STATE OF WISCONSIN

SUPREME COURT

In re:

PROPOSED AMENDMENTS TO
WISCONSIN STATUTES §§ 804.01, 805.07 AND 905.03.

MEMORANDUM IN SUPPORT OF PETITION OF WISCONSIN JUDICIAL COUNCIL FOR AN ORDER AMENDING WIS. STATS. § § 804.01, 805.07 AND 905.03

April M. Southwick
WI State Bar No. 1070506
110 East Main Street
Madison, WI 53703
(608) 261-8290
(608) 261-8289 (facsimile)
april.southwick@wicourts.gov

ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

February 20, 2012

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INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to create WIS. STATS. § § 804.01 (7), 805.07 (2) (d) and 905.03 (5); and to amend WIS. STAT. § 804.01 (2) (c). This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

The proposed amendments are intended to resolve uncertainty in the courts about the effect of certain disclosures of communications or information protected by the lawyer–client privilege or as work product; specifically those disputes involving inadvertent disclosure and subject matter waiver. The Court spotted this issue in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*[1] and raised it again in 2010 when the Court was fashioning the civil procedure rules that now govern the discovery of electronic information. At the time, the Judicial Council had already undertaken a study of potential fixes. The proposed amendments are the result of that study.

The proposed amendments reflect the same tandem procedure that applies in federal courts: a "clawback" procedure mated to an evidentiary rule. The clawback procedure freezes the status quo until the parties or a court decides whether the information that was disclosed is still privileged or protected. The evidentiary rule provides the rule of decision as to whether the disclosure results in a forfeiture of the privilege or work product protection.

[1] 2004 WI 57, ¶¶ 28-32, nn. 15-17, 271 Wis. 2d 610.

Like its federal counterpart, this proposal is intended to resolve uncertainty in the courts as to whether and when an inadvertent disclosure results in a forfeiture, and also to "respond[] to the widespread complaint that litigation costs necessary to protect against waiver of [lawyer]–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."[2] This concern is especially troubling in cases involving the discovery of electronically stored information ("ESI"). ESI exists and must be exchanged by parties to litigation in such large volumes that the risk of an inadvertent disclosure is exponentially greater than in the days of hard-copy discovery.[3]

Federal rules governing clawback and inadvertent disclosure do not alter state law principles governing what is privileged or work product in the first place, and neither do the proposed rule amendments. While establishing some exceptions, the rules do not purport to supplant applicable forfeiture doctrine generally. The proposal seeks only to provide a predictable, uniform set of standards under which parties can better determine the consequences of a disclosure covered by the lawyer-client privilege or work-product protection.

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[2] FED. R. EVID. 502 advisory committee's note.

[3] *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

DISCUSSION

I. E-discovery Federal Rules History

A. Federal Rule of Civil Procedure 26(b)(5)(B)

Federal Rule of Civil Procedure ("FRCP") 26(b)(5)(B), the so-called "clawback" provision of the federal rules, was enacted in 2006. The enactment created a process to recover, or claw back, information subject to a claim of privilege or of protection as trial preparation material when it has been inadvertently produced in discovery.[4]

Unfortunately, FRCP 26(b)(5)(B) created as many problems as it attempted to resolve. While the procedure freezes the status quo while the parties take their dispute over privilege and work-product claims to court, the procedure failed to give courts any rule of decision for determining whether the inadvertent disclosure had resulted in a waiver (or forfeiture – more on this distinction below) of some or all of the information that was disclosed (and potentially even information that had not been disclosed, under the principle of "subject matter waiver," discussed below). Basically, whether an

[4] FED. R. CIV. P. 26(b)(5)(B) provides:

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

inadvertent disclosure acted as a waiver was left to the substantive law of the controlling jurisdiction, and the federal courts took three distinct positions:

> The "strict accountability" approach followed by the Federal Circuit and the First Circuit [and the District of Columbia] (which almost always finds waiver, even if production was inadvertent, because "once confidentiality is lost, it can never be restored"); the lenient/ "to err is human" approach, followed by the Eighth Circuit and a handful of district courts (which views waiver as requiring intentional and knowing relinquishment of the privilege, and finds waiver in circumstances of inadvertent disclosure only if caused by gross negligence); and the third approach, adopting a " 'balancing' test that requires the court to make a case-by-case determination of whether the conduct is excusable so that it does not entail a necessary waiver" [(adopted by a number of district courts within the Fourth Circuit)].[5]

In *Hopson*, one of the leading decisions in this field, the United States District Court for the District of Maryland recognized that the policy of "narrowly confining the attorney-client privilege to its essential purpose, with subject-matter waiver as the price for unprotected disclosure" was at odds with "the distinct trend towards limiting the nature and amount of discovery to the needs of the particular case, given the issues in the case, the importance of the facts sought to be discovered, and the resources of the parties."[6] The court further acknowledged "the enormous costs that would accompany a requirement that in all civil cases the production of electronically stored information could not be accomplished until after a comprehensive privilege review and

[5] *Hopson,* 232 F.R.D. at 235–36 (footnotes omitted). *See also Harold Sampson Children's Trust,* 2004 WI 57, ¶¶ 28-32, nn. 15-17.

[6] *Hopson* at 238.

particularized assertion of privilege and work product claims," and noted that ESI production costs could amount to millions of dollars, including tens or hundreds of thousands of dollars in privilege review costs.[7] Additionally, the court observed that, "[w]ith regard to the process of assembling electronic information responsive to discovery requests, an entire industry of consultants ha[d] developed to provide services to litigants," with one consultant estimating " '2004 domestic commercial electronic discovery revenues were in the range of $832 million - a 94 percent increase from 2003,' " and projecting revenues of $1.282 billion for 2005, $1.923 billion for 2006, and $2.865 billion for 2007.[8]

The *Hopson* court, quoting the Report of the Judicial Conference of the United States by the Advisory Committee on the Federal Rules of Civil Procedure, noted:

> The problems that can result from efforts to guard against privilege waiver often become more acute when discovery of electronically stored information is sought. The volume of the information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming, yet less likely to detect all privileged information. Inadvertent production is increasingly likely to occur.[9]

FRCP 26(b)(5)(B) was a step in the right direction, but it was not the solution. The courts recognized that there was still need for a rule to address the question of

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[7] *Id.*

[8] *Id.* at 239 & n.32 (citing *Socha-Gelbmann 2005 Electronic Discovery Survey*, Socha Consulting LLC, http://www.sochaconsulting.com/2005surveyresults.htm (last visited Jan. 12, 2012)).

[9] *Id.* at 232 (quoting Committee on Rules of Practice and Procedure, Summary of the Report of the Judicial Conference 27 (Sept. 2005)).

privilege waiver. In fact, the judge in *Hopson* went so far to warn litigants that "[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures in the [then-] proposed rule."[10]

B. Federal Rule of Evidence 502

In response to the problems left unaddressed by FRCP 26(b)(5)(B), Congress enacted Federal Rule of Evidence 502 in September 2008. FRE 502 addresses the mechanics of privilege waiver for information subject to attorney-client privilege and work product protection. FRE 502 was designed to be read in tandem with FRCP 26(b)(5)(B), which addresses procedurally how to seek a "clawback" of inadvertently disclosed privileged documents, but does not discuss whether the inadvertent disclosure results in a privilege waiver. FRE 502 was designed to promote discovery by providing litigants with a tool to control review costs in large-scale document or electronic evidence productions while avoiding the risk of wholesale subject matter waiver in cases of inadvertent production of privileged materials.

Under FRE 502, where privileged material (or other information protected from disclosure) is inadvertently revealed, the disclosing party retains the privilege so long as it took reasonable steps both to prevent the disclosure and to rectify its mistake. As the Judicial Conference Committee Notes to Rule 502 make clear, "an inadvertent disclosure of protected information can never result in a subject matter waiver."[11] This changes the pre-Rule 502 black letter law that a waiver of the attorney-client privilege as to one

[10] *Id.* at 234.
[11] FED. R. EVID. 502 advisory committee's note.

document or communication – whether intentional or not – waived the privilege as to all other documents and communications relating to the same subject matter.[12] As a result, parties no longer need to fear the nightmare scenario that the inadvertent production of one privileged email or piece of correspondence might result in the wholesale loss of privilege. As discussed below, FRE 502 also addresses under what circumstances a disclosure will be deemed "inadvertent" rather than intentional.[13]

As previously noted, prior to FRE 502, federal courts used three different approaches in determining whether an inadvertent production of a privileged document waived the privilege.[14] FRE 502(b) establishes a "middle of the road" test for determining whether inadvertent disclosure of privileged or protected material will result in a finding of waiver. This approach was the most prevalent prior to the adoption of FRE 502, and most courts following this approach found waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner.[15]

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[12] *See, e.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).

[13] "When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)." FED. R. EVID. 502(b).

[14] For a more detailed examination of the former federal court approaches see John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure-Federal Law,* 159 A.L.R. Fed. 153, §3-§6 (2000).

[15] FED. R. EVID. 502(b) advisory committee's note.

II. Proposed Amendments to Wisconsin Rules

A. WIS. STAT. § 804.01 (7), Recovering Information Inadvertently Disclosed

The proposed amendment to WIS. STAT. § 804.01 (7) creates a Wisconsin version of the federal clawback rule. It tracks the language of FRCP 26(b)(5)(B) quite closely. Appendix 1 compares the proposed Wisconsin rule and the federal rule on which the changes are modeled.

The proposed rule directs a party that has inadvertently provided privileged documents to an opponent to notify the opponent. Once notification is received, the recipient must "return, sequester, or destroy" the inadvertently produced document and not use it in any way. A procedure is also provided for the court to resolve the claim of privilege relating to the materials.

The proposed amendments do not conflict with the Wisconsin Rules of Professional Conduct for Attorneys, which require that an attorney who "knows or reasonably should know that the document was inadvertently sent" must "promptly notify the sender."[16] Rather, the two rules work in concert: WIS. STAT. § 804.01 (7) is triggered when actual notification is received from the sender that the material was inadvertently sent, and the Rules of Professional Conduct are triggered when the recipient realizes that the material provided by an opponent is likely privileged.

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[16] WIS. SCR § 20:4.4(b).

B. WIS. STAT. § 804.01 (2) (c), Trial Preparation: Materials

WIS. STAT. § 804.01 (2) (c) is amended to make explicit the effect of different kinds of disclosures of trial preparation materials. An inadvertent disclosure of trial preparation materials is akin to an inadvertent disclosure of a communication protected by the lawyer-client privilege. Whether such a disclosure results in a forfeiture of the protection is determined by the same standards set forth in WIS. STAT. § 905.03 (5). A disclosure that is other than inadvertent is treated as a waiver. The distinction made in the proposed rules between "waiver" and "forfeiture" is deliberate and recognizes the careful distinction drawn by Wisconsin courts, a distinction that is not as carefully observed in other jurisdictions.[17]

C. WIS. STAT. § 805.07 (2) (d), Subpoena

The proposed amendment to WIS. STAT. § 805.07 (2) (d) is modeled on Federal Rule of Civil Procedure 45(d)(2)(B), which was amended in 2007 to adopt the wording of FRCP 26(b)(5)(B). Appendix 3 compares the proposed Wisconsin rule and the federal rule on which the changes are modeled. The proposed language in s. 805.07 (2) (d) mirrors the proposed language in s. 804.01 (7), discussed above, and applies it to inadvertent disclosures in response to a subpoena.

D. Forfeiture of Privilege, WIS. STAT. § 905.03 (5)

Wis. Stat. § 905.03, Wisconsin's rule regarding lawyer-client privilege, was adopted by Wisconsin Supreme Court order dated June 5, 1973, and effective Jan. 1,

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[17] *See State v. Ndina,* 2009 WI 21, ¶¶ 28-31, 315 Wis. 2d 653.

1974.[18] The newly proposed sub. (5) is modeled on subsections (a) and (b) of FRE 502. Like its federal counterpart, the proposed rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by lawyer-client privilege, on whether the disclosure itself operates as a forfeiture of the privilege or protection for purposes of admissibility of evidence.[19] The proposed rule does not alter the substantive law regarding lawyer-client privilege in any other respect, including the burden on the party invoking the privilege to prove that the particular communication qualifies for it.[20]

The Statement of Congressional Intent and the Committee Note of the Federal Advisory Committee on Evidence Rules regarding FRE 502 are instructive, though not binding, in understanding the scope and purposes of those portions of FRE 502 upon which s. 905.03 (5) is based. Basically, the proposed rule prevents some unintentional productions of privileged and protected documents from resulting in a forfeiture of the privilege. Appendix 2 compares the proposed Wisconsin rule to the federal rule on which the proposal is modeled.

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[18] Sup. Ct. Order, 59 Wis. 2d R1, R111 (1973).

[19] Sub. (5) employs Wisconsin's careful distinction between the terms "waiver" and "forfeiture" recognized in cases such as *Ndina*.

[20] The Judicial Conference's Committee on Rules of Practice and Procedure submitted proposed Rule 502 to Congress because, while the Rules Enabling Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals," it also provides that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. §§ 2072(a) and 2074(b) (2006).

When there has been an inadvertent disclosure of privileged or protected materials, proposed s. § 905.03 (5) (a) provides that there is no forfeiture if the privilege-holder took "reasonable steps" to both "prevent disclosure" in the first instance and "to rectify the error."

The proposed rule also limits "subject matter" waivers. When there has been a disclosure that waives the attorney-client privilege, proposed s. § 905.03 (5) (b) provides that the waiver extends to undisclosed privileged or protected communications on the "same subject matter" only if "they ought in fairness to be considered together." While the proposed rule will require courts to interpret and define both what is the "same subject matter" and when "fairness" requires a waiver, Wisconsin courts will have the benefit of a growing body of federal case law to provide guidance.

Like the federal rule upon which it is based, the key issue in most cases will be whether the disclosing party took reasonable steps to prevent disclosure. The various approaches available are discussed in the Advisory Committee Note and in *Harold Sampson Children's Trust*.[21] Sub. (5) represents an "intermediate" or "middle ground" approach, which is also an approach taken in a majority of jurisdictions. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling any holding in *Sampson.* *Sampson* holds that a lawyer's *deliberate* disclosure, without the consent or knowledge of

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[21] 2004 WI 57, ¶¶ 28-32, nn. 15-17, 271 Wis. 2d 610.

the client, does not waive the lawyer-client privilege.[22] Neither subpart of sub. (5) alters this rule. Sub. (5) (a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures might come into play under sub. (5) (b), which provides that, when a disclosure is not inadvertent, a privilege forfeiture under sub. (5) (a) may extend to undisclosed communications and information as well. However, such an extension ensues only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the *Sampson* rule.

In judging whether the holder of the privilege or protection took reasonable steps to prevent disclosure or to rectify the error, it is appropriate to consider the non-dispositive factors discussed in the Advisory Committee Note: (1) the reasonableness of precautions taken, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of disclosure, (5) the number of documents to be reviewed, (6) the time constraints for production, (7) whether reliable software tools were used to screen documents before production, (8) whether an efficient records management system was in place before litigation; and (9) any overriding issue of fairness.

Measuring the time taken to rectify an inadvertent disclosure should commence when the producing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were

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[22] *Id.*, ¶ 46.

produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

In judging the fourth factor, which requires a court to determine the quantity of inadvertently produced documents, it is appropriate to consider, among other things, the number of documents produced and the percentage of privileged documents produced compared to the total production.

In assessing whether the software tools used to screen documents before production were reliable, it is appropriate, given current technology, to consider whether the producing party designed a search that would distinguish privileged documents from others to be produced and conducted assurance testing before production through methods commonly available and accepted at the time of the review and production.

Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be

treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice-of-law analysis.[23]

The language of proposed sub. (5) differs from the language of FRE 502 in a way that should not be considered material. Sub. (5) applies to a privileged "communication." FRE 502 applies to a privileged "communication or information." The reason for the difference is that sub. (5) is grafted onto sub. (2), which states the general rule regarding the lawyer-client privilege in terms of "communications" between lawyers and clients, not "communications and information." Sub. (5) follows suit. This different language is not intended to alter the scope of the lawyer-client privilege or to provide any less protection against inadvertent disclosure of privileged information than is provided by FRE 502.

The proposal recognizes that despite the protections of FRE 502 and the proposed Wisconsin counterpart, parties still cannot "put the genie back in the bottle" once information has been disclosed – even inadvertently. Attorneys retain a duty to their clients to safeguard confidential information, and the new rules do not override that duty.

III. Enactment Of Clawback Provisions In Other States

A number of states, including Arizona,[24] Arkansas,[25] Florida,[26] Iowa,[27] Kansas,[28] Louisiana,[29] Maryland,[30] Massachusetts,[31] New Hampshire,[32] North Dakota,[33] Oklahoma,[34]

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[23] *See Beloit Liquidating Trust v. Grade,* 2004 WI 39, ¶ 24-25, 270 Wis. 2d 356.
[24] ARIZ. R. EVID. 502.
[25] A.R.E. 502.
[26] FLA. R. CIV. P. 1.285.
[27] IOWA RULE 5.502.

Tennessee,[35] Texas,[36] Virginia,[37] and Washington[38] have enacted rules roughly corresponding to FRE 502.

There is considerable variation from FRE 502 in the state enactments. For example, Arkansas[39] and Oklahoma[40] acknowledge selective non-waiver for disclosures made to governmental entities, an approach dropped from the final version of the federal rule. Variation also exists on other issues. Arizona,[41] Kansas[42] and Washington[43] deal with the impact of disclosures made in other federal or state courts.

Regardless of the minor variations, the Rule 502-type amendments are all directed at the ever-increasing cost of discovery. In cases where discovery of ESI is expected, one of the highest costs is the pre-production review of ESI designed to protect against

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[28] K.S.A. 60-426a.
[29] LA. C.C.P. ART. 1424(C) & (D) (2007)(non-waiver rule dealing with inadvertent disclosure).
[30] MD. RULE. 2-402(e)(3).
[31] Massachusetts Guide to Evidence §523, 2011 Ed.
[32] N.H. EVID. RULE 511 (privilege claim not "defeated" by "disclosure that was made inadvertently during the course of discovery").
[33] N.D.R.EV. 510.
[34] 12 OKLA. ST. St. § 2502.
[35] TENN. R. EVID. RULE 502.
[36] TEX. R. CIV. P. 193.3(D)(1999)(requiring a party to act within 10 days of actual discovery).
[37] VA CODE ANN. § 8.01-420.7.
[38] WASH. R. EVID. 502.
[39] A.R.C.P. 26(b)(5)(D) and A.R.E. 502 (selective non-waiver for production made to state agencies).
[40] 12 OKLA. ST. St. § 2502(F)(selective non-waiver of attorney-client or work product matter furnished to governmental agencies).
[41] A.R.E. 502(c) (if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).
[42] K.S.A. 60-426a.(c) (if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).
[43] WASH. R. EVID. 502(c) (if disclosure is made in federal court or another state without a court order governing waiver, it is not a waiver if it would not be waived in the other forum).

disclosure of privileged or protected information.[44] States courts are increasingly finding that a rule can result in a uniform approach that is not fact- or case-specific. Adopting a rule based on FRE 502 provides a stronger degree of predictability to litigants, as well as combats the rising costs of discovery.

IV. JUDICIAL COUNCIL DRAFTING PROCESS

The Judicial Council's drafting committee took a very basic approach to the issue of subject matter waiver, recommending adoption of only the two key provisions of FRE 502.[45] Like the previously proposed and adopted Wisconsin rules regarding discovery of ESI, the committee noted that Wisconsin courts have yet to encounter significant issues with the discovery and production of ESI. However, the committee recognized that given the trend toward an increasing amount of ESI, it is prudent to be proactive and implement rules before serious problems arise.

The committee's recommendations contained herein were derived after months of study by the committee members. The recommendations were submitted to the full Judicial Council for discussion and approval. Once a draft was approved, the

[44] *See, e.g.*, Clayton L. Barker & Philip W. Goodin, *Discovery of Electronically Stored Information*, 64 J. MO. B. 12, 18 (2008) (discussing the "staggering" costs associated with pre-production review of ESI for privileged information).

[45] The proposed amendments were studied and drafted by the Judicial Council's Evidence & Civil Procedure Committee. Membership included: Committee Chair Judge Edward Leineweber, Richland County Circuit Court; Tom Bertz, Anderson, O'Brien, Bertz, Skrenes & Golla; Al Foeckler, Cannon & Dunphy S.C.; Catherine La Fleur, La Fleur Law Office; Tom Shriner, Foley & Lardner LLP; Hon. Mary Wagner, Kenosha County Circuit Court; William Gleisner, Law Offices of William C. Gleisner, III; Karl Kelz, Taylor County District Attorney; Bob McCracken, Nash Spindler Grimstad & McCracken; Marty Kohler, Kohler & Hart; and Richard B. Moriarty, Department of Justice. The committee also received invaluable project assistance from Milwaukee County Circuit Judge Richard Sankovitz and Attorney James T. McKeown, 7th Circuit E-discovery Committee.

recommended amendments were then submitted to a number of organizations and individuals who were identified as potentially interested parties, including attorneys who commented on the previously adopted rules regarding discovery of ESI, and those who were identified as having authored articles or presented on issues involving discovery of ESI.[46] The potentially interested parties were asked to provide comments on the proposal. The comments were then studied by the committee, resulting in further amendment to the proposal. The additional amendments were then resubmitted to the full Judicial Council and final Judicial Council approval was obtained on October 21, 2011.

CONCLUSION

Attorneys and those who work with them owe clients and their confidences the utmost respect. Preserving confidences is one of the profession's highest duties. Arguably, strict rules about the consequences of disclosing confidences, even inadvertently, may serve to promote greater care in dealing with privileged information. However, precaution comes at a price. In the digital era, when information is stored, exchanged and produced in considerably greater volumes and in different formats than in earlier eras, thorough pre-production privilege review often can be prohibitively

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[46] The following organizations or individuals were provided with a draft of the recommended amendments and were invited to submit written comments to the Judicial Council: Wisconsin State Bar Sections, Civil Litigation section of the Milwaukee Bar Association, Wisconsin Association for Justice, Wisconsin Defense Counsel, Chief Judges in Wisconsin, Judicial Conference, Dean Joseph D. Kearney, Dean Kenneth B. Davis, Jr., League of Wisconsin Municipalities, Wisconsin Counties Association, John C. Mitby, Timothy D. Edwards, Matthew Stippich, Bruce Olson, Mark F. Foley, Sarah A. Zylstra, Patrick J. Murphy, Nathan A. Fishbach, Jonathan R. Ingrisano, Joseph L. Olson, Jennifer L. Naeger, and Steve M. Anderson. Special thanks to Attorney Jonathan Ingrisano, Godfrey & Kahn, for his excellent feedback.

expensive. Most clients seek a balanced approach, which the proposed rules provide while increasing predictability, reducing discovery costs, and protecting privilege.

Dated February 20, 2012.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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April M. Southwick, Attorney
WI State Bar #1070506
110 E. Main Street
Madison, Wisconsin 53703
(608) 261-8290
Facsimile: (608) 261-8289
april.southwick@wicourts.gov

Appendix 1

Comparison of proposed amendment to Wisconsin rule and Federal rule on which the proposal is modeled.

~~FED. R. CIV. P. 26: DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY~~ WIS. STAT. § 804.01 General provisions governing discovery.

~~**(5)** ***Claiming Privilege or Protecting Trial-Preparation Materials.***~~

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~~**(B)** *Information Produced.*~~

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(7) RECOVERING DOCUMENTS INADVERTENTLY DISCLOSED. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Appendix 2

Comparison of proposed amendment to Wisconsin rule and Federal rule on which the proposal is modeled.

~~FED. R. EVID 502: ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT; LIMITATIONS ON WAIVER~~ WIS. STAT. § 905.03 Lawyer-client privilege

~~The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.~~

(5) FORFEITURE OF PRIVILEGE

~~(b) Inadvertent disclosure.~~ (a) *Effect of inadvertent disclosure*. ~~When made in a Federal proceeding or to a Federal office or agency, the~~ A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a ~~waiver~~ forfeiture in a ~~Federal or State~~ proceeding if:

~~(1)~~ 1. the disclosure is inadvertent;

~~(2)~~ 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and

~~(3)~~ 3. the holder promptly took reasonable steps to rectify the error, including, if applicable, following ~~Federal Rule of Civil Procedure 26(b)(5)(B)~~ the procedures in s. 804.01(7).

~~(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of waiver~~~~.~~ (b) *Scope of forfeiture*. ~~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~~ A disclosure that constitutes a forfeiture under sub. (a) extends to an undisclosed communication ~~in a Federal or State proceeding~~ only if:

~~(1)~~ 1. the disclosure is not inadvertent;

~~(2)~~ 2. the disclosed and undisclosed communications ~~or information~~ concern the same subject matter; and

~~(3)~~ 3. they ought in fairness to be considered together.

~~**(c) Disclosure Made in a State Proceeding.** When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:~~

~~**(1)** would not be a waiver under this rule if it had been made in a Federal proceeding; or~~

~~**(2)** is not a waiver under the law of the State where the disclosure occurred.~~

~~**(d) Controlling Effect of a Court Order.** A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other Federal or State proceeding.~~

~~**(e) Controlling effect of a party agreement.** An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.~~

~~**(f) Controlling Effect of This Rule.** Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.~~

~~**(g) Definitions.** In this rule:~~

~~**(1)** "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and~~

~~**(2)** "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.~~

Appendix 3

Comparison of proposed amendment to Wisconsin rule and Federal rule on which the proposal is modeled.

~~**FED. R. CIV. P. 45:**~~ **WIS. STAT. § 805.07 SUBPOENA**

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(2) ~~Claiming Privilege or Protection~~. SUBPOENA REQUIRING THE PRODUCTION OF MATERIAL.

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~~(B) Information Produced.~~

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(d) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.