Congress to federalize the law of attorney-client privilege pursuant to its Commerce Clause powers. But that is a different issue. With

Accordingly, even if Congress were limited after *Lopez* to regulating intrastate activity that has some economic component, Section 13981 would come within that limitation.

Brief for the United States, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1037259, at *32. If it is permissible for Congress to legislate based on the "commerce" involved in litigating a state law cause of action, then the Supreme Court should have held that the provision of the VAWA at issue in *Morrison* was constitutional. It did not.

277. See, e.g., *supra* note 177 and accompanying text (discussing *Lopez*'s holding that Congress has limited Commerce Clause authority to regulate noneconomic, intrastate activity).

278. See *supra* note 205 and accompanying text (stating that *Raich* determined that if a class of economic activities is within the reach of Congress's Commerce Clause power, Congress's reach also may extend to noneconomic activity that is intrastate in nature if it is an essential part of the larger regulatory scheme).

279. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789-90 (1975) (observing that the Supreme Court of Virginia bears responsibility for regulating the practice of law); see also *Saier v. State Bar of Mich.*, 293 F.2d 756, 759 (6th Cir. 1961) (noting that the regulation of the practice of law is a state matter).

Rule 502, Congress did not act to regulate the relationship between attorney and client—which is arguably "economic in nature." Rule 502 only regulates waiver of privilege by disclosure in a federal proceeding, which is not economic activity; it is activity occurring during litigation. If Congress chose to regulate the larger attorney-client relationship, then it could regulate the lesser, noneconomic activity covered by Rule 502. Because Congress has chosen not to regulate the larger commercial activity, it cannot choose to regulate only the lesser, noneconomic activity affected by Rule 502.

Professor Glynn also argues that the aggregate impact of activity to protect against privilege waiver substantially affects interstate commerce: "The provision of legal services is usually in exchange for compensation; indeed, the nation's legal industry does a huge amount of business. The attorney-client privilege protects communications upon which the industry's article of commerce—the provision of legal services—depends."²⁸⁰ Virtually the same argument was considered and rejected by the Court in *Lopez* and in *Morrison*. In *Lopez*, the Government argued that possession of a firearm in a local school zone substantially affects interstate commerce because:

[P]ossession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being.²⁸¹

The Court rejected the Government's reasoning because, if followed to its fullest extent, it would have allowed the Government to regulate activities that affect only "individual citizens" and to regulate "any activity."²⁸² This position particularly concerned the Court because it would permit the exercise of federal

280. *Hearing on Proposal 502, supra* note 68, at 71.

281. *United States v. Lopez*, 514 U.S. 549, 563–64 (1995) (citations omitted).

282. *See id.* at 564 ("[U]nder [the] 'costs of crime' reasoning, . . . Congress could regulate . . . all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the . . . 'national productivity' reasoning, Congress could regulate any activity . . . related to the economic productivity of individual citizens . . .") (citations omitted).

power "even in areas such as criminal law enforcement or education where States historically have been sovereign."²⁸³

Education, after all, is economic or commercial in much the same way litigation is. Students or their families often pay tuition. Much education is narrowly designed to transmit and develop commercially valuable skills. Schools employ teachers and large staffs. By any measure, education is big business. And yet the Court made clear that a federal regulation of school curriculum would not be deemed a regulation of economic activity for purposes of Commerce Clause analysis. If the Commerce Clause "does not include the authority to regulate each and every aspect of local schools," nor would it seem to include the authority to regulate each and every aspect of state court litigation.²⁸⁴

In *Morrison*, the Court rejected Congress's reasoning that gender-motivated violence deters people from traveling interstate and from doing business interstate, which thus "diminish[es] national productivity, increase[es] medical and other costs, and decreas[es] the supply of and demand for interstate products."²⁸⁵ Following such reasoning, the Court said, "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."²⁸⁶ Further, it would permit Congress to invade other areas traditionally subject to state regulation exclusively.²⁸⁷ The Supreme Court has made clear that such reasoning—which can only be reached based on a "remote chain of inferences"—is inconsistent with the concept of dual sovereignty and a federal government of limited powers.²⁸⁸ It would significantly frustrate the

283. See *id.* (discussing the implications of the Government's arguments).

284. Berman, *supra* note 140, at 1505–06 (quoting *Lopez*, 514 U.S. at 566).

285. See *United States v. Morrison*, 529 U.S. 598, 615 (2000) (discussing Congress's findings supporting its conclusion that gender-motivated violence impacts interstate commerce (quoting H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.), as reprinted in 1994 U.S.C.C.A.N. 1803, 1853)).

286. *Id.*

287. See *id.* at 615–16 ("Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."). Professor Mitchell Berman posits that "*Lopez* and *Morrison* establish that when Congress regulates intrastate activities with the aim or purpose of somehow affecting (as by increasing) interstate commerce, whether such activities are economic in character and whether the regulation intrudes upon traditional areas of state sovereignty are considerations of central, perhaps decisive, significance." Berman, *supra* note 140, at 1502.

288. See *Gonzalez v. Raich*, 545 U.S. 1, 34 (2005) (declaring that the Court has rejected the argument that Congress can regulate noneconomic activity based exclusively on an attenuated inferential impact on interstate commerce).

ability of state courts to determine what rights the state has created and how they may be vindicated.²⁸⁹

Rule 502(d) raises special issues of constitutional concern and is subject to increased scrutiny because it represents a direct loss of state control over the operation of the state courts. An initial draft of Rule 502 that would have governed privilege for information initially disclosed in a state proceeding raised concerns that such a rule "would have constituted a substantial limitation on the authority of state courts to govern their own proceedings."²⁹⁰ Even after the Evidence Rules Committee revised Rule 502 to limit its application to information initially disclosed in a federal proceeding, however, it did not negate all federalism concerns. The Judicial Conference's Federal-State Jurisdiction Committee did not take a position of support for Rule 502.²⁹¹ Some members of the Federal-State Jurisdiction Committee remained concerned that "requiring all states to adhere to a uniform rule based upon the treatment of disclosures in the course of federal litigation may undermine the traditional control that state courts have exercised over the application of waiver rules."²⁹²

By enacting Rule 502, Congress unilaterally abrogated state law on privilege issues (at least as regards waiver). This new Federal Rule of Evidence "deprives state courts of the authority to determine what is privileged and how a privilege might be waived."²⁹³ The classic justification and reason why we privilege certain information is that the information springs from a relationship (for example, the attorney-client, the doctor-patient, or the husband-wife relationship) that is so highly valued by society that the state determines that we must do all that we can to foster and protect that relationship—including maintaining the confidentiality of information that is otherwise relevant and may be necessary to resolve the truth of a matter in dispute.²⁹⁴ Judge Becker

289. See THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Heritage Press ed., 1973) (stating that it is a just principle that every government ought to possess the means of executing its own provisions by its own authority) (emphasis omitted).

290. Draft of Cover Letter to Congress on Proposed Rule 502 at 3 (attachment to MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95); see also 2006 DRAFT RULES COMM. MEETING MINUTES, *supra* note 103, at 53 (discussing this same concern).

291. See Draft of Cover Letter to Congress on Proposed Rule 502 at 3 (attachment to MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95).

292. *Id.* Some members of the Committee "took the position that state courts should be free to determine what constitutes a waiver, even when the waiver occurred in an earlier federal proceeding." *Id.*

293. *Hearing on Proposal 502, supra* note 68, at 29 (testimony of Stephen Susman).

294. See 8 WIGMORE ON EVIDENCE § 2285 (3d ed. 1940) (listing the four fundamental conditions that are necessary to establish a privilege against disclosure); see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of the attorney-client privilege

incorporated and relied on this justification for the privilege when setting forth the test for determining whether a privilege exists in *federal* court:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.²⁹⁵

Thus, the state makes a value judgment about the proper balance between ensuring that necessary evidence is available to the finder of fact and protecting these privileged relationships.²⁹⁶ The state makes a similar value judgment as to when that balance is disrupted—for example, by disclosure of the information. Rule 502 displaces states' policy choices because it applies to prevent the admission of relevant evidence even in those states that have chosen to find a privilege waiver once the privileged information is disclosed.²⁹⁷

Rule 502(d) also intrudes upon the operation and administration of justice in state courts. In some instances, it will govern the admission of evidence in actions filed in state court involving only residents of the forum state who litigate purely state law causes of action.²⁹⁸ This is a "traditional governmental

is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); *Trammel v. United States*, 445 U.S. 40, 53 (1980) (deciding that the purpose of the spousal privilege is to "further[] the important public interest in marital harmony").

295. *In re Grand Jury Investigation*, 918 F.2d 374, 383–84 (3d Cir. 1990) (citing WIGMORE, *supra* note 294).

296. Arthur J. Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667, 683–84 (1974) (noting that the rules of privilege do nothing to facilitate the fact-finding process but are instead designed to protect communications that society deems vitally important).

297. *See United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States" (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion))).

298. *See Baker*, *supra* note 140, at 738 (noting that the Federal Rules of Evidence can be applied to state court proceedings involving purely state law causes of action).

function" that is historically considered an aspect of state sovereignty.²⁹⁹ It is regulation of noneconomic, intrastate activity. It is not, however, regulation that is necessary to support a larger regulatory scheme adopted by Congress.

C. Tenth Amendment Issues

Even if one assumes that Rule 502(d) is a regulation of commerce, it may still be unconstitutional if the Tenth Amendment reserves the power to regulate state court procedures of this type to the States.³⁰⁰ The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³⁰¹ The Supreme Court views the Tenth Amendment as surplusage—simply restating that Congress has only those powers set forth in the Constitution.

The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limit on an Article I power.³⁰²

Thus, if Congress regulates activity pursuant to a grant of power in the Constitution, it does not impermissibly invade state sovereignty.³⁰³

299. *Id.* at 737 (noting rules of evidence to be applied in state court proceedings involving state law causes of action are "integral areas of historical state sovereignty").

300. *See Bellia, supra* note 130, at 964 ("The threshold question is whether a regulation of court procedures is a regulation of commerce at all. If it is, the next question is whether the Tenth Amendment reserves the power to regulate state court procedures to the states."); *see also* Spencer, *supra* note 130, at 272 ("Congress's misuse of the Commerce Clause to regulate state courts directly is a clear violation of the Tenth Amendment.").

301. U.S. CONST. amend. X.

302. *New York v. United States*, 505 U.S. 144, 156–57 (1992).

303. *See* Spencer, *supra* note 130, at 273 (discussing the Tenth Amendment's limitation on the federal government's ability to regulate the states); *see also supra* Part III.B (noting that Congress sought to enact Rule 502 as a regulation of activity that substantially affects interstate commerce); *infra* Part IV (assessing Congress's authority to enact Rule 502(d) pursuant to its Article III power). As Professor Bellia points out, this issue would be far different if Rule 502(d) applied to actions in state courts only when the underlying cause of action was a federal question. Bellia, *supra* note 130, at 959–63. Congress may require state courts to follow federal procedural rules and federal evidentiary rules where they are "part and parcel" of a federal right of action or where application of the state rules would impose an unnecessary burden on a federal right. *Id.*

In certain circumstances, Congressional regulation of activity that substantially affects interstate commerce will nevertheless violate the Tenth Amendment.³⁰⁴ In *New York v. United States*,³⁰⁵ and *Printz v. United States*,³⁰⁶ the Supreme Court held that Congress lacks power to commandeer state legislatures and state executive officials to implement federal law.³⁰⁷ It is not clear whether the Tenth Amendment prohibits Congress from commandeering state judiciaries.³⁰⁸ This Article, however, concludes that Rule 502(d) does not commandeer the state judiciaries or require the states to enact legislation.³⁰⁹ It only requires them to respect an order of the federal courts.³¹⁰

Separately, it might be argued that Congress lacks authority to enact Rule 502(d) because it regulates state court procedures. Professor Bellia has argued "that Congress has no authority to regulate state court procedures in state law cases because 'procedural law' derives exclusively from state authority."³¹¹ But I do not maintain that Rule 502(d) regulates purely state court procedure. There is ample support for the position that Rule 502(d) is a law governing substance because the law of privileges affects substantive state policy.³¹² This

304. See *New York*, 505 U.S. at 160 ("[T]he Tenth Amendment limits the power of Congress to regulate in the way it has chosen.").

305. See *id.* at 188 (striking down a federal law that required each state to arrange for the disposal of all radioactive waste produced in that state).

306. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down a federal law that required local law enforcement officials to conduct background checks on individuals who sought to purchase a handgun).

307. See *New York*, 505 U.S. at 178 ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."); see also *Printz*, 521 U.S. at 926 ("'The Federal Government,' we held, 'may not compel the States to enact or administer a federal regulatory program.'" (quoting *New York*, 505 U.S. at 188)).

308. See Bellia, *supra* note 130, at 951 ("Federal regulation of the procedures by which state courts enforce not federal but state rights of action raises distinct constitutional problems.").

309. See Glynn, *supra* note 38, at 168 ("[T]he federal privilege neither requires states to enact legislation nor commandeers state executive officials to assist in the enforcement of federal law.").

310. See Broun & Capra 2006 Memo, *supra* note 103, at 240 ("Even without a rule, a federal court probably has the power to bind state courts with regard to waiver or nonwaiver of an evidentiary privilege.").

311. Bellia, *supra* note 130, at 972; see also *Jinks v. Richland County, S.C.*, 538 U.S. 456, 464–65 (2003) (acknowledging the argument that "Congress may not, consistent with the Constitution, prescribe procedural rules for state courts' adjudication of purely state law claims" but finding it unnecessary to address that argument because the statute in question was substantive).

312. See, e.g., IMWINKELRIED, *supra* note 26, at 45 (noting that the committee that helped draft the federal rules of evidence classified evidentiary doctrines as substantive in character);

view is furthered by the fact that Rule 502 was not enacted through the usual rulemaking process and instead was enacted by an act of Congress.³¹³

IV. Article III Power

As suggested above, Congress and the various Judicial Conference committees acted upon the belief that Congress's authority to enact Rule 502 arises, if at all, pursuant to its Commerce Clause power.³¹⁴ During the rulemaking process, however, it was suggested that Congress also may have power to enact Federal Rule of Evidence 502 pursuant to its Article III power to ordain and establish the "inferior courts."³¹⁵

Article III of the Constitution gives Congress power to regulate some disputes that are based entirely on state law causes of action.³¹⁶ Where parties are diverse, and the minimum amount in controversy is met, the action may be filed directly in federal court or it may be removed to federal court if it is first filed in state court.³¹⁷ Congress recently enacted the Class Action Fairness Act

Glynn, *supra* note 38, at 165 ("The substantive character of privileges is one of the key reasons why Article V of the Proposed Rules of Evidence failed . . ."); Mitchell, *supra* note 257, at 737 ("[L]egislation requiring the enforcement of selective waiver agreements would likely create a 'substantive' right independent of the privilege.").

313. See *supra* Part II.F (discussing the passage of Rule 502 by the House and Senate); see also Goldberg, *supra* note 296, at 682–83 ("The reason rules of privilege are substantive . . . is that they are designed to protect independent substantive interests that the state has regarded as more significant than the free flow of information. Thus, their intrinsic objective is to protect communications that the state deems inviolate.").

314. See *supra* Part II (discussing the legislative history of Rule 502); see also Broun & Capra 2006 Memo, *supra* note 103, at 17 (stating that "in order to be binding in both federal and state courts, the Rule would have to be enacted by Congress using both its powers to legislate in aid of the federal courts under Article III of the Constitution and its commerce clause powers under Article I").

315. U.S. CONST. art. III, § 1. Professor Rick Marcus, consultant to the Civil Rules Committee, suggested that "there might be enough authority for the rule in Congress's power to regulate federal courts." Broun & Capra 2006 Memo, *supra* note 103, at 34. *But see Hearing on Proposal 502, supra* note 68, at 69–70 (providing testimony of Professor Timothy Glynn that Congress's Article III power is not, alone, sufficient). Professors Spencer and Bellia have each written that Congress's authority to regulate the operation of state courts must derive, if at all, from the Commerce Clause. See Bellia, *supra* note 130, at 951 (noting that Congress has tried to justify its regulation of state courts by invoking "its power to regulate commerce"); Spencer, *supra* note 130, at 265–73 (discussing the various ways in which Congress oversteps its authority in regulating the procedures of state courts).

316. See U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases . . . between citizens of different States . . .").

317. See generally 28 U.S.C. §§ 1332, 1441 (2006).

of 2005,³¹⁸ which gives federal courts jurisdiction over class actions in which the amount in controversy exceeds the sum or value of \$5,000,000 and any one member of a class of plaintiffs is a citizen of a state different from any one defendant.³¹⁹ But federal courts have power over these cases because there is an express grant of such authority in Article III, which provides that federal judicial power extends to all case in which the parties are citizens of different states.³²⁰ There is no equivalent grant of authority in Article III or elsewhere in the Constitution that gives Congress or the federal courts power over state court resolution of disputes between citizens of the forum state based on state law causes of action.

One might point to the Federal Arbitration Act (FAA)³²¹ as another example of federal legislation that regulates state court litigation. In many ways, the line of Supreme Court decisions assessing Congress's ability to impose arbitration on states was an opportunity and invitation for the Supreme Court to approve Congress's ability to regulate the state court system without limits, based on its Article III powers. Instead, the Court has determined that the Act is limited in its reach by the limits on Congress's power under the Commerce Clause.³²²

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,³²³ the court rejected an invitation to justify the FAA based on Congress's Article III power

318. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(2), 2(a)(4), 119 Stat. 9 (codified at 28 U.S.C. § 1332 (2006)) (finding that abuses of the class action device have "adversely affected interstate commerce" and undermined "the free flow of interstate commerce").

319. 28 U.S.C. § 1332(d) (2006). The federal court may (and in some cases, must) decline to exercise its jurisdiction depending upon whether the action involves "matters of national or interstate interest . . ." *Id.*

320. U.S. CONST. art. III, § 2.

321. See 9 U.S.C. §§ 1-307 (2006) (making valid and enforceable any written agreements for arbitration of disputes arising out of contracts, maritime transactions, or interstate commerce). The Federal Arbitration Act was originally enacted in 1925 and known as the U.S. Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).

322. See *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the [Federal Arbitration Act] as the function equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."); see also *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1983) ("The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause."); *id.* at 28 (O'Connor, J., dissenting) ("Plainly, a power derived from Congress' Art. III control over federal-court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts.").

323. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (declining, implicitly, to base the FAA on Congress's Article III power by basing it instead on Congress's power to regulate commerce).

over federal courts³²⁴ and instead held that: "[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable foundations of 'control over interstate commerce and over admiralty.'"³²⁵ It reached this conclusion despite the fact that there is significant legislative history to indicate that Congress enacted the FAA pursuant to its Article III power over federal courts *not* pursuant to its power under the Commerce Clause.³²⁶

The Supreme Court's 2003 decision in *Jinks v. Richland County*³²⁷ provides the strongest support for the position that Congress has the power to enact Rule 502 pursuant to its Article III power, supported by its Article I power to enact laws that are "necessary and proper for carrying into Execution" its Article III power. In *Jinks*, the Supreme Court held that 28 U.S.C. § 1367(d)—which requires that state courts toll the state statute of limitation on a state law claim that is in federal court based on supplemental jurisdiction while the supplemental claim is pending in federal court and for 30 days afterward—is constitutional.³²⁸ The plaintiff filed a federal-court action claiming that defendant Richland County and two of its employees violated 42 U.S.C. § 1983 in connection with her husband's death.³²⁹ The plaintiff also alleged supplemental state law claims for wrongful death and survival.³³⁰ The

324. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271–72 (1995) (describing the Court's reasoning for justifying the FAA on Congress's Article III power instead of its power over interstate commerce); see also *Southland Corp.*, 465 U.S. at 14 ("Congress would need to call on the Commerce Clause if it intended the [FAA] to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce.").

325. *Prima Paint*, 388 U.S. at 405 (quoting H.R. REP. NO. 68-96, at 1 (1924); S. REP. NO. 68-536, at 3 (1924)); see also *Benhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 200–02 (1956) (finding that the FAA did not apply to a contract between New York residents performed in Vermont because it was not a "transaction involving commerce" and because "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases").

326. See *Southland Corp.*, 465 U.S. at 21–36 (O'Connor, J., dissenting) (arguing that the FAA was enacted pursuant to Congress's Article III powers and therefore was procedural; thus it could not be applied to the states); see also David H. Taylor & Sarah M. Cliffe, *Civil Procedure by Contract: A Convoluting Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 RICHMOND L. REV. 1085, 1140–47 (2002) (analyzing the legislative history of the FAA and concluding that Congress intended the FAA to rely on Article III power).

327. See *Jinks v. Richland County*, 538 U.S. 456, 465 (2003) (upholding 28 U.S.C. § 1367(d) as constitutional).

328. *Id.*

329. *Id.* at 460.

330. *Id.*

District Court granted defendants' summary judgment motion on the § 1983 claim and declined to exercise jurisdiction over the remaining state-law claims.³³¹ Plaintiff then filed the state-law claims in state court and won an \$80,000 judgment on the wrongful-death claim.³³² The South Carolina Supreme Court reversed, finding the state-law claims time barred.³³³ Although they would not have been barred under § 1367(d)'s tolling rule, the court held § 1367(d) unconstitutional as applied to claims brought in state court against a state's political subdivisions.³³⁴

The U.S. Supreme Court disagreed and held that "§ 1367(d) is necessary and proper for carrying into execution Congress's power '[t]o constitute Tribunals inferior to the supreme Court,' U.S. Const., Art. I, § 8, cl. 9, and to assure that those tribunals may fairly and efficiently exercise '[t]he judicial Power of the United States,' Art. III, § 1."³³⁵ The Court found that § 1367(d)'s tolling provision was "conducive to the administration of justice" in federal courts (and therefore a proper exercise of Congress's Article III power) because it "unquestionably promotes the fair and efficient operation of the federal courts."³³⁶ The Court reaffirmed its position that such a law was "necessary" even though "the federal courts can assuredly exist and function in the absence of § 1367(d)"³³⁷ The Necessary and Proper Clause does not require that an act of Congress be "'absolutely necessary' to the exercise of an enumerated power."³³⁸ It is enough that the act of Congress is "'conducive to the due administration of justice' in federal court, and is 'plainly adapted' to that end."³³⁹

Rule 502 may be a permissible exercise of Congress's Article III power to establish and ordain the lower federal courts. Rule 502 promotes the fair and efficient operation of the federal courts by allowing parties to produce privileged documents without waiving the privilege.³⁴⁰ If Congress's

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 462.

336. *Id.* at 462–63. The Court further rejected the argument that § 1367(d) was improper regulation by Congress of state court "procedure" and that "Congress may not, consistent with the Constitution, prescribe procedural rules for state courts' adjudication of purely state-law claims." *Id.* at 464–65. The Court found that the tolling of the statute of limitation was "substantive." *Id.*

337. *Id.* at 462–63.

338. *Id.* (quoting *M'Culloch v. State*, 17 U.S. 316, 414–15 (1819)).

339. *Id.* (quoting *M'Culloch v. State*, 17 U.S. 316, 417 (1819)).

340. As discussed in Part VI, *infra*, Congress's assumptions are questionable.

assumptions are correct, Rule 502(d) will reduce or eliminate the cost and burden of reviewing those documents for privilege. Like the tolling of the statute of limitation at issue in *Jinks*, federal courts could exist and function even if a Rule 502(d) order did not bind parties and courts in state court actions. The Rule would, however, be significantly less effective. Disclosure in a federal action would not waive the privilege in that action, but the Rule 502(d) order would not protect against waiver of privilege or work product protection in parallel or follow on actions in state court.³⁴¹ Thus, Rule 502 is arguably conducive to the administration of justice in state courts and plainly adapted to that end.

On the other hand, Rule 502(d) is distinguishable because 28 U.S.C. § 1367(d) affects only the *parties* to an action that is dismissed from a federal court whereas a Rule 502(d) order purportedly binds nonparties and state courts who may have no knowledge of the federal court action in which the order was entered. Thus, § 1367(d) is necessary to the federal courts' management and control of the parties that are before the federal court. As discussed in Part V, Rule 502(d) is necessary to the federal courts' management and control of nonparties and state courts.

In addition, Rule 502(d) is distinguishable because Rule 502(d) frustrates the intent and goal of state law of privilege whereas § 1367(d) supports the intent and goal of state law on statutes of limitations. When a federal court issues a Rule 502(d) order, it contradicts and overrides state law on privilege: The case will be handled differently and the disclosure of privileged information will result in a different outcome than if the case had been litigated in state court. When a federal court exercises its discretion to decline jurisdiction over state law claims, pursuant to § 1367 by contrast, the court is acting consistent with state law on statutes of limitation. The state law claims *could have been* filed in state court, but instead were brought in federal court within the period of limitation. The federal court offered a surrogate forum. If the state law claims proceed, the federal court will handle them and the result is supposed to be the same as if the case had been filed in state court. When the federal court exercises discretion to dismiss the state law claims, § 1367(d) provides a thirty day grace period so the plaintiff can refile the claims in state court and they are treated the same as if they had first been filed in state court.

If Article III ultimately provides a constitutional source of power for the enactment of Rule 502(d), then there will be few, if any, limitations on Congress's power to control state courts. Any litigation difference (substantive or procedural) between the federal practice and a state practice will justify

341. SEPTEMBER 2007 RULES COMMITTEE REPORT, *supra* note 4, at 34.

Congress acting to normalize the procedure in favor of the federal practice. This interpretation of Article III goes far beyond a simple extension of Congress's power to ordain and establish the federal courts, but it is arguably consistent with *Jinks*.

V. Due Process Issues

Entry of a Rule 502(d) order raises a significant question whether it violates the Due Process rights of persons and entities who are not parties to the federal court litigation because the rule purports to make an order of a federal court binding on all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation and regardless of whether the nonparties are subject to the jurisdiction of the issuing court.³⁴² The Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law.³⁴³ "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"³⁴⁴

In enacting Rule 502, Congress assumed that a nonwaiver agreement that is entered as an order of the federal court is binding against persons and entities (including state courts) not party to the original federal court action.³⁴⁵ This assumption is contrary to the well-established rule that an order is ordinarily

342. See FED. R. EVID. 502(d) ("[T]he disclosure is also not a waiver in any other federal or state proceeding."); see also *id.* advisory committee's note ("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."); JUNE 11–12 RULES COMMITTEE MINUTES, *supra* note 10, at 44 (recording the statement of Professor Daniel Capra, Reporter for the Evidence Rules Committee, that "a federal court's order holding that a privilege or protection has not been waived in the litigation before it will be binding on all persons and entities in all other proceedings—federal or state—whether or not they were parties to the federal litigation"). Rule 502(d) originally stated explicitly that such an "order binds all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation." MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95, at 10. The rule was revised to its present form, presumably to reflect changes suggested to the language by the Style Subcommittee. JUNE 11–12 RULES COMMITTEE MINUTES, *supra* note 10, at 43.

343. U.S. CONST. amend. V.

344. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)).

345. FED. R. EVID. 502 advisory committee's note (stating that a confidentiality order governing the consequences of disclosure made in a federal proceeding is "enforceable against non-parties in any federal or state proceeding").

only binding on parties to the litigation.³⁴⁶ Judge Learned Hand wrote for the Second Circuit more than seventy-five years ago that "no court can make a decree which will bind any one but a party . . ."³⁴⁷ The Federal Rules of Civil Procedure embody this principle that a court order does not bind other courts unless it is made enforceable against them by the same process required to enforce an order against a party.³⁴⁸ For example, a temporary restraining order (TRO) may be issued against a party and its officers, agents, servants, employees, attorney and other *nonparties* "who are in active concert or participation with [the party]."³⁴⁹ The TRO may be issued without notice if circumstances dictate, but it is: (a) temporary, (b) effective only after the moving party posts sufficient security to compensate by one who is wrongfully enjoined, and (c) *binds only those nonparties* "who receive actual notice of it by personal service or otherwise . . ."³⁵⁰

In *Baker v. General Motors*,³⁵¹ the Supreme Court held that a Michigan state court could not enjoin a witness in a Michigan proceeding (who happened to be a former General Motors employee) from testifying in a separate action against General Motors that was pending in Missouri state court.³⁵² The Court stated that the injunction entered in the Michigan case "cannot determine evidentiary issues in a lawsuit brought by parties who

346. See *Mitchell v. Exide Techs.*, No. 04-2303-GTV-DJW, 2004 WL 2823230, at *1 (D. Kan. Dec. 8, 2004) (refusing to enter stipulated protective order and noting that "the parties are reminded that orders of a court are binding on parties to the pending cause and cannot bind nonparties; thus, any provision within a proposed protective order stating otherwise is inaccurate"); *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 280–88 (D.D.C. 2002) (waiving attorney work product protection where documents were disclosed to adversaries in prior litigation notwithstanding that such documents were subject to a confidentiality and protective order in prior litigation that provided that the production of documents would not constitute a waiver of any privilege or protection); *Hartford Fire Ins. Co. v. Guide Corp.*, 206 F.R.D. 249, 250 (S.D. Ind. 2001) (refusing to enter parties' stipulated protective order that purported to protect against waiver of privilege because parties could not bind third parties nor restrict their ability to challenge the terms of the order); see also CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, appearing in 2003 Marcus Memo, *supra* note 66, at 42–43 ("The law is presently murky on whether such agreements do the job, and whether a court order makes a difference in effectuating such agreements.").

347. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

348. See FED. R. CIV. P. 71 ("When an order . . . may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.").

349. FED. R. CIV. P. 65(d)(2)(c).

350. FED. R. CIV. P. 65(d)(2).

351. See *Baker v. Gen. Motors*, 522 U.S. 222, 240 (1998) ("Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside Michigan's governance.").

352. *Id.* at 240–41.

were not subject to the jurisdiction of the Michigan court."³⁵³ The Court stated that "[m]ost essentially, Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for truth."³⁵⁴

Rule 502's impact on third parties, and the question whether an order can bind such persons, is certain to arise.³⁵⁵ A Rule 502(d) order will have the result of obfuscating the truth finding process (if enforceable) in other litigation conducted by other parties in state courts because it will prevent them from having access to relevant—and, in some cases, crucial—evidence that has been voluntarily (and even intentionally) disclosed in a prior proceeding.³⁵⁶ The new rule raises the question whether the court must hold a hearing before issuing a 502(d) order. If the order is to be binding against the whole world, must the court give notice to the whole world? If there are interested identifiable nonparties (for example, litigants in a parallel state court action), must the court give them notice and an opportunity to object? Nonparties have standing to intervene in an existing litigation to seek modification or dissolution of a protective order so that they may obtain

353. *Id.* at 239; *see id.* at 235 ("Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority."). The *Baker* case involved the effect of a state court injunction on a sister state's court rather than the effect on a state court of a Rule 502(d) order issued by a federal court. In the *Baker* case, however, the Michigan court's decree was a permanent injunction that was entered as part of the judgment in the action. *Id.* at 226. Rule 502(d) contemplates the simple entry of an order that does not necessarily become part of a judgment. *See* FED. R. EVID. 502(d) (pertaining simply to a federal court order).

354. *Baker*, 522 U.S. at 238.

355. District Court Judge Paul Grimm testified before the Evidence Rules Committee that there are numerous classes of litigation in federal court that "involve the potential for parallel or subsequent state litigation, they would include employment discrimination, other nonemployment-related discrimination cases, toxic tort and mass tort litigation, class action litigation, products liability litigation, commercial litigation, and intellectual property litigation." *Hearing on Proposal 502, supra* note 68, at 11. He also testified that discovery targeting the disclosures made in the federal proceedings is imminent:

I have not seen yet, but know it's coming, the interrogatory or document production request [to] identify [sic] all records previously disclosed in any other litigation involving the subject matter of this dispute that were produced in accordance with a non-waiver agreement, and for each such case identify the caption and the court in which pending. That is coming.

Id. at 11–12.

356. *See id.* at 47–53 (testimony of David Stellings).

access to information disclosed in that proceeding.³⁵⁷ Even if the 502(d) order is entered and the federal action reaches judgment or is dismissed, a nonparty may seek to modify or dissolve the protective order.³⁵⁸

A Rule 502(d) order that is good against all of the world goes far beyond the scope of an agreement or order that binds only the parties to the federal proceeding. And its effects go far beyond as well. Then federal Magistrate Judge Ronald J. Hedges asked why it should matter that the court has blessed what is essentially a private agreement:

What protection should an order give to parties *vis-à-vis* third-parties as opposed to between themselves? Presumably, the only reason for parties to secure a case management order which incorporates a quick peek or claw back agreement is to secure a judicial imprimatur to that agreement. Should a "so ordered" to an otherwise private agreement insulate parties from claims of waiver by third parties who never consented to that agreement, most likely never knew of the agreement beforehand, and did not have an opportunity to challenge the entry of the order?³⁵⁹

One response to this problem is that the right to due process only arises when there is a property (or liberty) interest at stake, and here there may not be a cognizable property interest in the (as yet) undisclosed evidence.³⁶⁰ The

357. See 6 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 26.106[2] (3d ed. 2008) ("The correct procedure for a nonparty to challenge a protective order is a motion to intervene in the action in which the protective order was issued."). A Rule 502(d) order is a form of protective order. See FED. R. EVID 502 advisory committee's note ("Under [Rule 502(d)], a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation.").

358. See 6 JAMES WM. MOORE ET AL., FEDERAL PRACTICE § 26.106[1] (3d ed. 2008) ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.").

359. Ronald J. Hedges, *A View From the Bench and Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 134 (2005). Other commentators have observed:

But the stipulation or order approach is inconsistent with classical waiver doctrine, which holds that any disclosure to an outsider destroys the attorney-client privilege. The fact that the parties have agreed in advance that disclosure should not have that effect, with or without the court's blessing, has no bearing on that conclusion. Even if such an agreement estops the recipient of the material from claiming waiver, it would have no effect on a nonparty's right to claim the disclosure established waiver. Yet the courts choose to disregard this theoretical glitch, presumably because the concrete reality of protracted discovery is more immediate than the abstract operation of classical waiver doctrine.

Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1612 (1986).

360. Reaching the constitutional issue of due process still ignores the conflict between Rule 502(d) and Federal Rule of Civil Procedure 71, which states "[w]hen an order grants relief for a

Supreme Court has held that a property interest in a benefit is protected by due process only if one has a "legitimate claim of entitlement to it."³⁶¹ What constitutes a cognizable property interest is neither defined by the Constitution nor created by the Constitution.³⁶² Instead, it is created and defined by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."³⁶³

State law sets out certain causes of action. A state law cause of action is a cognizable property right that is protected by the Fourteenth Amendment's Due Process Clause.³⁶⁴ Most (maybe all) states provide that litigants have a right to discovery and that the scope of discovery includes relevant, nonprivileged information.³⁶⁵ The Supreme Court has stated that a litigant has a *right* to evidence that is material to the litigant's case, absent a valid exception such as a claim of privilege.³⁶⁶

In California, the attorney-client privilege does not cover information that has been disclosed to a third person.³⁶⁷ Even where information is privileged, the privilege is waived if the holder of the privilege discloses, or consents to

nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." FED. R. CIV. P. 71.

361. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

362. *See id.* ("Property interests, of course, are not created by the Constitution.").

363. *Id.*; *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'").

364. *See Logan*, 455 U.S. at 428–29 (noting that the issue was "affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause"); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (recognizing implicitly that a cause of action is a type of property).

365. *See, e.g., CAL. CIV. PROC. CODE* § 2017.010 (West 2008) (describing the persons that are entitled to discovery and the matters that are discoverable). The statute reads:

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

366. *See Ex parte Uppercu*, 239 U.S. 435, 439–40 (1915) (describing the litigant's right to discovery); *id.* at 440 ("The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule.").

367. *See CAL. EVID. CODE* § 952 (West 2008) (noting that the attorney-client privilege only covers information disclosed to a third party when that third party is reasonably necessary for the information to occur between the attorney and the client).

disclosure of, a significant part of the communication.³⁶⁸ Waiver occurs even where the recipient of the privileged information agrees to keep the information confidential.³⁶⁹ Thus, a disclosure made in a federal proceeding prior to entry of a Rule 502(d) waives the privilege under California state law. If the federal court subsequently entered a Rule 502(d) order, that order would prevent a California state court litigant from obtaining relevant, nonprivileged information to which the litigant has a right. This restriction would violate the Fourteenth Amendment's Due Process Clause unless the state court litigant received appropriate notice and opportunity to be heard, or other process to challenge the court order.

Professor Glynn suggested that this problem could be avoided altogether by revising Rule 502 to eliminate the need for an order and to provide that disclosure of privileged information "does not constitute a waiver. That is a legal proposition."³⁷⁰ Congress did not, however, act on this suggestion. Rule 502 is not a generally applicable rule that in all cases protects the parties against waiver of the privilege for documents produced in discovery. If it were, this would be the equivalent of the court simply applying the law to a factual situation (there was a disclosure) and reaching a result dictated by federal law (there has been no waiver). Instead, the federal court has *discretion* to enter a 502(d) order.³⁷¹ Once the court enters a Rule 502(d) order, does it become established *law* that there can be no finding of waiver? Consider the state court's perspective. It must decide what effect, if any, to give to an *order* of another court. This is akin to the effect given a protective order entered in one court by a court in a subsequent (or simultaneous) proceeding.³⁷² "[C]ourts asked to modify another court's protective order are constrained by principles of comity, courtesy, and, when a court is asked to take action with regard to a

368. See CAL. EVID. CODE § 912(a) (describing how privilege can be waived through disclosure). "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." *Id.* The protection for attorney work product also is waived where the interest is disclosed to an adversary. See *Wells Fargo Bank, N.A. v. Super. Ct.*, 990 P.2d 591, 599–600 (Cal. 2000) (observing that while the documents disclosed to the adversary are waived, that waiver does not extend to nondisclosed documents).

369. See *Mckesson HBOC, Inc. v. Super. Ct.*, 115 Cal. App. 4th 1229, 1235–38 (2004) (waiving the privilege where the recipient both pledged confidentiality and shared a common purpose with the recipient).

370. *Hearing on Proposal 502*, *supra* note 68, at 68 (testimony of Professor Timothy Glynn).

371. See *infra* Part VI.C.

372. Broun & Capra 2006 Memo, *supra* note 103, at 17–18; see also *supra* notes 351–54 and accompanying text.

previously issued state court protective order, federalism"³⁷³ But if the State court chooses to ignore the federal court's order, may it do so? What if the state court violates the 502(d) order unwittingly (after all, it had no notice of the order)? Is the state court in contempt of the federal court order? What if the federal action has concluded? Does the federal court's order last in perpetuity? Does the federal court retain jurisdiction over the dispute and parties even after it has become final?

VI. Unresolved Issues of Application

Application of Rule 502 in practice raises a number of significant questions and specific problems that are not resolved by the existing language of the Rule or reference to the Advisory Committee Notes, the rulemaking history, or the legislative history surrounding the Rule. Primary among those issues is the extent to which Rule 502 preempts state rules of professional responsibility that govern the obligations of the Producing Party's attorney to review a client's documents and protect client confidences and the obligations of the Receiving Party's attorney who receives privileged or protected documents produced pursuant to a 502(d) order.

A. Preemption of State Law of Privilege and Professional Responsibility

Application of Rule 502(d) will require courts to determine the scope of preemption of two areas of law that are traditionally subject to state regulation: The law of privilege and the regulation of attorney conduct through rules of professional responsibility.³⁷⁴ The supreme courts of each state have inherent power to regulate the practice of law in that State.³⁷⁵ Likewise, state law of

373. 6 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 26.106[1] note 5.2 (3d ed. 2008) (citing *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 501 (D. Md. 2000)).

374. State law of privilege governs actions brought in state court. In actions brought in federal court in which the federal court sits in diversity jurisdiction, the federal court applies substantive state law including state law of privilege. FED. R. EVID. 501.

375. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789–90 (1975) (noting that Virginia authorized its highest court to regulate the practice of law); see also *Saier v. State Bar of Mich.*, 293 F.2d 756, 759–60 (6th Cir. 1961) (observing that the regulation of the practice of law is a state matter). State courts and federal courts have autonomous control over the lawyers practicing before them. See *Theard v. United States*, 354 U.S. 278, 281 (1957) ("The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."). There is no generally applicable federal bar examination and there are no generally applicable federal rules of professional conduct.

privilege governs actions brought in state court. Even where an action is brought in federal court based on diversity jurisdiction, the federal court applies state substantive law, including state law of privilege.³⁷⁶ Thus, there is likely a presumption that the state rules of privilege and professional responsibility are not preempted by Rule 502 unless that was the clear and manifest purpose of Congress.³⁷⁷ This presumption against preemption may be heightened because the effect of Rule 502 is to increase and bolster the protection afforded to privileged information, thus impairing the parties' ability to discover and utilize relevant evidence in the search for truth.³⁷⁸ As detailed below, however, Rule 502(d) will be ineffective in reducing the costs of document review in numerous instances if it does not preempt state law of privilege and professional responsibility.³⁷⁹

1. The Professional Responsibility Obligations of the Producing Party's Attorney

Rule 502 is intended to relieve attorneys of the burden of reviewing documents for privileged or work product protected information and thereby save clients the expense of paying for such review.³⁸⁰ In order to be effective, however, Rule 502 must preempt state rules of professional responsibility that impose duties on lawyers to zealously protect their clients' confidential information and to conduct this review before turning over the client's documents to a litigation adversary during discovery.

In general, an attorney may not disclose a client's confidential information—including but not limited to attorney-client privileged information—absent the client's informed consent.³⁸¹ This duty to protect the

376. FED. R. EVID. 501.

377. See *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1983) (Stephens, J., concurring in part and dissenting in part) ("The exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress.") (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978)).

378. See *Pierce County v. Guillen*, 537 U.S. 129, 144–45 (2003) ("We have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.") (citing *Baldrige v. Shapiro*, 455 U.S. 345, 360 (1982)).

379. In addition, a diligent attorney will continue to review documents to ensure that only those documents within the scope of discovery are produced. See FED. R. CIV. P. 26(b).

380. See S. REP. NO. 110-264, at 1–2 (2008) ("[T]hough most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material.").

381. See ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 (2006) ("A lawyer shall not reveal

client's confidential information "involves public policies of paramount importance"³⁸² and is "fundamental to our legal system."³⁸³ In California, for example, it is an attorney's duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."³⁸⁴

information relating to the representation of the client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation"); *id.* cmt. 16 (providing that a lawyer "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client"); *id.* cmt. 3 ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."); ILL. RULES OF PROF'L CONDUCT 1.6(a) (2006) (stating that unless otherwise permitted or required, "a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure"); N.Y. CODE OF PROF'L RESPONSIBILITY EC 4-4 (2002) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of the client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."); N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101 ("[A] lawyer shall not knowingly: Reveal a confidence or secret of a client").

382. *In re Jordan*, 526 P.2d 523, 526 (Cal. 1974).

383. *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 378 (Cal. 1999); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2006) (noting that the duty to preserve confidential information is a "fundamental principle in the client-lawyer relationship"); N.Y. CODE OF PROF'L RESPONSIBILITY EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.").

384. CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2008). In New York, the duty of confidentiality is described as the "most important rule" of professional conduct and the "cornerstone for the majority of other disciplinary rules." 29 CONNORS, PRACTICE COMMENTARIES, MCKINNEY'S CONS. LAWS OF N.Y., DR 4-101 (quoted in *Helie v. McDermott, Will & Emery*, 852 N.Y.S.2d 701, 707 (N.Y. Sup. Ct. 2007)). "A number of jurisdictions have concluded that the attorney for the Producing Party must act competently to avoid revealing a client's Confidential Information This requires a [Producing Party's attorney] to use reasonable care to ensure that metadata that contain Confidential Information are not disclosed to a third party." Colo. Bar Ass'n, Ethics Comm., Formal Ethics Op. 119 (2008); *see also* D.C. Bar Legal Ethics Comm., Ethics Op. 341 (2007) ("The Sending Lawyer . . . [must] tak[e] care to avoid providing electronic documents that inadvertently contain accessible information that is either a confidence or a secret and to employ reasonably available technical means to remove such metadata before sending the document."); Md. State Bar Ass'n, Formal Ethics Op. 2007-09 (2007) ("[T]he sending attorney has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery."); State Bar of Ariz., Ethics Op. 07-03 (2007) (same); Ala. State Bar, Office of General Counsel, Ethics Op. RO-2007-02 (2007) (same); Fla. Bar, Ethics Op. 06-2 (2006) (same); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Ethics Op. 782 (2004) (same).

Violation of this duty constitutes cause for disbarment or suspension of the attorney's license to practice.³⁸⁵ It also may give rise to civil liability for legal malpractice, breach of confidence or other similar tort.³⁸⁶ Unless, of course, Rule 502(d) preempts state law in each of these areas.

In a case that is covered by Rule 502, the federal court would order, for example, that defendant's production of attorney-client privileged information and work product protected information waives neither the privilege nor the protection for such information. But the attorney for the Producing Party would still be obligated to review all of the documents prior to disclosing them to ensure that the disclosure would not reveal the client's confidences and secrets.³⁸⁷ As an alternative to conducting this extensive privilege review, the attorney could seek the client's informed consent to disclosure of such information.³⁸⁸ Informed consent, however, requires the attorney to fully and effectively explain to the client the risks and consequences of disclosing privileged and protected information.³⁸⁹ What is disclosed cannot be unlearned

385. See CAL. BUS. & PROF. CODE § 6103 (West 2008) (providing that any willful violation of a court order related to ethical duties can result in disbarment or suspension).

386. See, e.g., *Biddle v. Warren Gen. Hosp.*, No. 96-T-5582, 1998 WL 156997, at *4 (Ohio Ct. App. Mar. 27, 1998) (recognizing breach of confidence action by a patient against his treating physician); *McCormick v. England*, 494 S.E.2d 431, 435-37 (S.C. Ct. App. 1997) (gathering cases from jurisdictions recognizing a cause of action for breach of confidence). California also recognizes the tort of breach of confidence. See *Tele-count Eng'rs, Inc. v. Pac. Tel. & Telegr. Co.*, 214 Cal. Rptr. 276, 279 (Ct. App. 1985) (describing the plaintiff's burden necessary to recover for breach of confidence). The tort is not limited to physicians but instead applies whenever "an idea, whether or not protectable, is offered to another in confidence, and is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and it is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission." *Id.* at 279 (quoting *Faris v. Enberg*, 158 Cal. Rptr. 704, 712 (Ct. App. 1979)).

387. See Kindall C. James, Comment, *Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review—Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?*, 52 LOYOLA L. REV. 839, 860-61 (2006) (addressing 2006 e-discovery amendments to the Federal Rules of Civil Procedure and noting that inadvertent disclosure of privileged information is a violation of ethical obligations to the client).

388. See, e.g., CAL. RULES OF PROF'L CONDUCT R. 3-100(A) (2008), available at http://www.calbar.ca.gov/state/calbar_generic.jsp?cid=10158&id=3422 ("A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . .").

389. See ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . ."); ABA. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) ("Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.").

by an adverse party, even if it cannot be used as formal evidence in that proceeding.

Rule 502 does not address what happens when one party refuses to provide informed consent, despite the entry of a Rule 502(d) order. Can that party refuse to waive its right (duty?) to conduct a full review of the documents prior to turning them over in discovery? Assume that the parties do not reach agreement on the need for a Rule 502(d) order—one party wants the court to enter an order, the other party wants to conduct a full document-by-document review for privilege—but the court nevertheless enters a 502(d) order.³⁹⁰ The court also orders that production of documents occur on a very rapid schedule—such that it is physically impossible for the Producing Party to both conduct a full privilege review and *also* comply with the court's ordered deadline.³⁹¹ If a party wants to conduct a complete privilege review, is that a legitimate excuse for not complying with the court's order?³⁹² May parties be "compelled to surrender the right to conduct privilege reviews on realistic schedules so that a case management order can provide expedited and inexpensive review"?³⁹³ Does the court's order require the attorney to violate the state rules of professional responsibility despite the client's objection? Does the court's order preempt the state rules of professional responsibility? If

390. The proposed rule was modified to specify that enforceability of federal court confidentiality orders is not dependent upon agreement of the parties. MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95, at 15; *cf.* MAY 2006 EVIDENCE RULES COMM. REPORT, *supra* note 97, at 3 (failing to discuss a requirement that the parties agree to a confidentiality agreement before a Rule 502(d) order becomes effective). In fact, Rule 502(d) was "designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion . . ." 154 CONG. REC. H7819 (daily ed. Sept. 8, 2008).

391. See CIVIL RULES ADVISORY COMMITTEE FALL 1999 MEETING AGENDA MATERIALS, *appearing in* 2003 Marcus Memo, *supra* note 66, at 41 ("[I]t would seem odd for the court to be able to tell an unwilling party that it could not do as thorough a review as it wanted to do because the court was in a hurry. So the consent of both is required under the proposal."); *Hearing on Evidence, Judicial Conference of the United States Advisory Committee on Evidence Rules 9* (Jan. 12, 2007) (testimony of Thomas Y Allman, Partner, Mayer, Brown, Rowe & Maw, L.L.P.), *available at* http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf ("I am terribly worried about the temptation of a busy judge to force an accelerated-privilege review on parties who haven't agreed to do it that way. I don't want 'quick peek' to be mandatory in all federal cases . . .").

392. See *Hearing on Proposal 502*, *supra* note 68, at 77 (testimony of Professor Richard Marcus) (stating that corporate counsel had repeatedly voiced concern that "federal judges who were in a hurry would insist that [corporation parties] produce material on a schedule that would not permit the review that they felt was necessary before production" and that [it was] "extremely urgent to those lawyers that a rule provide that a judge can do this only upon agreement of the parties").

393. MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95, at 18 (summary of testimony of Thomas Y. Allman).

the Producing Party would otherwise be entitled to recover the fees and costs of such a review, can the judge deny or refuse to shift the costs of doing such a privilege review?

Even if one assumes that Rule 502(d) preempts state rules of professional responsibility that require an attorney to protect a client's attorney-client privileged and work-product protected information, the new rule pointedly does not protect the Producing Party from the risks of disclosing several other types of information. First, Rule 502(d) does not protect against waiver of *any other* recognized privilege such as the doctor-patient privilege, the spousal privilege and the clergy privilege. Second, Rule 502(d) does not protect against the risks of disclosing a client's *nonprivileged* (and even nonresponsive, irrelevant) information that is nevertheless very damaging.

By choosing to protect only the *attorney-client* privilege, courts should conclude that Congress has now set up a hierarchy for privileges and has determined that the attorney-client relationship is *more* important than these other privileged relationships—even if the states consider all of these relationships to be deserving of an equivalent amount of protection. Likewise, Rule 502 protects against waiver of the *attorney work product* protection,³⁹⁴ but does not protect against waiver of protection for any other protected category of confidential information such as trade secrets or private personal and financial information.³⁹⁵ Courts, therefore, should conclude that Congress intentionally chose to respect existing law on waiver of these other less-favored privileges and protections.

In addition to upsetting the value judgments made by the states regarding these categories of privileged and protected information, Rule 502 will not protect attorneys and their clients against liability and negative consequences from disclosure of such information.³⁹⁶ Nor will it protect attorneys from the wrath of their clients and the other negative consequences of disclosing damning evidence in the case at hand.³⁹⁷ Congress has left attorneys in a position where they still must review *all* potentially discoverable information to protect against disclosure of these "less important" categories of privileged and protected information and to ensure that the documents produced are relevant.³⁹⁸ For example, New York's Disciplinary Rules specify that a lawyer has a duty to maintain the confidentiality of both a client's "confidence" (which

394. *Id.*

395. *See id.* (limiting protection exclusively to information under work-product protection).

396. *Id.*

397. *Id.*

398. *Id.*

means attorney-client privileged communications) and a client's "secret."³⁹⁹ A "'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁴⁰⁰ Although most rules of professional conduct permit an attorney to disclose a client's confidential information to comply with a court order,⁴⁰¹ entry of a Rule 502(d) order will not trigger this exception. A 502(d) order does not *compel* the Producing Party to disclose privileged or protected or irrelevant information; it simply provides that disclosure does not constitute waiver. A 502(d) order cannot compel disclosure of such information (at least for privileged and irrelevant information) because such information is beyond the scope of permissible discovery.⁴⁰²

Rule 502 also does not relieve an attorney of the obligation to review *potentially* responsive documents to determine whether they are discoverable because they are relevant to the claims and defenses raised or relevant to the subject matter of the action.⁴⁰³ The review of documents for *relevant*

399. N.Y. CODE OF PROF'L RESPONSIBILITY DR 4-101.A (2002).

400. *Id.* Federal Rule of Evidence 502 defines "attorney-client privilege" to mean "the protection that applicable law provides for confidential attorney-client communications" and "work-product protection" to mean "the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial." FED. R. EVID. 502(g). Do these two definitions encompass all types of information that are covered by the state's various iterations of what information an attorney is bound to keep confidential? Like "secrets" under New York's Disciplinary Rules?

401. *See, e.g.,* ABA MODEL RULES OF PROF'L CONDUCT R. 1.6(b) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or court order."); N.Y. MODEL RULES OF PROF'L CONDUCT 1.6(b) (2008) ("A lawyer may reveal or use confidential information to the extent the lawyer reasonably believes necessary . . . to comply with other law or court order."). Even where the court has ordered an attorney to disclose confidential information, the attorney may be required to resist the order, argue it is ineffective and consult with the client regarding an appeal of the order, before complying with the order. ABA MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13.

402. FED. R. CIV. P. 26(b)(1).

403. *See id.* ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."). One can imagine the Producing Party simply turning over the proverbial "document dump" that contains mostly nonresponsive material because the Producing Party has not reviewed the material. At this point the Receiving Party might object that the Producing Party has violated its obligation to respond to the specific discovery requests at issue and has produced too much—the proverbial "document dump." *See, e.g.,* Oklahoma *ex rel.* Edmondson, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *4 (N.D. Okla. May 17, 2007) (concluding that once documents are removed from their ordinary files, "only responsive documents [should] be placed in the boxes and that "[i]nclusion of nonresponsive documents clearly violates the letter and spirit of the rule").

information requires a review of the same documents as those inspected by attorneys conducting a document-by-document privilege review.⁴⁰⁴ Once these irrelevant and nonresponsive documents are produced, they can be used against the Producing Party and the rules of privilege provide no protection. If the documents are nonresponsive, but relevant, they can be used in the ongoing litigation. If they are nonresponsive and irrelevant, but damaging, they can be used by a plaintiff's attorney to initiate a separate lawsuit. Even where the documents that are produced are privileged (and the Rule 502(d) order preserves the privilege), the Receiving Party can use the documents in numerous ways to which the Producing Party cannot object.

Although Rule 502(d) protects against waiver of only two categories of information—attorney-client privileged and attorney work product protected—it must preempt state rules of professional responsibility governing far broader categories of information or it will provide little benefit to an attorney or their clients. Even if it does preempt state rules regarding protection and waiver of these other categories of information, however, it provides the clearest benefit to attorneys, not clients. Rule 502(d) offers an unappealing choice to the client—spend money to review documents or save money by approving document production with little or no review of the documents but risk all adverse consequences of the disclosure (other than waiver). By contrast, there is little downside for the attorney once a 502(d) order is entered but it provides a good deal of protection for the attorneys. A Rule 502 order will significantly limit the exposure and risk for attorneys who produce their clients' privileged or protected documents.

2. The Professional Responsibility Obligations of the Receiving Party's Attorney

With enactment of Rule 502, it is now certain that attorneys who request production of documents in a case in which the judge has entered a 502(d) order will receive attorney-client privileged and attorney work product protected documents on a fairly regular basis. The Rule does not contemplate what courts and clients will do once a party's secret information is disclosed and used against them. The Rule also does not contemplate what the Receiving

404. See *Hearing of the Advisory Committee on Evidence Rules 82–85* (Jan. 29, 2007) (testimony of Patrick Oot, Director of Electronic Discovery and Senior Counsel, Verizon), available at <http://www.uscourts.gov/rules/2007-01-29-Evidence-Minutes-Transcript.pdf> (stating that privilege review in a document intensive case required 115 attorneys while relevance review in the same case required 110 attorneys).

Party's attorney will do once it receives privileged or work product protected information. Neither the Federal Rules nor federal law requires the Receiving Party's attorney to notify the Producing Party or to stop reading the documents or to refrain from using them. What should the Receiving Party's attorney do? What must the Receiving Party's attorney do?

Following enactment of the e-discovery amendments to the Federal Rules of Civil Procedure, the obligations of a Receiving Party who receives privileged documents *and receives notice from the Producing Party* are clear:

After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.⁴⁰⁵

While Rule 26(b)(5)(B) provides some guidance on the Receiving Party's conduct, the requirements of the rule kick in only after the Producing Party provides notice to the Receiving Party that privileged documents have been disclosed. It does not obligate the Receiving Party's attorney to provide notice of receipt of privileged documents, nor does it provide guidance on lots of knotty ethical issues.⁴⁰⁶ Must the Receiving Party's attorney notify the Producing Party of the disclosure of privileged or protected information? May the Receiving Party's attorney read them? And take notes? May the Receiving Party's attorney use the documents until notice is received?

A 1992 ABA ethics opinion and a number of judicial opinions mandated that an attorney who received an *inadvertently* produced document must "take three steps: to refrain from reviewing it; promptly to notify the sender; and to abide the producing party's instructions."⁴⁰⁷ In 2005, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 05-437⁴⁰⁸ that supersedes the 1992 opinion and requires only that the "lawyer who receives a document relating to the representation of the lawyer's

405. FED. R. CIV. P. 26(b)(5)(B).

406. There are, of course, many practical issues, such as at what point can the Producing Party no longer object to use of "privileged" documents? If the Producing Party requests the return of "privileged" documents, who pays the Receiving Party's costs incurred in retrieving them? In using them to develop a litigation strategy or tactical use by the disclosing party of the "notice" and request to return documents? Noyes, *supra* note 84, at 647-49.

407. J. Nick Badgerow, *Rules vs. Rules: A Conflict on Inadvertent Production*, 77-JAN. J. KAN. B.A. 19, 19 (2008) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992)).

408. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).

client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."⁴⁰⁹ The 2005 opinion is intentionally silent on the question whether or not the lawyer may review the inadvertently produced privileged document.⁴¹⁰ If the lawyer abides by the ABA Ethics opinion, she will notify the Producing Party of the privileged document, but she might review it and commit it to memory.⁴¹¹

The Maryland State Bar has gone even further. It recently issued a formal opinion concluding that the Receiving Party may review and make use of privileged information and that "the Maryland Rules of Professional Conduct do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials."⁴¹²

On the other hand, some states require the Receiving Party's attorney to follow the withdrawn 1992 Ethics opinion's three-step mandate to (1) refrain from viewing, (2) promptly notify the sender, and (3) abide the Producing Party's instructions.⁴¹³ For example, in a 2007 decision, the California Supreme Court held that a lawyer who received inadvertently produced work product protected documents was subject to disqualification.⁴¹⁴ The California Supreme Court affirmed the rule that that a California attorney who receives

409. *Id.* (quoting MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008)).

410. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (concluding that the ABA Model Rules of Professional Conduct permit a Receiving Party to review and use information embedded in metadata); Steven C. Bennett, *Ethics and Inadvertent Disclosure 1* (2006), http://www.jonesday.com/files/Publication/ccd8426e-8154-4477-ba3a-3d9a0e03d2ad/Presentation/PublicationAttachment/add4da10-54e2-4a0c-8c68-4a611e45439f/Ethics%20Article_Steven%20C.%20Bennett.pdf (noting that under the ABA, a Receiving Party may read privileged documents disclosed inadvertently and is obliged to notify the Sending Attorney of the error).

411. *See supra* note 410 (discussing the ABA ethics opinion); *see also* Fla. Bar Ass'n Op. 93-3 (Feb. 7, 1994) (noting that once the Receiving Attorney notifies the Producing Party, "it is then up to the sender to take any further action").

412. Md. State Bar Ass'n, Comm. on Ethics, Op. 2007-09 (2007). *See also* Colo. Bar Ass'n, Ethics Comm., Formal Op. 119 (2008), which provides:

[W]here the Receiving Lawyer has no prior notice [of an inadvertent production], the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. *See* RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance.

413. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

414. *See Rico v. Mitsubishi Motors Corp.*, 171 P.3d 1092, 1094 (Cal. 2007) (concluding that an attorney who receives a privileged document "may not read a document any more closely than is necessary to ascertain that it is privileged" and has an obligation to notify opposing counsel of the situation).

inadvertently produced privileged documents must stop reviewing the documents as soon as the reviewer is able to ascertain that the documents are privileged and must immediately notify the Producing Party that he or she possesses apparently privileged documents.⁴¹⁵

A number of ethics opinions concur and require the Receiving Attorney to refrain from reviewing or using privileged information that is inadvertently transmitted documents.⁴¹⁶ All of these ethics opinions generally apply to *inadvertent* disclosure in one of two forms: (1) a transmission that is intended for a client goes to opposing counsel or (2) when an unauthorized person intentionally transmits privileged information to an opposing party.⁴¹⁷ These ethics opinions distinguish (either explicitly or implicitly) between *inadvertent* disclosures and production of documents in civil discovery.⁴¹⁸ There is arguably no duty on the part of the Receiving Attorney to refrain from reviewing or using the privileged information that is received in response to a discovery request. Such information is not produced "inadvertently."

One way to solve this problem is for the parties to reach agreement in advance that the Receiving Party will follow the three-step mandate and request that the court include this agreement as part of its Rule 502(d) order.⁴¹⁹ But even entry of a Rule 502(d) order that incorporates a three-step mandate will not force the Receiving Party to forget the privileged information.

In many ways, Rule 502 does not eliminate the cost of conducting a privilege review; it simply shifts that cost and burden to the requesting party. In actions in which the district court enters a Rule 502(d) order, the Producing Party's attorney may choose to intentionally produce documents without reviewing them, knowing with near certainty that they will contain some privileged documents. Presumably, the Receiving Party must do all the work of

415. *Id.* at 1098–99.

416. See Ala. State Bar, Office of Gen. Counsel, Op. No. R0-2007-02 (2007); see also Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 783–85 (2005) (surveying state bar opinions and state court opinions). For a 2006 update of this survey of the different states' approaches to inadvertent disclosure, see http://legalethicsforum.typepad.com/blog/2006/06/50_state_survey.html.

417. See David Hricik, *Mining for Embedded Data: Is It Ethical To Take Intentional Advantage of Other People's Failures?*, 8 N.C. J. L. & TECH. 231, 235–36 (2007) (describing the two most common forms of inadvertent disclosure).

418. See generally D.C. Bar Ethics Opinion 341; Fla. Bar Op. 06-2 (2006); Ala. State Bar, Office of Gen. Counsel Op. No. R0-2007-02 (2007).

419. See Bennett, *supra* note 410, at 2 (discussing agreements addressing inadvertently produced documents); David E. Springer & Su Ji Lee, *Finders Weepers: The Ethical Obligation of an Attorney Who Receives Inadvertently Produced Documents*, 5 EMP. & LABOR RELATIONS L. 1, 7 (2006) (discussing up front inadvertent disclosure agreements).

reviewing the documents, identifying potentially privileged documents, determining whether they are privileged, and, if so, giving notice to the Producing Party each time a privileged document is located. The Receiving Party must then decide whether to refrain from reviewing the documents and using them. Even if the Receiving Party is subject to a court order incorporating the three-step mandate, the Receiving Party's attorney still faces an ethical dilemma if it identifies documents that are possibly (but not clearly) privileged.

Once the Receiving Party has sorted out the documents and notified the Producing Party of any issues, the Producing Party may then request the return of the documents.⁴²⁰ If the Receiving Party then wishes to review and use the documents, it must "promptly present the information to the court under seal for a determination of the claim."⁴²¹ And then the Receiving Party's attorney gets to bill the client for all of this work.

B. Use of Information Produced Pursuant to a Rule 502(d) Order

Entry of a Rule 502(d) order precludes a claim that disclosure of documents in a federal proceeding waives the attorney-client privilege or attorney work product protection for information contained in those documents. Thus, the Producing Party may continue to assert the privilege or protection to prevent the Receiving Party (or a nonparty) from admitting the disclosed information into evidence in that federal proceeding or in any other federal or state proceeding. Rule 502(d) does not (and cannot) prevent the Receiving Party from *using* the privileged or work product protected information:

For example, the adversary may formulate questions or trial strategies that are based on or informed by privileged or protected documents. In that event, objecting may be either impossible or pointless. Similarly, if the adversary has fact or expert witnesses review and rely on privileged or protected documents (of course, before the claims are asserted and sustained), it will be impossible to have those witnesses "unlearn" that information and difficult to excise the resulting knowledge from their testimony or opinions.⁴²²

420. FED. R. CIV. P. 26(b)(5)(B).

421. *Id.*

422. Posting of David B. Alden to Drug and Device Law, *New Federal Rule of Evidence 502—A Modest Improvement?* (Sept. 23, 2008), <http://druganddevice.com/2008/09/new-federal-rule-of-evidence-502-modest.html> (on file with the Washington and Lee Law Review).

Also, the privileged document may provide reasonable grounds to impeach a witness—directly or indirectly. Finally, the threat of disclosure of the information contained in the privileged document may put a dark cloud over the Producing Party's handling of the case and force a quick settlement.

Once privileged or work product protected information is reviewed by the Receiving Party, it will provide a virtual roadmap to follow up discovery to learn the underlying facts or data that are not protected by the privilege. The Receiving Party will quickly conduct their own interviews and depositions of relevant witnesses and they will propound additional document requests. Use of interrogatories and requests for admission will be particularly important because these discovery devices are not limited to facts but, instead, may go to matters of opinion and to matters that require application of law to fact.⁴²³

Finally, Rule 502(d) provides no restriction on the use and admission into evidence of (1) other (non attorney-client) privileged information, (2) other (non attorney work product) protected information, and (3) a client's nonprivileged, nonprotected but very damaging information. Such information may be used and admitted into evidence in the federal proceeding and any other federal or state proceeding where it is relevant and otherwise admissible.

C. Routine Entry of 502(d) Orders: Factors Guiding District Courts in the Exercise of Their Discretion to Issue a 502(d) Order

Rule 502(d) gives federal courts discretion to enter an order protecting a party against waiving the attorney-client privilege or work-product protection when a party makes a knowing and voluntary disclosure of such information as long as the disclosure is "connected with the litigation pending before the court."⁴²⁴ Congress did not pass a law mandating that "this type of evidence is automatically off limit" as in *Guillen v. Pierce County*.⁴²⁵ Instead, the federal

423. See FED. R. CIV. P. 33(a)(2) ("An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact"); see also FED. R. CIV. P. 36(a)(1)(A) ("A party may serve on any other party a written request to admit . . . the truth of any matters . . . relating to . . . facts, the application of law to fact, or opinions about either").

424. FED. R. EVID. 502(d). By contrast, Rule 502(b) protects the holder of the privilege against waiver from an inadvertent disclosure only if the holder took reasonable steps to protect against disclosure in the first instance and then "promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." FED. R. EVID. 502(b).

425. See *Pierce County v. Guillen*, 537 U.S. 129, 146–47 (2003) (upholding, as a proper exercise of Congress's Commerce Clause authority, a federal statute that protected certain highway safety information from evidentiary discovery and admission). *Guillen* is discussed

judge has *discretion* to make it off limits. Neither the rule nor the accompanying Committee Notes, however, provides any factors to guide the district courts in the exercise of their discretion.⁴²⁶ What showing must a party (or parties) who seeks a 502(d) order make? If one party requests a Rule 502(d) order and the other party objects, what factors should the court consider in making its decision whether to issue such an order?

The federal court also may enter a Rule 502(d) order despite the protestation of one of the parties to the federal proceeding.⁴²⁷ If this occurs, does the aggrieved party have a right to challenge the court's exercise of discretion? What constitutes an abuse of discretion? Does a nonparty or state court have the right to challenge the original (federal) court's *discretionary* decision to issue an order?⁴²⁸ Assuming that the nonparties who will be bound by the order somehow learn about the proposed order, are they entitled to appear and challenge it?

The Advisory Committee Notes refer to a Rule 502(d) order as a "confidentiality order."⁴²⁹ Ordinarily, confidentiality and protective orders will not be entered absent specific findings and a showing of good cause.⁴³⁰ Although any party may move for a protective order to limit public access to the court records,⁴³¹ there is no guarantee that the motion will be granted. To

supra Part III.A.

426. See generally FED. R. EVID. 502(d).

427. *Id.* As first proposed, the Rule required agreement of the parties before a federal court could enter a 502(d) order. This requirement was removed from the rule. See FRE 502 Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Committee on Evidence Rules dated October 15, 2006, Re: Proposed Rule 502, Released For Public Comment 19, available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-11.pdf> (noting that FRE 502(d), as originally proposed, required that the parties agree on the confidentiality order before it can be issued and recommending the removal of such requirement). This requirement was removed from the rule. FED. R. EVID. 502(d).

428. Professor Capra, the primary drafter of Rule 502, and Magistrate Judge Paul W. Grimm, author of the *Hopson* and *Victor Stanley* opinions discussed herein, both indicate yes. The Sedona Conference Web Seminar, Limitations on Privilege Waiver Under New Federal Rule of Evidence 502 (Nov. 25, 2008), available at <http://www.sedonaconference.org/conferences/wgsa/20081125> (on file with author).

429. FED. R. EVID 502 advisory committee's note ("Under [Rule 502(d)], a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation.").

430. See, e.g., *Rollsree Co. v. Pella Products of St. Louis, Inc.*, 145 F.R.D. 92, 96 (S.D. Iowa 1992) (stating that a party seeking a protective order must make a "good cause" showing that disclosure of the information would be harmful, and that the requesting party "must make a specific demonstration of facts in support of the request"); *J.T. Baker, Inc. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 86, 90 (D.N.J. 1989) (same).

431. FED. R. CIV. P. 26(c). Rule 26(c) provides in part:

The Court may, for good cause, issue an order to protect a party or person from

rebut the presumption of public access to court records, the moving party has the burden of establishing good cause, which must be based on "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."⁴³² If the parties stipulate to the need for a protective order and make a joint motion, the court still may refuse to grant the order and, even if granted, the order must be narrowly tailored.⁴³³

It seems likely that courts will be inclined to enter a Rule 502(d) order in most commercial litigation cases and that documents will routinely be produced under the guise of this "confidentiality order."⁴³⁴ The voluntary and intentional disclosure of privileged documents will become common practice, possibly pursuant to standing orders that include a Rule 502(d) order.⁴³⁵ But this defeats the long-standing requirement that a confidentiality agreement must be specific and limited and may be granted only on a showing of good cause. Instead, it would be used as a *substitute* for the kind of careful work and review that must be done to get a protective order. The availability of a 502(d) order also may provide justification for a court in compelling production of a broader scope of information, despite the Producing Party's objection. Rule 502(d) will diminish the importance of maintaining the *confidential* nature of a client's

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (D) forbidding inquiring into certain matters, . . . (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only by the court; [and] (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.

Id.

432. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (quoting *In re Halkins*, 598 F.2d 176, 193 (D.C. Cir. 1979)).

433. See, e.g., N.D. CAL. CIV. L. R. 79-5(a) (2008) ("[O]rder may issue only upon a request that establishes that the document, or portions thereof, is privileged or protectable as a trade secret or otherwise entitled to protection under the law, [hereinafter referred to as "sealable"]. The request must be narrowly tailored to seek sealing only of sealable material."); N.D. CAL. CIV. L. R. 79-5(f) (declaring that all documents are presumptively available to the public ten years from the date the case is closed).

434. Professor Daniel Capra, Reporter for the Evidence Rules Committee and Primary drafter of Rule 502, has stated that the Rule does not set forth any factors guiding the court's exercise of discretion and that "the assumption really was that many courts will enter orders straightforwardly upon a showing that it basically is an electronic discovery case, that there's a lot of information there and it makes sense to limit costs." The Sedona Conference Web Seminar, *Limitations on Privilege Waiver Under New Federal Rule of Evidence 502* (Nov. 25, 2008) (on file with author), available at <http://www.sedonaconference.org/conferences/wgsa/20081125>.

435. The Sedona Conference Web Seminar, *Limitations on Privilege Waiver Under New Federal Rule of Evidence 502*, at 23:15 (Nov. 25, 2008), available at <http://www.sedonaconference.org/conferences/wgsa/20081125> (on file with author).

information and will increase the routine disclosure of such information. Thus, Rule 502(d) may ultimately undermine the attorney-client privilege and the attorney work product doctrine and expand the scope of discovery at the same time.⁴³⁶

D. Retroactive Application: Federal Court Power to Put the Waiver Genie Back in the Privilege Bottle

Rule 502 does not address whether a federal court may enter a Rule 502(d) order that "undoes" the effect of an earlier-in-time disclosure that constitutes a waiver of the privilege or protection.⁴³⁷ Assume, for example, that an action is brought in federal court on a state law cause of action based on diversity jurisdiction. The parties to this federal court action enter into a nonwaiver agreement pursuant to Rule 502(e). The agreement "is binding on the parties to the agreement, unless it is incorporated into a court order."⁴³⁸ The parties then exchange documents and find that the exchange includes many attorney-client privileged documents. The applicable state law deems the privilege to have been waived in that circumstance. At that point, the parties request the federal court to enter a Rule 502(d) order. The federal court enters such an order and includes language in the order to the effect that the "order binds all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation."⁴³⁹

Does the federal court order retroactively restore the privilege, putting the waiver genie back in the bottle? The text of Rule 502(d) was clarified to indicate that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision.⁴⁴⁰ In this hypothetical diversity action, state law of privilege determines whether specific

436. As noted by one commentator, "[r]outine disclosures of privileged and protected communications to adversaries as FRE 502(d) contemplates could, as expectations of confidentiality disappear, discourage employees from confiding in the company's attorneys and make attorneys reluctant to provide frank legal advice or engage in zealous advocacy." David B. Alden & Ted S. Hiser, *New Federal Rule of Evidence 502 and Possible Litigation Document Review Cost Savings*, Jones Day Commentaries (Sept. 2008), available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5487 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("Were [work product] materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.")).

437. FED. R. EVID. 502(d).

438. FED. R. EVID. 502(e).

439. FED. R. EVID. 502(d).

440. FED. R. EVID. 502(f).

information is attorney-client privileged.⁴⁴¹ Does state law also determine whether the privilege was waived by disclosure that occurred before the federal court entered a Rule 502(d) order? The Evidence Rules Committee stated that Rule 502 "applies in state court to determine whether a disclosure previously made at the federal level constitutes a waiver—despite any indication to the contrary that might be found in the language of Rules 101 and 1101."⁴⁴² Thus, it seems that entry of a Rule 502(d) order may supersede state law.

Now change our hypothetical diversity action to include the following: The parties do not enter a Rule 502(e) nonwaiver agreement. Discovery commences and the parties exchange documents. The Receiving Party's attorney identifies attorney-client privileged documents, reviews them, and uses them to formulate litigation strategy. Several months later, the Producing Party's attorney also recognizes that the documents include privileged information and requests that the court enter a 502(d) order. The Receiving Party objects and argues that there has been a waiver of the privilege. The court nevertheless enters a Rule 502(d) order. Is it binding on the party who received the documents? Is it binding on a nonparty who later argues during discovery in a subsequent lawsuit that there was a waiver? As part of the rule-making process, the rule was amended to remove the requirement of the parties' agreement, so arguably it should apply to these two circumstances and put the waiver genie back in the privilege bottle.⁴⁴³

Rule 502(d) also does not address a disclosure that is made in an otherwise public portion of the proceeding. Rule 502(d) applies by its terms to any disclosure that is "connected with the litigation pending before the court."⁴⁴⁴ Rule 502(d) arguably applies to protect against waiver of privilege for documents that are disclosed and used in a deposition,⁴⁴⁵ that are submitted to

441. See FED. R. EVID. 501 ("However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.").

442. MAY 2007 EVIDENCE RULES COMM. REPORT, *supra* note 95, at 14.

443. See Memorandum from Dan Capra, Reporter and Ken Broun, Consultant, to Advisory Comm. on Evidence Rules 19, available at <http://www.uscourts.gov/rules/Agenda%20Books/EV2006-11.pdf> (noting that Rule 502(d), as originally proposed, required that the parties agree on the confidentiality order before it can be issued and recommending the removal of such requirement).

444. FED. R. EVID. 502(d).

445. See FED. R. CIV. P. 26(b)(5)(B) 2006 advisory committee's note (indicating that resolution of a claim of privilege is dependent upon the Producing Party giving notice to the Receiving Party, which may "include the assertion of the claim during a deposition").

the court in a motion for summary judgment,⁴⁴⁶ and that are offered at trial, as long as the Producing Party objects and the federal court enters a 502(d) order.

Neither Rule 502 nor the Federal Rules of Civil Procedure set forth a time line or deadline for the Producing Party to object to use of privileged information by the Receiving Party. For example, assume that the document containing privileged information is used at a deposition and the Producing Party fails to object to the use of privileged information. Has the privilege been waived, even if the court previously entered a 502(d) order? What if the Receiving Party asks the deponent about privileged information without revealing that the subject matter of the question was derived from a document produced pursuant to a Rule 502(d) order? The Producing Party's attorney:

[W]ill need to become expert at quickly spotting privileged and protected documents as the adversary uses them in any deposition or at trial and then objecting and defending the basis for those claims "on the fly." Counsel's inability to quickly raise and support the claims that Rule 502(d) preserved may mean that they are simply waived through different conduct.⁴⁴⁷

To head off these late-developing privilege disputes, federal courts "may set deadlines for privilege-holders to assert claims of privilege or protection in produced documents, either before depositions begin or before trial, which may significantly reduce any cost savings."⁴⁴⁸

VII. Conclusion

Rule 502 is the first step in the federalization of state privilege law and, unintentionally, the first step in federalizing state rules of professional responsibility. Congress's concern for the rising cost of reviewing documents for privileged information overcame its respect for the autonomy of the states and their respective court systems. Rule 502(d) allows federal courts to

446. Even if a protective order is issued in a particular case protecting certain documents from disclosure, documents that are used for a dispositive summary judgment motion are subject to a higher scrutiny. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136–37 (9th Cir. 2003) (noting that absent compelling circumstances that warrant confidentiality, a presumption of access applies to documents attached to dispositive motions). Because entry of summary judgment serves as a substitute for trial, a higher showing is required to deny public access to the court's summary judgment records than the "good cause" standard for issuance of a protective order. *Id.* at 1135–36. In such cases, the moving party bears the burden of establishing "compelling reasons" to seal the record. *Id.* at 1136 (requiring the moving party to meet this higher standard even though documents were filed under seal pursuant to general "protective order" governing materials produced in discovery).

447. Alden, *supra* note 422.

448. *Id.*

intervene in this delicate state law balance and issue orders that bind state courts. In some instances, the federal court will issue a Rule 502(d) order while sitting in diversity jurisdiction when applying state law on a cause of action involving a resident of that forum state. In such a case, the federal court will look to state law to determine whether a particular confidential communication is attorney-client privileged, but the federal court will nevertheless issue an order perfecting and protecting the privilege despite the disclosure of such information that would destroy the privilege under that very same state law. It is doubtful whether Congress has the power to tread this dubious path.

Assuming Congress has the power to federalize state privilege law, maybe it is not such a bad thing. Professor Timothy Glynn, among others, has suggested that privilege law should be formally federalized.⁴⁴⁹ He recommends that Congress should enact preemptive privilege legislation that provides uniform privilege protection applicable in proceedings in both state and federal court, as well as in arbitrations, administrative proceedings, and legislative proceedings.⁴⁵⁰ But Congress did not do that here. Rather than taking over the entirety of state privilege law and making it uniform, Rule 502 gives federal courts the power to issue discretionary orders that bind anyone and everyone in the world, including state courts, and that interfere with state courts' ability to implement state law of privilege.

The result of this "baby step" may well be a sea change in our attitude toward the security and safeguarding of a client's confidential information. Entry of a 502(d) order may become the norm, even part of the "Local Rules" of some courts. District courts will order production of a broader scope of information during discovery, comforted by the fact that the "disclosed" information is nevertheless protected by the 502(d) order. It will then become standard practice for attorneys to voluntarily produce privileged and protected documents rather than reviewing them because it is cheaper and easier to do so. Although the purpose of Rule 502 was to "reaffirm and reinforce" the attorney-client privilege and the work product protection, Rule 502(d) may ultimately dilute and weaken the importance of the various state laws that protect the relationship between attorney and client.

449. Glynn, *supra* note 38, at 133; see also *Hearing on Evidence Before the Judicial Conf. of the U.S. Advisory Comm. on Evidence Rules 5* (Jan. 12, 2007) (testimony of George L. Paul), available at http://www.uscourts.gov/rules/EV_Hearing_Transcript_011207.pdf (noting that the vast majority of litigation in the United States occurs in state courts and that the effect of the new rule is severely limited because it is not a "nationwide" rule that applies to disclosures first made in state courts).

450. *Id.*

APPENDIX

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.

(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 Fed. R. Civ. P. 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.