Bloomberg BNA

Digital Discovery & e-Evidence®

BNA INSIGHT

The Demise of Subject Matter Waiver: Federal Rule of Evidence 502(a) Five Years Later

By David D. Cross and Nathiya Nagendra

Background

In complex litigation, privilege-related costs can be crippling—and disclosure of privileged information can be devastating. The time and expense of manually reviewing document after document—line by line—to determine whether some or all of a document's content is privileged are enormous in complex cases where document collections are measured in terabytes.

This process routinely requires difficult judgments about whether a communication was made for the purpose of legal advice, as opposed to some other non-privileged purpose, such as the business advice corporate counsel often provide because of the dual hats so many of them wear.

Because these judgments can be close calls and the risk of privilege waiver could, at least historically, be very significant, privilege review often involves many attorneys reviewing the same documents to ensure the correct call is made—including lead counsel, the team member with the highest billing rate.

The Beginning of the Process. And review is just the first step in the expensive process of protecting privilege. The next step requires the tedious, time-intensive task of preparing a privilege log and redacting portions—sometimes a sentence at a time—from the thousands of documents to be logged. Capturing the specific details about each document to prepare a defensible log is akin to writing a phone book, in terms of its structure, detail, and the joy the task brings to the authors.

Legislative Intent. In 2008, the U.S. Congress sought to provide relief from escalating privilege-related costs through the adoption of Rule 502 of the Federal Rules of Evidence.[1] Rule 502 is intended to resolve and clarify inconsistent judicial decisions regarding the disclosure of privileged material in litigation.[2] In particular, Rule 502(a) effectively eliminates subject matter waiver except where a party intentionally waives privilege through the disclosure of privileged information in a selective, misleading, and unfair manner.[3]

Historically, fear of subject matter waiver has led parties to spend considerable time and resources on tedious manual review and extensive privilege logs. The rule's substantial limitation on subject matter waiver should result in a dramatic reduction of privilege-related costs for litigants.

Although the rule has been in effect for nearly five years and has been applied by courts with relative consistency, it is unclear whether it has reaped the significant cost reductions for litigants the Congress envisioned. Rule 502(a) provides:

> 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;

[1] Fed. R. Evid. 502 Advisory Committee's Note.
[2] *Id.*
[3] *Id.*

 ISSN 1941-3882

(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.[4]

Majority View. The ''fairness'' requirement of Rule 502(a) has engendered some uncertainty regarding when subject matter waiver occurs and what its scope should be. The majority of judicial opinions establish a clear principle: if privileged documents are produced intentionally but would not be used in the case to the receiving party's disadvantage, courts generally will limit waiver to the disclosed documents themselves. Where a party introduces privileged documents for strategic reasons, however, courts may find a broader subject-matter waiver.

This majority interpretation generally reflects the intentions of Congress in enacting Rule 502(a), as detailed by the rule's legislative history. It also should help effectuate the intended cost-savings of Rule 502(a), by giving litigants reasonable confidence that subject matter waiver is generally a remote risk—and one that is most often self-imposed through tactical disclosures of privileged information.

What Did Congress Intend?

Many courts have looked to the Advisory Committee's Note to Rule 502 for guidance, particularly because of the rule's recent adoption. The Note identifies two major purposes of the rule:[5]

First, to resolve longstanding disputes in the courts about the effect of inadvertent disclosure and subject matter waiver; [6] and

Second, to respond to ''the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information.''[7]

In *Bear Republic Brewing Co. v. Central City Brewing Co.*, the court described in detail the history of Rule 502(a)'s adoption.[8] The initial draft of proposed Rule 502 did not include a requirement in section (a) that the waiver be intentional.[9]The requirement that the *waiver*—rather than merely the *disclosure*—be intentional, was added to the proposed rule to ensure that there would be no subject-matter waiver unless the party *intended* that the disclosure would operate as a waiver.[10]

Committee minutes provide insight into the rationale for this change:

> [O]ne Committee member posited that there may not need to be a need for protection against subject matter waiver for mistaken disclosures, because the provision on inadvertent disclosure (Rule 502(b)) would grant protection against any finding of waiver so long as the producing party acted with reasonable care and took prompt and reasonable steps to get the mistakenly disclosed information returned. But other members noted that protection against subject matter waiver was necessary even with the protections provided by Rule 502(b)—otherwise parties will be likely to increase the costs of preproduction privilege review in order to avoid even the remote possibility of a drastic subject matter waiver.
>
> Committee members also considered whether the language on intentionality should refer to the intent to disclose the information or to the intent to waive the privilege. After discussion, the Committee determined that subject matter waiver should not be found unless it could be shown that the party specifically intended to waive the privilege by disclosing the protected information. The Committee voted unanimously to amend proposed Rule 502(a) to provide that subject matter waiver could only be found if ''the waiver is intentional.''[11]

The minutes indicate that the Congress included the provision that the waiver must be intentional in an attempt to dramatically limit the circumstances that would lead to subject matter waiver.

If privileged documents are produced intentionally but would not be used in the case to the receiving party's disadvantage, courts generally will limit waiver to the disclosed documents themselves.

The Advisory Committee's Note to the rule also indicates that the Congress intended to narrow subject matter waiver through the ''ought in fairness'' provision.[12] The language ''ought in fairness'' is modeled after Federal Rule of Evidence 106, the rule of completeness, because of the basic principle that ''a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.''[13]

According to the Note, the point of Rule 502(a) is to limit subject matter waiver to situations in which the disclosing party seeks to use the privileged material for advantage in the litigation but at the same time invokes the privilege to deny its adversary access to additional materials that could provide important context for properly understanding the disclosed materials.[14]

More specifically, the Note explains that subject matter waiver ''is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.''[15]

The court in *Bear Republic Co.* also looked at the ''Statement of Congressional Intent Regarding Rule 502

[4] Fed. R. Evid. 502(a).
[5] Fed. R. Evid. 502 Advisory Committee's Note.
[6] *Id.*
[7] *Id.*
[8] 275 F.R.D. 43, 46-50 (D. Mass. 2011).
[9] *Id.* (citing 23 Charles Alan Wright et al, *Federal Practice and Procedure* § 5441 at 853 (1st ed. Supp. 2011)).
[10] *Bear Republic Brewing Co.*, 275 F.R.D. at 46-50 (citing 23 Charles Alan Wright et al, *Federal Practice and Procedure* § 5441 at 853 (1st ed. Supp. 2011)).
[11] *Bear Republic Brewing Co.*, 275 F.R.D. at 47 (citing 23 Charles Alan Wright et al, *Federal Practice and Procedure* § 5441 at 853 (1st ed. Supp. 2011)).
[12] Fed. R. Evid. 502 Advisory Committee's Note.
[13] *Id.*
[14] 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2016.2 (3d ed. 1995 & Suppl. 2010).
[15] Fed. R. Evid. 502 Advisory Committee's Note.

  DDEE ISSN 1941-3882

of the Federal Rules of Evidence'' before interpreting Rule 502(a).[16] It found in this statement two assertions by the Congress indicating that something more than an ''intentional'' disclosure is necessary for broad subject matter waiver.[17]

First, the Congress explained that the rule is intended to address situations ''when a party's *strategic* use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter so that the information being used can be fairly considered in context.''[18]

Second, the Congress made clear that ''the party using an attorney-client communication *to its advantage* in litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter . . . .''[19]

Although the Advisory Committee's Note is quite clear on the purpose of Rule 502(a), courts interpreting this subdivision have grappled with three common questions: (1) what constitutes an ''intentional'' waiver, (2) when does ''fairness'' require broad subject matter waiver, and (3) what counts as the ''same subject'' and should opinion work product be included.

When Does Disclosure Constitute 'Intentional Waiver'?

Rule 502(a) itself does not provide a test for determining whether a disclosure constitutes an intentional waiver. The Advisory Committee's Note, however, explains that an intentional waiver requires a voluntary disclosure.[20]

In particular, the Note states that ''an inadvertent disclosure of protected information can never result in a subject matter waiver.''[21] Rule 502(a), thus, eliminates the risk of subject matter waiver for inadvertent disclosure.

Courts have declined to extend the scope of a waiver when they have found that the disclosing party lacked subjective intent to waive privilege and had no intention to use the disclosed information in the course of the litigation.

In one case, the court held that production of an e-mail between the plaintiff and her sister, which was covered by the attorney-client privilege, did not ''satisfy the higher standard of intentional waiver in Rule 502(a),'' because the plaintiff's counsel did not know that the plaintiff's sister was a lawyer and made it clear at argument that the plaintiff would not use the e-mail.[22]

As a result, the court found that the plaintiff had not waived privilege as to undisclosed communications on the same subject matter.[23]

Likewise, in *Stephenson v. Wyeth LLC*, the court found that the plaintiff did not waive work product protection by reading privileged e-mails to the defendant and submitting a copy of them as an attachment to her filings.[24]

When the plaintiff's attorney disclosed the communication to defense counsel, she claimed she did so with the verbal understanding that she would not be waiving any privilege claims.[25] The court accepted this representation and declined to find that the plaintiff had waived the work product privilege as to undisclosed communications.[26]

Courts may look to the circumstances of disclosure and infer intent even where the disclosing party disavows any intent to waive privilege.

Waiver can occur, however, even where the disclosing party denies any intention to waive privilege as to information voluntarily disclosed.

In one case, for example, the court found that the defendant's failure to remedy disclosure of privileged information, even if inadvertent, supported an inference of intentional waiver.[27]

The defendant had disclosed a memorandum regarding whether to continue annual reviews of the plaintiff's incarceration in solitary confinement, discussed the memorandum with opposing counsel, and made a conscious decision not to recall the memorandum even though it had previously been characterized as privileged.[28]

Similarly, in *Eden Isle Marina, Inc. v. United States,* the court rejected the defendant's argument that its production of work product information did not constitute a waiver because it was inadvertent as described in Rule 502(b).[29]

The court held that the production was intentional because the defendant had produced the information on three separate occasions and in a manner ''so careless that it [could not] be construed as inadvertent.''[30]

Thus, courts may look to the circumstances of disclosure and infer intent even where the disclosing party disavows any intent to waive privilege. At least one court has held, however, that the sheer number of privi-

[16] *Bear Republic Brewing Co.*, 275 F.R.D. at 49.
[17] *Id.*
[18] *Id.* (citing 154 Cong. Rec. H7818–7819 (2008)).
[19] *Bear Republic Brewing Co.*, 275 F.R.D. at 49 (citing 154 Cong. Rec. H7818–7819 (2008)).
[20] *See* Fed. R. Evid. 502(a) Advisory Committee's Note.
[21] *Id.* Some commentators have argued that Rule 502(a) does not require a subjective intent to waive privilege, but only that the production is ''voluntary'' and not ''inadvertent.'' *See* Paul W. Grimm, Lisa Yurwit Begstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII Rich. J. L. & Tech. 1, 22 (2011).
[22] *Seyler v. T-Sys. N. Am., Inc.,* 771 F. Supp. 2d 284, 288 (S.D.N.Y. 2011).
[23] *Id.* The court noted that the evidence might have been sufficient to establish that the disclosure of the e-mail was not ''inadvertent'' for the purposes of Rule 502(b) and therefore that the plaintiff had waived her privilege as to that single e-mail, but stated that this was not a question before the court.
[24] No. 04-2312-CM, 2011 BL 265354, at *2 (D. Kan. 2011).
[25] *Id.*
[26] *Id.*
[27] *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471-PAB-KMT, (D. Colo. 2009).
[28] *Id.*
[29] 89 Fed. Cl. 480, 510 (2009).
[30] *Id.*

leged documents disclosed does not necessarily support a finding of intentional waiver of the attorney-client privilege.[31]

Waiver also can occur where the disclosing party claims that the disclosed information was not privileged to begin with, if the court finds the claim to be a meritless effort to avoid subject matter waiver as to undisclosed information and the disclosing party relies on the disclosed information in the litigation.

In *U.S. Airline Pilots Association v. Pension Benefit Guaranty Corp.*, the defendant disclosed an investigative report to the plaintiff and, after the plaintiff sought additional related materials, the defendant argued that the report could not have waived the work product protection for the other materials because it was never protected in the first place.[32]

The court found this argument ''wholly untenable'' and concluded that the report summarized legal conclusions derived from an investigation undertaken in anticipation of litigation.[33] The court also emphasized that the defendant relied on the disclosed report in the litigation.[34]

In reaching its conclusion, the court noted that most courts presume that a deliberate disclosure constitutes an intentional waiver, at least absent credible evidence that the disclosing party was unaware of the contents of the disclosed material.[35]

In short, courts appear to be following the Advisory's Committee's guidance in the notes to Rule 502(a) that an intentional waiver generally means that the disclosure is voluntary or deliberate.

The 'Ought in Fairness' Provision

Although Rule 502(a) merely provides that subject matter waiver will occur if fairness requires it, the Advisory Committee's Note further explains that this means subject matter waiver is reserved for when a party uses disclosed material for a ''selective and misleading presentation of the evidence.''[36]

The majority of courts agree that fairness dictates that subject matter waiver should occur only when a party uses the disclosure for some advantage in litigation.[37]

One court, however, has found that subject matter waiver may occur absent a selective or misleading disclosure.[38]

In *Bear Republic Brewing Co.*, the court discussed the Advisory Committee's Note and the Congress's intentions in adopting Rule 502(a) at length.[39] It noted that although the Note required ''intentional'' disclosure ''in a selective, misleading, and unfair manner'' to find waiver of more than what was disclosed, this additional ''requirement'' was not found in the rule and thus was not controlling.[40] It held that the rule, not the Advisory Committee's Note, was the law.[41]

Therefore, under the strict language of the rule itself, as long as the waiver was intentional, some subject matter waiver could occur.[42]

Accordingly, even though there was no basis for finding that the disclosure in the case was made in a misleading manner, the court held that privilege applicable to material on the same subject matter also should be waived.[43]

Fortunately, this case looks to be an outlier, with many other courts instead adhering to the guidance provided by the Advisory Committee's Note.

Courts interpreting Rule 502(a) have found that disclosure for some tactical advantage in litigation, selective disclosure, and disclosure as both a sword and shield all warrant subject matter waiver in fairness to the opposing party.

'Tactical Advantage.' The overwhelming majority of courts have denied subject matter waiver, except in cases where the party disclosed the privileged information for a tactical advantage in litigation.

In *U.S. Securities Exchange Commission v. Welliver*, the defendants intentionally waived attorney-client privilege by voluntarily introducing privileged documents as exhibits.[44]

However, neither party could describe how the privileged documents were to be used or relied upon, and the court held that, although the defendants' disclosure and waiver were intentional, subject matter waiver was not appropriate because nothing suggested the defendants deliberately disclosed the information to gain a tactical advantage.[45]

---

[31] *GATX Corp. v. Appalachian Fuels, LLC*, No. 09-41-DLB, 2010 BL 289201, at *6-7 (E.D. Ky. 2010).

[32] 274 F.R.D. 28 (D.D.C. 2011); see also *Lerman v. Turner*, 2011 BL 2641, at *9–10 (N.D.Ill. Jan. 6, 2011).

[33] 274 F.R.D. at 30-31.

[34] *Id.* at 31-32.

[35] *Id.* at 31.

[36] Fed. R. Evid. 502(a) Advisory Committee's Note.

[37] *See e.g.*, *Carpenter v. Churchville Greene Homeowner's Ass'n*, No. 09-CV-6552T, (W.D.N.Y. 2011) (finding that fairness did not require subject matter waiver because consideration of the disclosed testimony alone would not disadvantage the opposing party); *In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, (D. Kan. 2011) (finding that a limited disclosure regarding an employee's notes did not require broader subject matter waiver of the employee's notes generally because nothing on the record indicated the defendant made the disclosure to gain an unfair tactical advantage); *Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-02471-PAB-KMT, 4 (D. Colo. 2009) (finding that fairness dictated that the plaintiff be allowed to proceed with discovery of protected information because the defendant had intentionally and willfully intended to invoke privilege to mislead the plaintiff and gain an advantage in the litigation); *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 503 (2009) (holding that subject matter waiver was unnecessary because the defendant's production of protected documents lacked strategic value and did not benefit the defense in any way).

[38] *Bear Republic Brewing Co.*, 275 F.R.D. at 46-50. Another court agreed with the *Bear Republic* court to the extent that a party's disclosure of privileged matter in a ''selective, misleading, and unfair manner'' is not *essential* for a finding of subject matter waiver under the plain language of the rule. However, that court still emphasized that a party's disclosure in a selective manner *is relevant* to a fairness inquiry, that fairness limits scope, and that the rule clearly disfavors broad subject matter waivers, before granting a highly limited subject matter waiver in order to give the opposing party a more ''complete picture.'' *Mills v. Iowa*, 285 F.R.D. 411, 416 (S.D. Iowa 2012).

[39] *Bear Republic Brewing Co.*, 275 F.R.D. at 46-50.

[40] *Id.* at 49.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] No. 22-cv-3076, 2012 BL 289803, at *5 (D. Minn. 2012).

[45] *Id.*

  DDEE ISSN 1941-3882

Likewise, in *Eden Isle Marina, Inc. v. the United States*, the court held that the defendant was not disclosing documents to gain an advantage in litigation.[46]

Instead, the defendant's production of protected documents was ''merely sufficiently careless and reckless to be intentional'' but did not benefit the defense in any way.[47]

The court held that ''because defendant's disclosures lacked any strategic value and [had] not adversely impacted plaintiff's ability to prosecute its case,'' no subject matter waiver was warranted.[48]

Similarly, in *Martin v. State Farm Mutual Automobile Insurance*, the court found that no broad subject matter waiver was justified.[49] It noted that the circumstances surrounding the defendant's disclosure ''certainly [did] not reflect an orchestrated effort to gain an unfair advantage in the pending litigation.''[50]

Moreover, the court could not see how allowing the plaintiffs access to undisclosed materials pertaining to the same subject matter of the disclosed letter would provide ''an important understanding'' of the letter because it was not complex and was easily understandable on its face.[51]

Therefore, no subject matter waiver was warranted to provide context to the opposing party and ensure the disclosure did not disadvantage it.

'Selective Disclosure.' Selective disclosure is one of the key factors courts consider in determining whether fairness warrants broad subject matter waiver.

In *Appleton Papers Inc. v. U.S. Environmental Protection Agency*, the court applied Rule 502(a) and found the government had not waived protection for its consultants' work by citing portions of it in consent decrees.[52]

The court found that the government had cited its consultants' work ''only in passing and certainly not in order to make a dispositive point.''[53] The court further noted that ''[g]iven the limited disclosures made here (which involved wiggle words like 'estimates' and 'suggestions'), it cannot be argued that the government's disclosures were done selectively or that it had cherry-picked certain data in order to create a misleading impression.''[54]

Applying a similar approach but reaching a different result, in *Belmont Holdings Corp. v. Suntrust Banks, Inc.*, the court found that the plaintiff had waived the protections provided by the work-product doctrine and attorney-client privilege regarding their investigators' knowledge and notes by intentionally and selectively introducing privileged testimony in its pleadings.[55]

The court further found that this selective use of information by the plaintiff, in connection with its efforts to oppose dismissal of the amended complaint and to seek the imposition of sanctions, meant that fairness required a further disclosure of related, protected information, ''in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.''[56]

In several cases, the court found that fairness did not warrant broad subject matter waiver because the selective disclosure did not disadvantage the opposing party.

In *Pinkard v. Baldwin Richardson Foods Co., Inc.*, the plaintiff intentionally disclosed a portion of a witness's report in order to demonstrate the basis for his belief that an employee's personnel file likely contained relevant documents that had not been produced.[57]

The court found that fairness did not require disclosure of the entire report since the defendant did not proffer any reason to believe that any other portion of the report—let alone its entirety—was relevant to whether the defendant investigated allegations that its employee engaged in sexual harassment.[58]

The court emphasized, however, that if the plaintiff intended to introduce any portion of the report to prove his claims he would have to promptly provide a copy of the report to the defendant's counsel.[59]

Additionally, in *Lawless v. Delaware River Port Authority,* the court held that the defendant was not putting forward privileged information in a selective, misleading, and unfair manner so as to present a one-sided story to the court because the disclosed statement actually hurt the defendant's case.[60]

The 'Sword and Shield' Principle. Several courts have articulated what ''ought in fairness'' be disclosed as dependent upon whether the party making the disclosure is using it as both a sword and a shield.[61] They have held that selectively disclosing privileged materials to accentuate beneficial details while minimizing harmful ones is unfair.

In *Coleman v. Sterling*, the defendants intentionally disclosed investigative reports to the plaintiffs during discovery but redacted certain sections of the report.[62]

The court held that these redacted sections would provide important context for a proper understanding of the protected materials and as such, denying the plaintiffs access to the redacted sections would advantage the defendants by allowing them to use attorney-client privilege and work-product protection at once as shield and sword.[63]

In *GATX Corp. v. Appalachian Fuels, LLC*, however, the court found that the plaintiff was not using the attorney-client privilege as both shield and sword.[64]

It noted that although two sets of e-mails disclosed by the plaintiff were in fact privileged, the plaintiff had not put the contents of either of these e-mails at issue in or-

[46] 89 Fed. Cl. 480, 503 (2009).
[47] *Id.*
[48] *Id.* at 521.
[49] No. 3:10-CV-0144, 2011 BL 88398, at *6 (S.D.W. Va. 2011).
[50] *Id.*
[51] *Id.*
[52] No. 11-C-318, 2012 BL 81808, at *5 (E.D. Wis. 2012).
[53] *Id.*
[54] *Id.*
[55] No. 1:09-cv-1185-WSD, (N.D. Ga. 2012).
[56] *Id.*
[57] No: 09-CV-6308T, 2013 BL 828087, at *8 (W.D.N.Y. 2013).
[58] *Id.*
[59] *Id.*
[60] No. 11-7306, (E.D. Pa. 2013).
[61] *See e.g., Theranos, Inc. v. Fuisz Tech., Ltd.*, No. C 11-5236 PSG, 2013 BL 130925, at *4 (N.D. Cal. 2013) (''[The defendant] appears primed to employ the favorable communications as a sword while guarding possibly damaging emails with the shield of the privilege, and that position undoubtedly creates an unfair prejudice to [the plaintiff].'').
[62] No. 09-CV-1594 W(BGS), (S.D. Cal. 2011).
[63] *Id.*
[64] No. 09-41-DLB, 2010 BL 289201, at *6-7 (E.D. Ky. 2010).

der to prove its case.[65] None of the privileged e-mails appeared on the plaintiff's exhibit list and the plaintiff indicated it had no intent to introduce them at trial.[66] As such, the court held that any waiver of the attorney-client privilege extended only to the information actually disclosed in the documents.[67]

'Same Subject' Matter and Opinion Work Product

One challenging aspect of subject matter waiver is how courts define what constitutes the ''same subject'' matter to be disclosed if all the requirements in Rule 502(a) are satisfied for subject matter waiver.[68]

For example, in *Century Aluminum Co. v. AGCS Marine Insurance Co.*, the court held that by voluntarily producing a privileged document concerning ''significant development in the weather investigation'' and drafted by Mr. Robb, AGCS had waived the attorney-client privilege and work product protection as to all of Mr. Robb's communications concerning the defendants' weather investigation.[69]

On the other hand, the court disagreed with the plaintiffs that the scope of the waiver should extend to all communications with Mr. Robb, with no limitation on the topic, because a waiver of that kind would not be proportionate to the purposeful disclosures made by the defendant.[70]

Similarly, in *U.S. Airline Pilots Association v. Pension Benefit Guaranty Corp.*, although the court found subject matter waiver with respect to the investigative report the defendant disclosed, the court limited the scope of the subject matter waiver to those topics that it deemed ''the same'' subject matter as that of the disclosed report, denying the plaintiff's request for waiver as to topics ''related to'' the report's subject matter.[71]

Some cases have limited the scope of subject matter waiver available under Rule 502(a) by essentially carving out opinion work product, even though Rule 502(a) contains no such exclusion on its face and generally applies to ''work-product protection'' without distinguishing between opinion or fact work product.

These courts generally hold that the standards set out in Rule 502(a) effectively do not apply to opinion work product because of the heightened protection it receives under the law and that intentional waiver of opinion work product does not warrant subject matter waiver.[72]

Conclusion

With about five years of case law since Rule 502 was enacted, questions remain as to whether the rule has been applied in a consistent and effective manner that allows litigants to significantly reduce their costs.

The overwhelming trend has been to deny subject matter waiver unless courts believe a party selectively disclosed privileged material in order to gain an advantage in litigation. This application of Rule 502(a) is consistent with the Congress's intentions in adopting Rule 502 and the Advisory Committee's guidance in the notes to the rule.

As a result, litigants generally should not fear subject matter waiver through intentional disclosures, unless it appears as though the disclosure is being used for an unfair, strategic purpose. And litigants should not face any risk of subject matter waiver where disclosure was inadvertent.

Practice Tips. Producing parties should bear in mind that their subjective intent may not protect them against waiver should a receiving party claim intentional waiver, if the court finds that the circumstances support an inference of intentional waiver.

Therefore, producing parties should take reasonable steps to make clear that they do not intend to waive privilege. This can be done through agreement with the other side pursuant to Rule 502(e), a non-waiver order pursuant to Rule 502(d), or perhaps even a cover letter expressly stating the producing party's intentions.

Intent to not waive privilege can also be expressed by promptly remedying any involuntary disclosure once the producing party learns of it (or learns that intentionally disclosed material contains privileged information) and avoiding using the disclosed information in the proceedings.

Given that a finding of intentional waiver is a necessary condition for subject matter waiver under Rule 502(a), avoiding such a finding obviously is critical to obtaining the full protections of the rule.

Litigants generally should not fear subject matter waiver through intentional disclosures, unless it appears as though the disclosure is being used for an unfair, strategic purpose.

To avoid subject matter waiver associated with a voluntary disclosure of privileged information, make clear that the disclosure is not misleading or otherwise unfair. For example, the producing party can disavow any intention to use the disclosed information to prosecute or defend the claims in the litigation.

If the producing party does intend to use the disclosed information, it can show that the disclosure is not selective, either because the disclosure captures the

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See Bear Republic Brewing Co.*, 275 F.R.D. at 49-50 (holding that what ''in fairness'' should be ''considered'' along with the disclosed material was ''all the circumstances involved with respect to this material, including how it came to be obtained, at whose direction it was obtained, and the manner in which it was obtained''); *Carpenter v. Churchville Greene Homeowner's Ass'n*, No. 09-CV-6552T, (W.D.N.Y. 2011) (finding that an e-mail summarizing notes and impressions of information learned from a plaintiff's witness was not the same as the witness's testimony).
[69] 285 F.R.D. 468 (N.D. Cal. 2012).
[70] *Id.*
[71] 274 F.R.D. at 33.
[72] *See LOL Finance Co. v. Johnson*, No. 4:09CV3224, (D. Neb. 2011) (explaining that opinion work product enjoys ''substantially greater protection than ordinary work product''); *Chick-fil-A v. Exxon Mobile Corp.*, No. 08-61422-CIV, (S.D. Fla. 2009) (''[O]pinion work product enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.'' (quoting *Cox v. Adm'r U.S. Steel & Carnagie*, 17 F.3d 1386, 1422 (11th Cir. 1994))).

  DDEE ISSN 1941-3882

entirety of the document at issue or because other portions of the document—or related documents—are not relevant to the information disclosed in the context of the proceedings at hand.

If the disclosure is incomplete, however, the producing party still may be able to avoid subject matter waiver by showing that the limited disclosure puts the receiving party at no disadvantage.

Rule 502(a) provides powerful protection against broad subject matter waiver for privileged information. Litigants should not hesitate to take full advantage of its protections.

Fortunately, the vast majority of courts interpreting the rule have done so correctly, consistent with the Advisory Committee's guidance. While Rule 502(d) provides the strongest protection against privilege waiver—and is of course available for voluntary disclosures—Rule 502(a) provides meaningful protection where the parties cannot agree on, or a court will not enter, a 502(d) order.

Parties still have to consider the risk that once disclosed an adversary might use privileged information in some way, but at least any documents cannot be used and information on the same subject matter should remain protected except where fairness warrants otherwise.

Bottom Line. Litigants should feel increasingly comfortable forgoing the costly, tedious manual review of entire document collections and associated privilege logs, and instead take advantage of such cost-saving solutions as electronic privilege filters and electronically-generated privilege logs (using metadata).

Litigants can perhaps save manual review and logging for those relatively few documents that really need it, such as those belonging to custodians who regularly communicate with counsel about sensitive matters.

For other custodians, litigants generally can feel comfortable that any disclosed privilege information should not lead to subject matter waiver, and thus the privileged information that really matters should remain protected. This will save significant time and expense, and allow litigation counsel to focus on more important responsibilities than preparing the legal equivalent of a phonebook.

David D. Cross is Co-Chair of the E-Discovery & Information Management Group and a member of the Antitrust and Litigation Groups in Crowell & Moring LLP's Washington, D.C. office. He is Co-Chair of the American Bar Association's E-Discovery Subcommittee for the Section of Litigation and an active member of the Sedona Conference, Working Group 1. Mr. Cross' practice includes antitrust, intellectual property, health care, securities, and general commercial litigation, representing both plaintiffs and defendants in federal and state courts as well as arbitration.

Nathiya Nagendra is a third-year law student at Columbia Law School and a former summer associate in the Washington, D.C. office of Crowell and Moring LLP. Nathiya received a B.A. in International Studies and Philosophy from American University. She will be returning to Crowell and Moring LLP as an associate in Fall 2014.