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Survey of Illinois Law: Waiver of the Attorney-Client Privilege and Work Product Protection, 37 S. Ill. U. L.J. 825 (2013)

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SURVEY OF ILLINOIS LAW: WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

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I. INTRODUCTION

Effective January 1, 2013, two new Illinois Supreme Court rules clarify and limit the waiver of the attorney-client privilege and work product protection rule. Illinois Rule of Evidence 502[1] ("IRE 502"), which

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1. Ill. R. Evid. 502:

(a) Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver. When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any 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 an Illinois proceeding or to an Illinois office or agency, the disclosure does not operate as a waiver in any 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 Supreme Court Rule 201(p).

(c) Disclosure Made in a Federal or Another State's Proceeding or to a Federal or Another State's Office or Agency. When the disclosure is made in a federal or another state's proceeding or to a federal or another state's office or agency and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in an Illinois proceeding if the disclosure:
  (1) would not be a waiver under this rule if it had been made in an Illinois proceeding; or
  (2) is not a waiver under the law governing the federal or state proceeding where the disclosure occurred.

(d) Controlling Effect of a Court Order. An Illinois 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 proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

spells out the limitations on waiver, is accompanied by a "clawback provision" in Illinois Supreme Court Rule 201(p) ("Rule 201(p)")[2] that details the procedural steps a disclosing party should take to successfully assert the privilege following an inadvertent discovery disclosure. Additionally, these changes clarify the mandatory duty of the receiving party. IRE 502 was modeled on Federal Rule of Evidence 502 ("FRE 502") and Rule 201(p) was modeled on Federal Rule of Civil Procedure 26(b)(5)(B). Both rules represent a clarification of, and in certain instances, a departure from Illinois common law. This survey article will provide a detailed summary of these recent changes in Illinois.

II. ILLINOIS ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

Although IRE 502 has codified the *waiver* of the attorney-client privilege and work product protection, the privilege and protection rules remain governed by the common law in Illinois.[3] Illinois' attorney-client privilege and work product protection are generally governed by "the principles of the common law," absent a contrary statute, Supreme Court rule, or a constitutional provision.[4] The attorney-client privilege protects communications between a client and a professional legal advisor when the

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(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.

2. ILL. SUP. CT. R. 201(p):

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

3. This is similar to FRE 502, which "makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter." FED. R. EVID. 502, Advisory Committee Notes.

Illinois common law attorney-client privilege protects "communications which the claimant either expressly made confidential or which he could reasonably believe under the circumstances would be understood by the attorney as such" Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st) 110115, ¶ 30. During discovery, the burden is initially on the party asserting the attorney-client privilege, and not on the party seeking discovery of the allegedly protected items. Janousek v. Slotky, 2012 IL App (1st) 113432, ¶ 23.

4. ILL. R. EVID. 501.

client seeks legal advice.[5] In addition, it protects the confidentiality of communications between a party or the party's agents and the attorney.[6]

Although courts in Illinois have considered the two doctrines to be "separate and distinct," IRE 502 has set out the same waiver rule for work product and for material protected by the attorney-client privilege.[7] Pursuant to IRE 502(f)(2), work product protection applies to "tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial"[8] by or for a party to the subsequent litigation.[9] Until the adoption of IRE 502(f)(2), which is modeled on FRE 502(g)(2),[10] the Illinois work product doctrine was viewed more narrowly than the federal work product doctrine.[11]

In Illinois, "only 'opinion work product,' matter which discloses the theories, mental impressions or litigation plans of a party's attorney, is protected from discovery."[12] In contrast, under the broader federal standard, "all work performed by an attorney or his [or her] agent in anticipation of litigation is protected from discovery."[13] Under FRCP

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5. Ralph Ruebner & Katarina Durcova, Illinois Evidence: Illinois Rules of Evidence, Statutes, and Constitution; A Compendium for Criminal Litigation 112 (Vandeplas Publishing, LLC, 2012).
6. Janousek v. Slotky, 2012 IL App (1st) 113432, ¶ 31, *citing* People v. Knuckles, 165 Ill. 2d 125, 131 (1995).
7. *Id.* at ¶ 34; *see also* ILL. SUP. CT. R. 201(b)(2) ("Privilege and Work Product. All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. The court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just.").
8. ILL. R. EVID. 502(f).
9. Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc., 189 Ill. 2d 579, 591, 727 N.E. 2d 240, 246 (2000).
10. FED. R. EVID 502(g)(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; *see also* FED. R. EVID 502(g) commentary: "The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination."

    The definition of work product "materials" is intended to include both tangible and intangible information. *See In re* Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product")."
11. Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr., 213 Ill. App. 3d 427, 432, 572 N.E.2d 1025, 1029 (1991).
12. *Id.*; *See* ILL. SUP. CT. R. 201(b)(2) ("Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney."); *See e.g.*, Shields v. Burlington N. & Santa Fe Ry. Co., 353 Ill. App. 3d 506, 510-11, 818 N.E. 2d 851, 854-55 (2004).
13. Mlynarski, at 432; FED. R. CIV. PROC. 26(b)(3)(A) & (B):
    (3) Trial Preparation: Materials.
    (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another

26(b)(3), fact work product, which includes documents and tangible materials prepared in anticipation of litigation,[14] is discoverable if the party seeking discovery "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[15] On the other hand, opinion work product, which includes the mental impressions, theories, and opinions of the attorney,[16] is "nearly absolutely immune" from discovery under FRCP 26(b)(3).[17] Illinois, however, has not adopted FRCP 26(b)(3).

Illinois Supreme Court Rule 201(b)(2) and IRE 502(f)(2) appear to be in conflict, because IRE 502(f)(2) adopted the broader federal definition of work product protection that had previously been explicitly rejected by the Illinois Supreme Court in *Monier v. Chamberlain*.[18] In *Monier*, the Illinois Supreme Court narrowed the scope of work product protection, finding it "preferable to the Federal position"[19] for two reasons. First, the Illinois Supreme Court found the narrower definition of work product protection superior to the federal definition, because it was clear-cut and would "render[] material encompassed thereby absolutely exempt from discovery,

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party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

14. Appleton Papers, Inc. v. E.P.A., 702 F.3d 1018, 1023 (7th Cir. 2012); Charles W. Ehrhardt & Matthew D. Schultz, *Pulling Skeletons From The Closet: A Look Into The Work-Product Doctrine As Applied To Expert Witnesses*, 31 FLA. ST. U.L. REV. 67, 70 (Fall 2003).

15. Nutramax Lab., Inc. v. Twin Lab., Inc., 183 F.R.D. 458, 462 (D. Md. 1998).

16. Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1023 (7th Cir. 2012); Charles W. Ehrhardt & Matthew D. Schultz, *Pulling Skeletons From The Closet: A Look Into The Work-Product Doctrine As Applied To Expert Witnesses*, 31 FLA. ST. U.L. REV. 67, 70 (Fall 2003).

17. Nutramax Lab., Inc. v. Twin Lab., Inc,, 183 F.R.D. 458, 462 (D. Md. 1998), *citing In re* Allen, 106 F.3d 582, 607 (4th Cir. 1997) (opinion work product enjoys "nearly absolute" immunity); *In Re* Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994) (opinion work product even "more scrupulously protected" than fact work product); National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (opinion work product "absolutely immune" from discovery); Martin Marietta v. United States, 856 F.2d 619, 625 (4th Cir. 1988); *In re* John Doe, 662 F.2d 1073, 1080 (4th Cir. 1981), cert. denied 455 U.S. 1000, 102 S.Ct. 1632, 71 L.Ed.2d 867 (1982) (opinion work product enjoys "nearly absolute" immunity from discovery); Duplan Corp v. Deering Milliken, Inc., 540 F.2d 1215, 1217 (4th Cir. 1976) (opinion work product "immune" from discovery).

18. Shields v. Burlington N. & Santa Fe Ry. Co., 353 Ill. App. 3d 506, 511, 818 N.E.2d 851, 855 (2004), *citing* Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E. 2d 40 (1966), and noting, "Our supreme court [in *Monier*] expressly rejected the federal definition of 'work product' and deliberately narrowed the scope of the protection the work product doctrine provides.").

19. Monier v. Chamberlain, 35 Ill. 2d 351, 361 (1966).

while at the same time freeing relevant and material evidentiary matter."[20] Second, the Illinois Supreme Court opted away from the federal definition because there was a "huge jungle of conflicting decisions" in federal courts attempting to interpret and to apply the definition.[21] The conflict arose because FRCP 26(b)(3) only "partially codified"[22] the work product doctrine first articulated by the United States Supreme Court in *Hickman v. Taylor*.[23] Illinois has not adopted FRCP 26(b)(3), and the Illinois Supreme Court has rejected the *Hickman* standard.[24] Illinois has only adopted the broader federal definition of work product protection under FRE 502(g)(2).

In *Hickman*, the U.S. Supreme Court sought to protect files and mental impressions of an attorney, including "written statements, private memoranda and personal recollections prepared or formed [. . .] in the course of his legal duties."[25] The Supreme Court also included in that definition "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways."[26] FRCP 26(b)(3), on the other hand, states that "a party may not discover 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)." FRCP 26(b)(3) specifically "protect[s] against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." FRCP 26(b)(3) has been found to "more clearly protect[] non-attorney work product than *Hickman*."[27] FRCP 26(b)(3), however, does not

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20. *Id.*

> The Hickman [v. Taylor, 329 U.S. 495 (1947)] case, in holding that the plaintiff could not discover statements taken by the defense of occurrence witnesses because they constituted the "work product" of an attorney, intimated that circumstances indicating "good cause" might, in a proper case, require the production of material ordinarily encompassed within the concept of "work product." Its progeny in the lower Federal courts amounts to a huge jungle of conflicting decisions. (*See* Anno. 73 A.L.R. 2d 12; Kennelly, The Work Product Doctrine in Illinois, (1963) Negligence Law Forum 129, 134-40.) We believe that narrowing the scope of the "work product" doctrine—and rendering material encompassed thereby absolutely exempt from discovery, while at the same time freeing relevant and material evidentiary matter— is preferable to the Federal position.

Id.

21. *Id*.
22. *In re* Grand Jury Subpoena, 220 F.R.D. 130, 141 (D. Mass. 2004).
23. Hickman v. Taylor 329 U.S. 495 (1947).
24. Monier, v. Chamberlain, 35 Ill. 2d 351, 361 (1966).
25. Hickman, at 510 (1947).
26. *Id.* at 511.
27. *In re* Grand Jury Subpoena, at 141. ("unlike *Hickman*, Rule 26(b)(3) does not reach 'intangible' work product, but Rule 26(b)(3) more clearly protects non-attorney work product than Hickman does").

cover intangible work product.[28] FRE 502(g)(2), which is the basis for IRE 502(f)(2), provides a definition for work product, which includes tangible and intangible work product.

It appears that to this day the federal courts have not settled on a clear definition of the phrase "prepared in anticipation of litigation" within the meaning of FRCP 26(b)(3).[29] Instead, federal district courts follow three different standards: (1) "because of" the anticipated litigation;[30] (2) "for use" in litigation;[31] and (3) the "primary motivating purpose" standard.[32] The majority of federal courts apply the "because of" standard.[33] The United States Court of Appeals for the Seventh Circuit has also adopted this test.[34] Under this standard, work product protection "applies to attorney-led investigations when the documents at issue 'can fairly be said to have been prepared or obtained because of the prospect of litigation,' . . . because 'some articulable claim, likely to lead to litigation, [has] arisen.'" [35] The courts using the "for use" in litigation standard have explained that it applies work product protection only to "work done in anticipation of or for trial."[36] This standard, however, does not apply to materials prepared "in

28. *Id*., *citing* Jeff A. Anderson et al., *Special Project, The Work Product Doctrine*, 68 CORNELL L. REV. 760, 762, 865 (August 1983).

29. United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998); Robert S. Clark, 11 UTAH BAR J. 9 (1998).

30. *See, e.g.*, Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010); In re Prof'ls Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009); In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th Cir. 2004); PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002); Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002); Montgomery County v. MicroVote Corp., 175 F.3d 296, 305 (3d Cir. 1999); United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998); Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992).

31. United States v. Textron Inc. & Subsidiaries, 577 F.3d 21, 29 (1st Cir. R.I. 2009).

32. United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982).

33. Grace M. Giesel, *Article: Alternative Litigation Finance and the Work Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1101, n. 128 (Winter 2012).

34. *See e.g.*, Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2009); Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976-77 (7th Cir. 1996); Binks Mfg. Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983).

35. Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2009) ("Work-product protection applies to attorney-led investigations when the documents at issue 'can fairly be said to have been prepared or obtained because of the prospect of litigation.' Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976-77 (7th Cir. 1996) (internal quotation marks omitted). There is a distinction between precautionary documents 'developed in the ordinary course of business' for the 'remote prospect of future litigation' and documents prepared because 'some articulable claim, likely to lead to litigation, [has] arisen.' Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983) (emphasis added) (alteration in original) (internal quotation marks omitted). Only documents prepared in the latter circumstances receive work-product protection.").

36. Textron, at 29-30:

> It is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated. Rather, as the Supreme Court explained, "the literal language of [Rule 26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent

the ordinary course of business [. . .] or for [. . .] nonlitigation purposes."[37] Lastly, the "primary motivating purpose" standard provides work product protection where "the primary motivating purpose behind the creation of the document was to aid in possible future litigation."[38]

In Illinois, the work product doctrine covers only opinion work product, which includes "an attorney's 'theories, mental impressions or litigation plans' and thus [does] not encompass[] much of the work generated on a party's behalf in preparation for trial."[39] Illinois work product doctrine does not protect ordinary work product.[40] Ordinary work product is material that does not include "a party's attorney's theories, impressions, or plans."[41] Although the Illinois protection applies to opinion work product, the Illinois Supreme Court in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, held that an attorney's notes of discussions with various witnesses that contained opinion work product may, nevertheless, be discoverable where the party seeking disclosure showed "the absolute impossibility" of obtaining such information elsewhere.[42] Whereas, the federal courts are split on whether work product protection applies to non-lawyers,[43] Illinois Supreme Court Rule 201(b) extends the work product protection to materials created by non-lawyers, as long as these materials contain an attorney's "theories, impressions, or plans."[44]

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litigation." Federal Trade Commission v. Grolier Inc., 462 U.S. 19, 25, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983) (emphasis added). This distinction is well established in the case law. *See, e.g.*, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category. It is only work done in anticipation of or for trial that is protected. Even if prepared by lawyers and reflecting legal thinking, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed. R. Civ. P. 26 advisory committee's note (1970). Accord Hickman v. Taylor, 329 U.S. at 510 n. 9 (quoting English precedent that "[r]eports . . . if made in the ordinary course of routine, are not privileged").

Id.

37. *Id*.
38. United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981); *see also In re* Kaiser Aluminum & Chem. Co., 214 F.3d 586, 593 (5th Cir. 2000).
39. JEFFREY A. PARNESS, ILLINOIS CIVIL PROCEDURE, §14.06 (LexisNexis Matthew Bender) (*citing* Monier v. Chamberlain, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966)) "Yet, the zone of privacy under Rule 201(b) is quite limited, covering only work product containing an attorney's "theories, mental impressions or litigation plans" and thus not encompassing much of the work generated on a party's behalf in preparation for trial; this privacy zone does not protect the names of witnesses uncovered (even after significant efforts) or the statements made by such witnesses."
40. *Id*.
41. *Id*.
42. *Id*. *citing* Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 109-10, 432 N.E.2d 250, 253 (1982).
43. FED R. CIV. PROC. 26, Advisory Committee Note to Subdivision (b)(3).
44. Jeffrey A. Parness, Illinois Civil Procedure, §14.06 (LexisNexis Matthew Bender).

While the work product doctrine protects "the right of an attorney to thoroughly prepare his [or her] case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts,"[45] the attorney-client privilege protects from disclosure certain confidential communications made between a client and his or her attorney.[46] The purpose of the privilege "is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information."[47] Although courts recognize a societal interest in protecting the confidentiality of communications between an attorney and his or her client, countervailing policy interests of truth-seeking during court proceedings have caused a narrow interpretation of the privilege.[48] Illinois' "strong policy of encouraging disclosure" therefore requires the courts to narrowly interpret the privilege.[49]

In keeping with the public policy of encouraging disclosure, Illinois courts have placed the initial burden of showing that the privilege applies on the party asserting the privilege or protection.[50] The party asserting the privilege must show that it expressly made the communication in a confidential manner or that it reasonably believed that the communication would remain confidential.[51]

As previously noted, IRE 502 is modeled on FRE 502. Therefore, FRE 502, and its commentary, serve as a helpful guide in the interpretation of IRE 502. While FRE 502 establishes "some exceptions to waiver," it "does not purport to supplant applicable waiver doctrine generally."[52] Accordingly, FRE 502 was "not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made."[53] In Illinois, pursuant to IRE 501, privileges are "governed by the principles of the common law," absent a contrary statute,

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45. Fischel & Kahn Ltd. v. van Straaten Gallery Inc., 189 Ill. 2d 579, 591 (2000), *citing* Hickman v. Taylor, 329 U.S. 495, 510 (1947).
46. People v. Adam, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207 (1972).
47. Center Partners, 2012 IL 113107, ¶ 31.
48. *Id*. at ¶ 32.
49. *Id*. at ¶ 31.
50. Janousek v. Slotky, 2012 IL App (1st) 113432, ¶ 23.
51. *Id.* at ¶ 24; *see also* Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st) 110115.
52. FED. R. EVID. 502, Advisory Committee Notes §2, ("Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally. The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g.*, Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); Ryers [Byers] v. Burleson, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.").
53. FED. R. EVID. 502, Advisory Committee Notes §2.

Supreme Court rule, or constitutional provision. The Illinois attorney-client privilege is the creation of the common law. Therefore, the Illinois common law attorney-client privilege waiver rule will continue to apply and will not be displaced in situations where no disclosure of privileged information or work product occurred.[54] Such situations may include legal malpractice actions or allegations of ineffective assistance of counsel raised by a criminal defendant.[55]

Prior to the enactment of IRE 502, there was no clear precedent for waiver of work product protection in Illinois, and Supreme Court Rule 201(b) did not address the issue.[56] IRE 502 now sets out a broader definition of work product than established under Illinois common law. IRE 502 adopted the broader definition of work product found in FRE 502, and the Illinois rule, much like FRE 502, now covers opinion as well as fact work product. Illinois has until now only offered work product protection to opinion work product, and not to fact work product. The broader definition was adapted from FRE 502(g). However, Illinois has not adopted FRCP 26(b)(3).

The Illinois Supreme Court, through the adoption of IRE 502, has greatly simplified the waiver analysis. First, following a disclosure, the court must determine whether the disclosure was intentional or inadvertent. If the disclosure was intentional, the court will consider whether fairness requires the imposition of subject matter waiver. If the disclosure was inadvertent, the court should rely on the guidelines provided in IRE 502(b) to determine whether the holder of the privilege or protection took reasonable steps to prevent the disclosure and promptly took reasonable steps to rectify the error in accordance with Rule 201(p), if applicable.

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54. *Id*:

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

Id.

55. *See, e.g.*, Fischel & Kahn Ltd. v. van Straaten Gallery Inc., 189 Ill. 2d 579, 591 (2000) (client suing a former attorney does not waive the privilege as to communications with a subsequent attorney; s*ee also,* People v. O'Banner, 215 Ill. App. 3d 778 (1st Dist. 1991) (substance of attorney-client communications at issue not protected by attorney-client privilege where criminal defendant raised claim of ineffective assistance of counsel).

56. PARNESS, *supra* note 44. ("While significant Illinois precedents are lacking and Rule 201(b) is silent, opinion work product protection may also be waiveable.").

A. IRE 502(a): Intentional Disclosure and Subject Matter Waiver

Sub-section (a) of IRE 502 addresses subject matter waiver of work product protection and the attorney-client privilege. IRE 502(a) has substantially narrowed the scope of subject matter waiver following an intentional disclosure. Prior to the adoption of IRE 502(a), the Illinois common law subject matter rule recognized that a client's disclosure of portions of her conversation with her attorney amounted "to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter."[57] The Illinois common law mirrored the federal common law rule on subject matter waiver, finding that voluntary disclosure by a party of a part of a privileged communication waived the privilege for all communications "on the same subject matter."[58]

The enactment of FRE 502 "narrow[ed] the scope of waiver of the attorney-client privilege in federal proceedings to communications actually revealed. It create[d] an exception allowing subject matter waiver only under *unusual circumstances*."[59] FRE 502(a) does not determine whether disclosure of materials waives the privilege or protection. Rather, if there has been a waiver, FRE 502 informs whether protection for other material not provided is also waived.[60]

Now in Illinois, under IRE 502(a), which was modeled on FRE 502(a), subject matter waiver occurs "only if [it is] intentional, the disclosed and undisclosed communications or information concern the same subject matter, and they ought in fairness be considered together." It is clear from IRE 502(a)(1) that subject matter waiver cannot occur in cases of inadvertent or accidental disclosure.[61]

Moreover, subject matter waiver is not a default rule following an intentional disclosure. Rather, it acts as an exception which is enforced

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57. *In re* Grand Jury, Jan. 246, 272 Ill. App. 3d 991, 997 (1st Dist. 1995); *see also* People v. O'Banner, 215 Ill. App. 3d 778, 793 (1st Dist. 1991); People v. O'Connor, 37 Ill. App. 3d 310, 314 (3rd Dist. 1976); Newton v. Meissner, 76 Ill. App. 3d 479, 499 (1st Dist. 1979) (noting that voluntary disclosure of confidential information does not effectively waive the privilege as to all conversations or the whole breadth of the discussion which may have taken place).

58. Charles Alan Wright et al., §5444 Limiting Scope of Waiver, 23 Fed. Prac. & Proc. Evid. §5444 (Updated April 2012).

59. *Id*. (emphasis added); s*ee also* 7 ANNOTATED PATENT DIGEST §42:68 (noting that voluntary disclosure "to a third party, or opposing party, [of] substantial portions of documents or communications protected by the attorney-client privilege generally waived the privilege to the whole subject matter addressed in the disclosed communication."); Vardon Golf Co., Inc. v. Karsten Mfg. Corp., 213 F.R.D. 528, 533 (N.D. Ill. 2003); Blanchard v. EdgeMark Fin. Corp., 192 F.R.D. 233, 236 (N.D. Ill. 2000).

60. FED. R. EVID. 502, Advisory Committee Notes Subdivision (a); *In re* Aftermarket Filters Antitrust Litig., 2010 U.S. Dist. LEXIS 122111, 18-19 (N.D. Ill. Nov. 18, 2010).

61. *See also* FED. R. EVID. 502, Advisory Committee Note Subdivision (a).

only in those "unusual situations"[62] where the producing party is attempting to gain an unfair advantage by selectively disclosing only favorable information, while refusing to produce the unfavorable materials.[63] In all other instances, where a party makes an intentional disclosure, a waiver occurs only as to the information or communication actually disclosed.[64]

Before the enactment of the Illinois Rules of Evidence, Illinois courts addressed the nature of subject matter waiver of the attorney-client privilege only in the context of disclosure in judicial proceedings or depositions.[65] The Illinois common law rule was silent on whether subject matter waiver would apply to extrajudicial disclosure.[66] Recently, the Illinois Supreme Court, in a case of first impression, addressed the nature of the attorney-client privilege waiver in extrajudicial setting in *Center Partners, Ltd. v. Growth Head GP, LLC*.[67] The Supreme Court clarified that extrajudicial disclosure may include, but is not limited to business negotiations.[68] The Supreme Court held that subject matter waiver does not apply to extrajudicial disclosure of attorney-client communications when they are not subsequently used by the holder "to gain an adversarial advantage in *litigation*."[69] Therefore, fairness considerations require the application of subject matter waiver when a holder of the attorney-client privilege or work product protection strategically discloses only select portions of privileged and protected material during business negotiations

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62. Charles Alan Wright et al., §5444 LIMITING SCOPE OF WAIVER, 23 FED. PRAC. & PROC. EVID. § 5444 (Updated April 2012); *see also* 7 Annotated Patent Digest § 42:68 (noting that voluntary disclosure "to a third party, or opposing party, [of] substantial portions of documents or communications protected by the attorney-client privilege generally waived the privilege to the whole subject matter addressed in the disclosed communication."); *see also* Vardon Golf Co, at 533; Blanchard, at 236.

63. *See* Center Partners, 2012 IL 113107, ¶26.

64. *See* FED. R. EVID. 502 Advisory Committee Note Subdivision (a).

65. *See, e.g.*, *In re* Grand Jury, Jan. 246, 272 Ill. App. 3d 991, 997, 651 N.E.2d 696, 700 (1995) (disclosure in a deposition); People v. O'Banner, 215 Ill. App. 3d 778, 793, 575 N.E.2d 1261, 1270 (1991) (testimony at trial); *and see* People v. O'Connor, 37 Ill. App. 3d 310, 314, 345 N.E.2d 520, 524 (1976) (testimony at trial).

66. Center Partners, at ¶ 43; *citing* People v. Gerold, 265 Ill. 448, 481, 107 N.E. 165, 178 (1914), Newton v. Meissner, 76 Ill. App. 3d 479, 394 N.E.2d 1241 (1979), *In re* Grand Jury, 272 Ill. App. 3d at 997, 651 N.E.2d at 700 ("[a]lthough voluntary disclosure of confidential information does not effectively waive an attorney-client privilege as to all other non-disclosed communications that may have taken place (citation omitted), where a client reveals portions of her conversation with her attorney, those revelations amount to a waiver of the attorney-client privilege as to the remainder of the conversation or communication about the same subject matter."); *see also* O'Banner, , 215 Ill. App. 3d at 793, 575 N.E.2d at 1270; *and see* O'Connor, 37 Ill. App. 3d 310 at 314, 345 N.E.2d at 524; *see also* Newton, 76 Ill. App. 3d at 499, 394 N.E.2d at 1255 (noting that "voluntary disclosure of confidential information does not effectively waive the privilege as to all conversations or the whole breadth of the discussion which may have taken place."

67. Center Partners, at ¶ 26. Note that ILL. R. EVID. 502, effective January 1, 2013, was not yet in effect when the Supreme Court issued its opinion on November 29, 2012.

68. *Id*. at ¶ 60.

69. *Id*. at ¶ 49 (emphasis added).

in a misleading manner in order "to gain a later tactical advantage in anticipated litigation."[70]

The fairness factor of IRE 502(a)(3) is consistent with the Supreme Court's considerations of fairness in *Center Partners*.[71] IRE 502(a)(3) states that a subject matter waiver extends to undisclosed communication if the disclosed and undisclosed communications "ought in fairness to be considered together." The "fairness" language in FRE 502(a), which IRE 502(a) mirrors, was adopted from FRE 106,[72] which IRE 106 replicates.[73] IRE 106 provides that whenever a party introduces a part of a writing, the opposing party may require disclosure "of any other part or any other writing or recorded statement which ought in fairness be considered contemporaneously with it." IRE 106 was an attempt to modernize Illinois evidentiary rules.[74] Under IRE 502(a), fairness considerations would require subject matter waiver only in those "unusual situations"[75] where a party uses the privilege as both a "shield" and a "sword."[76] A party uses the privilege as a "sword" by intentionally disclosing only favorable information to the opponent, while at the same time invoking the privilege as a "shield" to hide unfavorable materials.[77] For this reason, IRE 502(a) will help prevent parties in Illinois from using the attorney-client privilege and work product protection to gain an unfair advantage in litigation.

In addition, the fact that IRE 502(a) was modeled on FRE 502(a) should ensure uniformity in the interpretation of subject matter waiver in Illinois state proceedings and in federal actions. The commentary to FRE 502(a) indicates that "the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure."[78] Since IRE 502(a) contains the same requirements as FRE 502(a), subject matter waiver in Illinois should be more consistent with federal waiver proceedings.

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70. *Id*. at ¶ 48.
71. *Id*. at ¶ 59, *citing In re* EchoStar Communications Corp., 448 F.3d 1294, 1303 (Fed. Cir. 2006), *In re* Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 24 (1st Cir. 2003); Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, 1995 WL 360590, (N.D. Ill. June 14, 1995).
72. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (a).
73. ILL. R. EVID. 106 ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.").
74. ILL. R. EVID. Committee Commentary (2).
75. *Cf*. FED. R. EVID. 502(a), Committee Note.
76. Center Partners, at ¶ 39.
77. *Id*. at ¶ 59, *citing In re* EchoStar Communications Corp., 448 F.3d 1294, 1303 (Fed. Cir. 2006), *In re* Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 24 (1st Cir. 2003); Graco Children's Products, Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd., No. 95 C 1303, 1995 U.S. Dist. LEXIS 8157, 1995 WL 360590, (N.D. Ill. June 14, 1995).
78. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (a).

B. IRE 502(b): Inadvertent Disclosure

Prior to the adoption of IRE 502 and Rule 201(p), Illinois lacked uniformity in cases of inadvertent disclosure. Previously, Illinois courts applied three standards: (1) a subjective standard; (2) an objective standard; and (3) a balancing test.[79]

Under the subjective standard, a "true waiver" from inadvertent disclosure could never occur, because the holder had "no intention to waive the privilege."[80] However, the objective standard almost always resulted in finding of a waiver, because the mere act of disclosure resulted in a waiver.[81] Thus, once a court found that confidential information had been revealed, confidentiality was lost, as well as the attorney-client privilege.[82] Finally, the balancing standard required the courts to evaluate various factors, including the "reasonableness of the precautions" taken by the disclosing party, whether timely attempts had been made to rectify the disclosure, the scope of discovery, the extent of the disclosure, and the interests of fairness.[83]

If a court adopts the subjective or the objective analysis, either test the court chooses would largely be determinative of the outcome. Application of the subjective analysis would result in a finding of no waiver,[84] whereas the application of the objective analysis would result in a finding of waiver simply if a disclosure had been made. The outcome in cases where the courts followed the balancing test, however, was more unpredictable, because courts had more flexibility in their ultimate determination by taking various factors into consideration along with the "interests of fairness."

The Illinois courts' determination of the scope of waiver "based on the standards of fairness" was "[c]onsistent with federal law" as it existed prior to the adoption of FRE 502(b).[85] Prior to the enactment of FRE 502(b), similarly varying standards existed for determining the consequences of inadvertent disclosure in federal courts.[86] Some courts followed the view

79. Dalen v. Ozite Corp., 230 Ill. App. 3d 18, 28, 594 N.E.2d 1365, 1371 (1992), *citing* Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204 (N. Dist. IN 1990).

80. People v. Murry, 305 Ill. App. 3d 311, 315, 711 N.E.2d 1230, 1234 (1999); *see also,* Dalen, 230 Ill. App. 3d at 28, 594 N.E.2d at 1371 ("Under a subjective analysis, inadvertent disclosure can never result in a true waiver because 'there was no intention to waive the privilege, and one cannot waive the privilege without intending to do so.").

81. *See* Dalen, 230 Ill. App. 3d at 28, 594 N.E.2d at 1371.

82. *Id*.

83. *Id*.; *see also* Sherman v. Ryan, 392 Ill. App. 3d 712, 736, 911 N.E.2d 378, 400 (2009) (refusing to apply the balancing test where no actual disclosure occurred, therefore, defendants' disclosure of work product to auditors did not constitute waiver of work product protection).

84. People v. Murry, 305 Ill. App. 3d 311, 316, 911 N.E.2d 1230, 1235 (1999).

85. Paul R. Rice & Peter Bonanno, 1 Attorney-Client Privilege: State Law Illinois § 9:80 (Updated April 2010).

86. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (b).

that a disclosure had to be intentional to constitute a waiver, while others found a waiver "only if the disclosing party acted carelessly."[87] Through FRE 502(b), federal courts apply the majority approach, which was identical to the balancing approach adopted by some Illinois courts.[88] From this, one can conclude that IRE 502(b) has also adopted the balancing test. However, much like FRE 502(b), IRE 502(b) did not codify specific factors, since such factors are merely "non-determinative guidelines that vary from case to case."[89]

Although "inadvertent disclosure" is not defined in IRE 502, the absence of a definition does not mean that the phrase should in any way be considered ambiguous or confusing. Since IRE 502 was modeled on FRE 502, the interpretation of "inadvertent disclosure" in the context of FRE 502(b) is instructive. Accordingly, "inadvertent disclosure" should be given its most straightforward meaning. "Inadvertent disclosure" means the opposite of "intentional disclosure," and is simply "mistaken" or "unintentional" production.[90]

Pursuant to IRE 502(b), an inadvertent disclosure will not result in a waiver of the privilege where the holder of the privilege took "reasonable steps to prevent disclosure," and "promptly took reasonable steps to rectify the error." Following inadvertent disclosure during discovery in civil cases, the disclosing party should look to Rule 201(p) to ensure protection of the privilege over the material. First, the disclosing party "*may* notify any party that received the information of the claim and the basis for it."[91] FRE 502(b), on which IRE 502(b) is modeled, "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."[92] However, FRE 502(b) "does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently."[93] From this we conclude that under IRE 502(b), the producing party also need not engage in such post-production review, but it must take affirmative action if there are "any obvious indications"[94] that it inadvertently disclosed protected information to the other party.

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87. *Id.*
88. *Id*. *See, e.g.*, Dalen v. Ozite Corp., 230 Ill. App. 3d 18, 28, 594 N.E.2d 1365, 1371(1992).
89. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (b); *see also* Sidney I. v. Focused Retail Prop. I, LLC, 274 F.R.D. 212, 215 (N.D. Ill. 2011).
90. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII RICH. J.L. & TECH. 8, at 33 (2011), http://jolt.richmond.edu/v17i3/article8.pdf.
91. ILL. SUP. CT. R. 201(p) (emphasis added).
92. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (b).
93. *Id*.
94. *Id*.

The producing party has the burden to show that disclosure was inadvertent and that it took reasonable steps to prevent the disclosure.[95] If the producing party cannot show that it took such reasonable steps, it will not be allowed to "reclaw" the disclosed documents pursuant to Rule 201(p).[96]

Although Rule 201(p), much like FRCP 26(b)(5)(B) on which it was modeled, uses permissive language and states that the producing party *may* notify the receiving party about the inadvertent disclosure, the commentary to the federal rule appears to mandate the giving of notice. The commentary to FRCP 26(b)(5)(B),[97] admonishes that the producing party

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95. *Id*.

96. *Cf*. Kmart Corp. v. Footstar, Inc., 2010 U.S. Dist. LEXIS 116647.

97. FED. R. CIV. PROC. R. 26, Committee Note to Rule 26(b)(5):

> Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).
>
> A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.
>
> After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

"asserting a claim of privilege or protection after production *must* give notice to the receiving party."[98] Ideally, the notice should be in writing, but even if it is not written, it must specifically set out the basis for the claim so as to enable the receiving party to identify the allegedly protected information.[99]

Once notified about the inadvertent disclosure, the recipient has a mandatory duty to take various steps to comply with Rule 201(p). The recipient "*must* promptly return, sequester, or destroy the specified information and any copies; *must* not use or disclose the information until the claim is resolved; *must* take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and may promptly present the information to the court under seal for a determination of the claim."[100] Throughout the process, the producing party has an obligation to "preserve the information until the claim is resolved."[101] The new rules intend to provide greater protection to parties participating in a voluminous discovery process, especially "[w]hen the review is of electronically stored information."[102]

FRCP 26 (b) (5) was not intended to create a federal rule of privilege waiver or to modify substantive law.[103] FRCP 26 (b) (5) merely sought to

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> If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.
>
> Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Id.

98. *Id*. (emphasis added).
99. *Id*. (emphasis added).
100. ILL. SUP. CT. R. 201(p) (emphasis added).
101. ILL. SUP. CT. R. 201(p).
102. FED. R. CIV. PROC. R. 26, Note to Subdivision (b)(5):
> The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.
103. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 201 (Spring 2006) ("If the Civil Rules Advisory Committee wanted to avoid creating a federal rule of preservation,

"adopt the essentials of a 'claw back' agreement as the default procedure in the event there was no formal agreement."[104] There is no indication that Rule 201(p) was intended to modify Illinois substantive law. Rule 201(p) is a procedural rule that sets out the steps required to preserve confidentiality of inadvertently disclosed materials where no agreement with respect to such disclosure existed.

C. IRE 502(c): Disclosure to Federal Office or Agency

Sub-section (c) of IRE 502 addresses the effect of disclosure of privileged material to a federal office or agency.[105] The adoption of IRE 502(c) has aligned Illinois law with current federal law, and has the potential to eliminate any conflicts in the interplay between Illinois and federal attorney-client waiver and work product protection provisions. Absent a court order concerning waiver, the disclosure of material to a federal office or agency does not constitute waiver in an Illinois proceeding if the disclosure would not be a waiver had it been made in an Illinois proceeding. Alternatively, such disclosure will not constitute a waiver in Illinois if it is not a waiver under the law governing the federal proceeding where the disclosure had occurred. The Illinois rule imposes the same guidelines on the treatment of a disclosure to another state's office or agency. Where disclosure occurs in another state and is subject to a protective order, Illinois is required to provide full faith and credit to the other state's order.[106]

If a party in an Illinois proceeding inadvertently discloses confidential communications (where no state-court protective order exists), and this disclosed information is subsequently sought in a federal proceeding, FRE 502(c) would apply, and a federal court would apply "the law that is most

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expressly or implicitly, in Rule 26(b)(2), the Committee wanted even more to avoid creating a federal rule of privilege waiver, expressly or implicitly, in Rule 26(b)(5). Not only could that invade the territory of the Evidence Rules Advisory Committee, but it could also be viewed as establishing or modifying substantive law under the guise of adopting a procedural rule. However, something had to be done to rein in the cost of screening electronically stored information (and conventional documentation for that matter) for privilege before production.").

104. *Id*.

105. ILL. R. EVID. 503(c).

106. *See, e.g.*,Uniform Enforcement of Foreign Judgments Act (735 ILL. COMP. STAT. 5/12-650 (2012); 735 ILL. COMP. STAT. 5/12-651 (2012) ("'foreign judgment' means any judgment, decree, or *order of a court* of the United States or of any other court which is entitled to full faith and credit in this State.") (emphasis in original); *see also* Sackett Enterprises, Inc. v. Staren, 211 Ill. App. 3d 997, 1000, 570 N.E.2d 702, 704 (1991) ("The [United States] Constitution requires that 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.'" (U.S. Const., art. IV, §1")).

protective against waiver."[107] Because IRE 502(c) adopted the language of FRE 502(c), it would similarly uphold the law that is most protective against waiver. Since the waiver rules in Illinois and federal proceedings are now consistent with each other, there should be no conflict with federal law in Illinois following a disclosure that occurred to a federal office or agency. There should be no conflict even though FRE 502(f) "applies [FRE 502] to state proceedings . . . even if state law provides the rule of decision."[108] It follows that if a disclosure occurs to a federal office or agency, Illinois courts in subsequent state proceedings are required to "honor [Federal] Rule 502."[109] Following the adoption of IRE 502(c), Illinois courts should "honor" the federal rule despite the fact that the language of the IRE 502(c) appears to allow Illinois courts to apply Illinois law as an alternative to simply deferring to the law governing federal proceedings where the disclosure occurred. Since the Illinois rule of waiver is now consistent with the federal rule, conflicts should arise rarely because courts in Illinois will apply the same rules as federal courts.

D. IRE 502(d): Controlling Effect of a Court Order

The new rule further raises the issue of enforceability of Illinois protective orders in subsequent federal proceedings. Sub-section (d) of IRE 502 states that, "An Illinois 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 proceeding." Illinois Supreme Court Rule 201(c)(1) states that a "court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression." Although IRE 502(d) is generally in keeping with the requirements of Rule 201(c)(1), it goes beyond the scope of Rule 201 by compelling the enforcement of such protective orders in other proceedings. The extension of the rule may not be necessary, however, because federal courts will already enforce Illinois protective orders,[110] and other states are required to provide full faith and credit to Illinois orders.[111] Adoption of IRE 502(d) enhances the

107. FED. R. EVID. 502, The Honorable Lee H. Rosenthal, Letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Committee on the Judiciary of the U.S. Senate and House of Representatives (September 26, 2007).

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

109. *Id*.

110. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (c).

111. *See, e.g*., Uniform Enforcement of Foreign Judgments Act (735 ILL. COMP. STAT. 5/12-650 *et seq*.); 735 ILL. COMP. STAT. 5/12-651 ("'foreign judgment' means any judgment, decree, or *order of a court* of the United States or of any other court which is entitled to full faith and credit in this

enforceability of Illinois protective court orders, where Illinois courts have found no waiver, in subsequent federal or other states' proceedings.

E. IRE 502(e): Controlling Effect of Party Agreement

Sub-section (e) of IRE 502 allows parties to enter into agreements "to limit the effect of waiver that occurs between or among them."[112] IRE 502(e) states, "An agreement on the effect of disclosure in an Illinois proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order."[113] It follows that such an agreement is not enforceable against those who are not party to the agreement or in unrelated litigation. To ensure enforceability of such agreement against third parties or in other litigation, the agreement should be made part of a court order.[114]

III. SEPARATION OF POWERS CONCERNS

Finally, it is important for us to comment that IRE 502 does not infringe on separation of powers principles with respect to waiver in Illinois administrative proceedings.[115] During committee hearings, Professor Jeffrey A. Parness argued that IRE 502 would unconstitutionally prescribe evidentiary rules for administrative proceedings.[116] We do not agree. IRE 101 limits the applicability of the Illinois Rules of Evidence to "proceedings in the courts of Illinois."[117] In Illinois, the Illinois Supreme Court has the authority to enact rules of evidence that govern civil and criminal judicial proceedings. On the other hand, it is the legislature that has the authority to enact rules of procedure and evidence for administrative hearings.[118] Since the legislature has chosen to apply evidence rules that govern civil judicial proceedings to administrative proceedings,[119] that

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State." [emphasis added]); *see also* Sackett Enterprises, Inc. v. Staren, 211 Ill. App. 3d 997, 1000, 570 N.E.2d 702, 704 (1991) ("The [United States] Constitution requires that 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.' (U.S. Const., art. IV, §1")).

112. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (e).

113. ILL. R. EVID. 502(e).

114. FED. R. EVID. 502, Advisory Committee Notes to Subdivision (e).

115. *Id*.; *see also* ILL. R. EVID. 101.

116. Jeffrey A. Parness, *The Ins and Outs of the New Illinois Evidence Rules*, 35 S. ILL. U. L.J. 4, 7-8 (Summer 2011).

117. Illinois Rule of Evidence 101 specifies that Illinois Rules of Evidence govern judicial proceedings "to the extent and with the exceptions stated in Rule 1101." Rule 1101 makes Illinois Rules of Evidence inapplicable ("other than with respect to privileges") in a preliminary determination of a question of fact, in a grand jury proceeding, small claims actions and in various other proceedings (such as sentencing, contempt, extradition or rendition proceedings, among others).

118. Illinois Administrative Procedure Act, 5 ILL. COMP. STAT. 100/1-1 (2013).

119. 5 ILL. COMP. STAT. 100/10-40 (2013), Rules of evidence; official notice. In contested cases:

includes the application of IRE 502. IRE 502 does not violate separation of powers principles because the two branches have acted harmoniously within their respective spheres.

IV. CONCLUSION

IRE 502 and Rule 201(p) have the potential to greatly simplify and clarify Illinois law pertaining to the waiver of the attorney-client privilege and work product protection. IRE 502(f), however, may have created a conflict in Illinois by adopting the federal definition of work product protection. This conflict should be addressed by the Illinois Supreme Court to provide litigating parties some additional clarity in this area. Other than this conflict, the rules provide clear guidelines for Illinois courts and should be especially helpful to litigants who engage in large-volume discovery, including the inadvertent disclosure of electronically stored information.[120]

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. *The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed.* Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

Id. (emphasis added).

120. Jack B. Weinstein, et al., *Federal Rules of Evidence, Rule 502, Attorney-Client Privilege and Work Product; Limitations on Waiver* (2013).