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The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Right Direction

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COMMENTS

The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Right Direction

I. Introduction

Pretrial discovery—especially electronic discovery—can cost millions of dollars.¹ One of the more costly aspects of electronic discovery is conducting privilege review prior to disclosing to an adversary documents requested during discovery.² Due to the increasing variety of methods for storing potentially discoverable documents, and to the increasing number of discoverable documents (intraoffice email, for example), the hours attorneys must dedicate to privilege review can number in the hundreds, or even thousands.³ One way practitioners in federal courts can mitigate rising costs from privilege review is to make use of fairly recent additions to the Federal Rules.⁴ Federal courts may limit the scope of discovery of electronically stored information (ESI)⁵ or enter orders ruling that certain disclosures of confidential information to other parties do not waive attorney-client privilege or work product protection.⁶ The Federal Rules of Evidence further mitigate privilege review costs and the damage of disclosure by limiting subject matter waiver and offering some protection for inadvertent disclosures.⁷

Until November 1, 2009, practitioners in Oklahoma's state courts had only some of these options readily available to them. Disclosures of attorney-client privileged material were governed by a variation on traditional waiver doctrine.⁸ Under traditional waiver doctrine, voluntary disclosures result in waiver of any privilege to keep the disclosed information confidential.⁹ Such

1. See, e.g., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

2. See *id.*

3. See *id.*

4. See *Amendments to the Federal Rules of Civil Procedure*, U.S. COURTS, http://www.uscourts.gov/uscourts/rulesandpolicies/rules/EDiscovery_w_Notes.pdf (last visited Feb. 21, 2011); FED. R. EVID. 502.

5. See FED. R. CIV. P. 26(b)(2)(B), (C).

6. See FED. R. EVID. 502(d).

7. See *id.* 502(a),(b). But see Robert D. Owen & Melissa H. Cozart, *FRE 502: One Year Later*, N.Y. L.J., Oct. 13, 2009, at S4 (questioning the effectiveness of Federal Rule of Evidence 502 at mitigating costs since its adoption).

8. See 3 LEO H. WHINERY, OKLAHOMA EVIDENCE—COMMENTARY ON THE LAW OF EVIDENCE § 36.01 (2d ed. 2000).

9. See *id.* § 35.10.

voluntary disclosures are also likely to result in waiver of privilege over information related to the same subject matter.¹⁰

Some of the tools for protecting privilege that are available to litigants in federal courts have now been made available to litigants in Oklahoma state courts, altering Oklahoma's waiver approach somewhat.¹¹ House Bill 1597 was signed into law on May 22, 2009, and became effective on November 1, 2009.¹² In an attempt to mitigate the high costs of discovery, and specifically of privilege review, the new law amends the statute governing attorney-client privilege in Oklahoma.¹³

This new law borrows inspiration and some language from Federal Rule of Evidence 502, and from the proposed—but ultimately rejected—provision on selective waiver.¹⁴ The new law limits subject matter waiver in Oklahoma, but only in cases of selective waiver.¹⁵ Subject matter waiver occurs when a party discloses a significant piece of privileged information and thereby waives privilege with respect to the entirety of that information.¹⁶ The recently enacted limitation on subject matter waiver provides that such waiver does not occur unless it would be unfair to maintain the privileged nature of related but undisclosed information.¹⁷

The new law also protects the privileged nature of information inadvertently disclosed, similarly to the Federal Rules of Evidence.¹⁸ Inadvertent disclosure occurs when a party discloses privileged information to its adversary that the party would not have disclosed if it had more closely reviewed the information prior to disclosure.¹⁹ The new law protects privilege over inadvertently

10. See 12 OKLA. STAT. § 2511 (Supp. 2002).

11. See 12 OKLA. STAT. § 2502(E), (F) (Supp. 2009).

12. See Act of May 22, 2009, ch. 251, § 2, 2009 Okla. Sess. Law Serv. 1470, 1470-71 (West) (codified as amended at 12 OKLA. STAT. § 2502 (Supp. 2009)).

13. See 12 OKLA. STAT. § 2502.

14. Compare *id.* § 2502(E), (F), with FED. R. EVID. 502(a), (b), and Proposed Federal Rule of Evidence 502(c) [hereinafter Proposed FED. R. EVID. 502], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV05-2006.pdf>. Selective waiver allows a party to voluntarily disclose privileged information to the government without waiving the privilege with respect to its civil adversaries. See, e.g., Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 132 (2007).

15. See 12 OKLA. STAT. § 2502(F).

16. See, e.g., *id.* § 2511.

17. See *id.* § 2502(F).

18. *Id.* § 2502(E).

19. See Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 219-20 (2006).

disclosed information so long as reasonable steps were taken to prevent and rectify the particular error(s) made in disclosing.²⁰

The new law, although intended to mitigate preproduction privilege review costs, is not well-drafted and does not seem to have been fully considered. The amendments are probably a response to ballooning discovery and litigation costs associated with privilege review, as is the case with the Federal Rule that inspired them.²¹ If so, the changes to Oklahoma privilege law reveal an intent to lower the costs of privilege review.

Unfortunately the Oklahoma provisions were cherry-picked from adopted and proposed Federal Rules, and the end result is strikingly dissimilar to the Federal Rules.²² The provisions chosen and the manner in which they were drafted into Oklahoma law likely will not do much to effectuate the intent of the amendment. The provisions of the Federal Rules that were omitted from the Oklahoma statute would be more effective in this endeavor.

The new law should have included a provision similar to Federal Rule of Evidence 502(d) that would enable courts to issue orders protecting attorney-client privilege for information voluntarily disclosed under “claw-back” and “quick peek” agreements.²³ It should also have uncoupled the limitation on subject matter waiver from selective waiver. Because of its failure to do so the amended statute seems unlikely to succeed at widely mitigating inflated litigation costs.

This comment will analyze the amendments to attorney-client privilege law in Oklahoma through the lens of the Federal Rules, enacted and rejected. Part II of this comment will discuss the history and background behind Federal Rule of Evidence 502 and explain why traditional waiver doctrine and the Federal Rules of Civil Procedure left a perceived need for the rule and its operation. It will summarize the operation of select provisions of Federal Rule of Evidence 502, focusing on the limitation of subject matter waiver, protection of inadvertent disclosures, and allowance of court orders to protect the privileged status of disclosures.

Part III will summarize the relevant discovery provisions and law of attorney-client privilege in Oklahoma prior to the enactment of the amended statute. This summary will focus on the issues of subject matter waiver, inadvertent disclosure, and controlling court orders protecting privilege. Additionally, Part III will posit that Oklahoma’s variation on traditional waiver doctrine and the similarity of Oklahoma’s Discovery Code to the Federal

20. *See* 12 OKLA. STAT. § 2502(E).

21. *See* FED. R. EVID. 502 advisory committee’s note.

22. *Compare* 12 OKLA. STAT. § 2502(E), (F), *with* FED. R. EVID. 502 *and* Proposed FED. R. EVID. 502, *supra* note 14.

23. *See* FED. R. EVID. 502(d) advisory committee’s note.

Rules of Civil Procedure create the same expensive discovery costs at the state level that gave rise to Federal Rule of Evidence 502 at the federal level.

Part IV will examine the pertinent text of the amended statute compared to the pertinent text of Federal Rule of Evidence 502 and Proposed Federal Rule of Evidence 502(c). Part V will then argue that the amended statute is beneficial, but ultimately will not be as effective at reducing discovery costs as other provisions might have been. This argument provides a likely construction of the amendments and identifies some issues of clarity present in the amended statute. This part will then analyze problems arising from these issues, and make recommendations for changes to the amended statute and for further legislation to introduce provisions that would more effectively mitigate discovery costs. Part VI will summarize and conclude.

II. Background at the Federal Level to the Adoption of Federal Rule of Evidence 502

A. Traditional Waiver Doctrine

In general, all relevant evidence is admissible in federal court.²⁴ There are, however, some exceptions to this rule.²⁵ Among these exceptions is material that is protected by a legally recognized privilege.²⁶ A privilege exists to keep certain information confidential in service of a statutorily recognized public policy “for the purpose of protecting certain relationships and encouraging the open and free flow of communication between persons in such relationships.”²⁷

Foremost among the traditionally recognized privileges at the federal and state levels is the attorney-client privilege.²⁸ The privilege is held by the client, protects the client, and may be invoked by the client or the client’s representative.²⁹ Because the client holds the power to invoke the privilege, it follows that the client has the ability to waive the privilege.³⁰

Under traditional waiver doctrine, if the client discloses privileged information to any nonprivileged third party, the client waives the privilege as

24. *See, e.g.*, FED. R. EVID. 402.

25. *See id.*

26. *See, e.g., id.* 402 advisory committee’s note (listing privileges among the types of relevant evidence excluded “in response to the demands of particular policies”).

27. 81 AM. JUR. 2D *Witnesses* § 273 (2004).

28. *See id.* § 325; 3 WHINERY, *supra* note 8, § 36.01.

29. *See, e.g.*, 12 OKLA. STAT. § 2502 (Supp. 2009); 3 WHINERY, *supra* note 8, § 35.02 (noting an alternative, but less influential, justification for privileges is “protect[ing] the essential privacy of significant human relationships independent of whether they have any effect on the conduct of persons within that relationship”).

30. 81 AM. JUR. 2D *Witnesses* § 334.

to that information.³¹ Furthermore, this waiver extends to other information relating to the same subject matter.³² One federal court has colorfully noted that, under traditional waiver doctrine, “if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels.”³³ As a result, the attorney-client privilege must be zealously guarded, lest confidential communications and their subject matter be admissible as evidence. This can be problematic in light of modern liberal discovery requirements.

B. The Federal Rules of Civil Procedure and Liberal Discovery

The Federal Rules of Civil Procedure allow for liberal discovery and require disclosure of a rather large variety and amount of information, including ESI.³⁴ Parties are not required to disclose information covered by the attorney-client privilege or the work product doctrine.³⁵ The discovery process in most cases commences after the parties have had a discovery conference.³⁶

At that conference, the parties may agree to limit the scope of discovery and to utilize “quick peeks” and “claw-backs.”³⁷ Quick peeks are agreements in which one party discloses material requested by the other for examination without conducting privilege review and without waiving the privilege to keep that material confidential; the receiving party then determines the subject matter of the information and requests discovery of the documents it actually wants; and the disclosing party reviews only those documents for privilege.³⁸ Claw-backs are agreements between parties that ensure that privilege is not waived for materials inadvertently disclosed and returned pursuant to the agreement, which often tracks Federal Rule of Civil Procedure 26(b)(5)(B).³⁹ After the discovery conference, a court issues a scheduling order at a pretrial conference to govern discovery, and that order may memorialize party agreements.⁴⁰

Another option for preventing overly-costly electronic discovery exists in the Federal Rules of Civil Procedure. Rule 26 allows parties to identify those

31. *See id.* § 336; 3 WHINERY, *supra* note 8, § 35.11; *see also* 12 OKLA. STAT. § 2511.

32. *See* 3 WHINERY, *supra* note 8, § 35.11; *see also* 12 OKLA. STAT. § 2511.

33. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).

34. *See* FED. R. CIV. P. 26.

35. *See id.* 26(b)(1), (3)(A). The work product doctrine is similar to attorney-client privilege, but differs in that it is a privilege held by the attorney to protect information prepared in expectation of litigation. *See Hickman v. Taylor*, 329 U.S. 495, 509-11 (1947).

36. FED. R. CIV. P. 26(d)(1).

37. *See id.* 26(f) advisory committee’s note (discussing the 2006 amendment).

38. *See id.*

39. *See id.*

40. *See id.* 16, 16(b)(3)(B)(iv).

materials “not reasonably accessible because of undue burden or cost.”⁴¹ This exception provides no absolute protection from discovery costs because a court may still order discovery of those materials for “good cause.”⁴²

Despite these attempts at cost saving in the Federal Rules of Civil Procedure, absent legislation, the rules cannot alter the substantive law of attorney-client privilege.⁴³ Nor can courts be expected to reach consistent rulings on whether attorney-client privilege is waived without some clear guidance from the law of evidence, especially when non-parties to the subject litigation are concerned.

C. Federal Courts Diverged on Whether the Attorney-Client Privilege Was Waived in Cases of Disclosure

Great tension exists between traditional waiver doctrine on the one hand, with its requirements for zealous defense of a client’s confidential information, and the liberalized discovery encouraged by the Federal Rules of Civil Procedure on the other. It was unfortunate for the federal system prior to the effective date of Federal Rule of Evidence 502 that there was no clear answer, and thus no uniform approach among the circuits, to the question of whether certain disclosures resulted in waiver of attorney-client privilege.⁴⁴

In the case of inadvertent disclosure, many federal courts held that the privilege was waived.⁴⁵ Some other federal courts found that the attorney-client privilege still existed after inadvertent disclosure, although these jurisdictions were the minority.⁴⁶ Still other federal courts applied a fairness test similar to the one now embodied in Federal Rule of Evidence 502(b).⁴⁷ This hodge-podge approach to inadvertent waiver created disparate results.

Even in the courts where inadvertent disclosure automatically resulted in waiver, it did not always result in subject matter waiver.⁴⁸ A disparity in approaches to subject matter waiver—finding it or not finding it—also existed at the federal level.⁴⁹

41. *Id.* 26(b)(2)(B), (C).

42. *See id.*

43. *See* Broun & Capra, *supra* note 19, at 215, 217. Note that Federal Rule of Evidence 502 was enacted by Congress, rather than by the Court pursuant to the Rules Enabling Act, and is therefore the legislative action required. *See id.* at 242-43.

44. *See id.* at 217.

45. *See id.* at 221.

46. *See id.* at 220.

47. *See id.* at 222-24.

48. *See id.* at 224-29.

49. *See id.* at 224.

Claw-backs and quick peeks, although they were suggested by the Federal Rules of Civil Procedure,⁵⁰ were not the panacea to costly discovery that they were intended to be. These tools represented a mitigation effort from the civil procedure side of litigation that, absent some evidentiary corollary, had no teeth. Prior to Federal Rule of Evidence 502, it was likely, or at least imminently possible, that a court would follow traditional waiver doctrine to find that privilege was waived; or at least waived with respect to nonparties to the agreements.⁵¹ In some cases, however, courts also found the opposite: that because of the existence of the agreements, the privilege was not waived.⁵²

Ultimately, prior to the enactment of Federal Rule of Evidence 502, the only safe suggestion for parties that wished to preserve privilege was to conduct intensive privilege review. Privilege review is costly because parties spend many hours locating and compiling information to respond to discovery requests, and then many more hours reviewing that information for privilege in order to prevent the damage done by disclosure.⁵³

D. Discovery Costs Balloon With Privilege Review for Electronic Discovery

The issue that really put a spark to this powder keg was electronic discovery.⁵⁴ With the widespread adoption and utilization of computers, “[c]omputerized data have become commonplace in litigation.”⁵⁵ Privilege review was already complex and costly prior to the widespread use of electronic data storage.⁵⁶ The most useful check on production costs then—“the time and resources available to the requesting parties to review and photocopy the documents”—has now been shifted as a burden to the responding party.⁵⁷ Now confidential information is often stored on the same discrete hard drive as information over which no privilege will be claimed, even if the information is kept in different “files.”

Because the responding party must locate the requested ESI and screen it for privilege, and because backup data may now be measured in terabytes, which equate to “500 billion typewritten pages of plain text,” it is easy to see

50. FED. R. CIV. P. 26(f) advisory committee’s note (discussing the 2006 amendment).

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

52. See, e.g., *Hopson v. Mayor of Balt.*, 232 F.R.D. 228, 234-35 (D. Md. 2005) (collecting cases that have found an agreement to protect disclosures from waiver); Marcus, *supra* note 51, at 1611-13 (same).

53. See Broun & Capra, *supra* note 19, at 213-14.

54. See *id.*

55. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

56. See *id.*

57. *Id.*

how discovery costs may quite easily get out of hand.⁵⁸ Furthermore, large-scale use of ESI is no longer only affordable for the largest corporations; the cost of terabyte data storage—\$74.99 for a one terabyte external hard disk drive, as of June 2010—continues to decline.⁵⁹ If one considers how long it would take to read anywhere near this much text and then applies even the cheapest attorney's hourly rate, it becomes apparent that discovery can quickly become more costly than any other facet of litigation, easily reaching millions of dollars. The issue is only compounded when the focus of electronic discovery moves beyond this first layer data to the metadata.⁶⁰

A recent survey of attorneys provides anecdotal evidence to support the proposition that discovery costs are prohibitive.⁶¹ The survey considered responses from 1,382 attorneys engaged in litigation in federal and state courts in spring of 2008.⁶² The results reveal that there is widespread perception of ballooning discovery costs, with “[t]he vast majority (75 percent) of . . . respondents confirm[ing] the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense.”⁶³ When faced with this increase in expense litigants may be discouraged from pursuing meritorious claims.

E. The Provisions of Federal Rule of Evidence 502 and Its Projected Result

Federal Rule of Evidence 502 was drafted amid these concerns in an effort to allow some escape from the rock of waiver and the hard place of privilege review.⁶⁴ The Federal Rule establishes exceptions to common law waiver rules, rather than statutorily mandating when waiver occurs.⁶⁵ Among the

58. *Id.*

59. *Iomega eGo Desktop 1TB USB 2.0 Midnight Blue External Hard Drive 34837*, NEWEGG.COM, <http://www.newegg.com/Product/Product.aspx?Item=N82E16822186219> (last visited Sept. 13, 2010).

60. See generally Elliot Paul Anderson, *What Lies Beneath: Native Format Production and Discovery of Metadata in Federal Court*, 78 OKLA. B.J. 999 (2007). Metadata is “information about information,” including when and by whom ESI was created, changed, accessed, or deleted. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

61. See AM. COLL. OF TRIAL LAWYERS, TASKFORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT 1-2 (2009) [hereinafter ACTL-IAALS FINAL REPORT], available at <http://www.actl.com> (follow “All Publications” hyperlink under “Publications”; then follow “ACTL-IAALS OFFICIAL FINAL REPORT” hyperlink).

62. *Id.* at 2.

63. *Id.* at 16.

64. See generally Broun & Capra, *supra* note 19, at 217 (recognizing practitioner's difficult choices in balancing cost and the protection of privileges).

65. See *id.* at 257-58.

provisions of the Federal Rule are a limitation on subject matter waiver,⁶⁶ a standardized approach to inadvertent disclosure,⁶⁷ and a provision allowing for controlling court orders to protect privilege of disclosed information.⁶⁸

The Federal Rule limits the occurrence of subject matter waiver of information disclosed in federal proceedings or to federal offices or agencies, unless the waiver is intentional and “ought in fairness to be considered together” with the undisclosed information.⁶⁹ The rule’s test for determining when subject matter waiver should occur is modeled after Federal Rule of Evidence 106, and is designed to prevent strategic disclosure.⁷⁰ That is, subject matter waiver should only be found in those cases where an intentional disclosure of some, but not all, privileged information was made because the partial disclosure distorts the truth or misdirects discovery. The result is a presumption against subject matter waiver.⁷¹

Federal Rule 502 also standardizes the approach federal courts take to address inadvertent disclosures made in a federal proceeding or to a federal office or agency by requiring a test of the reasonableness of steps taken to prevent and to rectify inadvertent disclosures of privileged information.⁷² The rule is intended to take the middle ground between treating all inadvertent disclosures as waivers or no inadvertent disclosures as waivers.⁷³

Federal Rule 502 allows a federal court to order that a disclosure does not operate as a waiver, and holds that order binding even on other parties in state and federal courts.⁷⁴ Only a court order issued pursuant to this rule can bind non-parties in state and federal courts to any non-waiver agreements—such as claw-backs and quick peeks—made between parties.⁷⁵

In addition to these notable provisions, Federal Rule 502 protects privilege in federal proceedings of disclosures made in prior state court proceedings that constituted waiver in state court, but would not have constituted waiver had the disclosures been made in federal court.⁷⁶ It also protects a disclosure that might have been a waiver in federal court but was not under the law of the

66. See FED. R. EVID. 502(a).

67. See *id.* 502(b).

68. See *id.* 502(d).

69. *Id.* 502(a). Here “fairness” will usually not require subject matter waiver.

70. See *id.* 502(a) advisory committee’s note.

71. See *id.*

72. See *id.* 502(b).

73. See *id.* 502(b) advisory committee’s note.

74. See *id.* 502(d). Any federalism concerns are beyond the scope of this comment, but an argument for the constitutionality of this approach may be found in Broun & Capra, *supra* note 19, at 240-45.

75. See FED. R. EVID. 502(e).

76. See *id.* 502(c).

state where the disclosure occurred.⁷⁷ The rule requires state courts to recognize as privileged any information that was disclosed under the protection of the rule, even if such disclosures are not privileged under state law; and applies to state court causes of action that are heard in federal courts.⁷⁸ The rule does not alter state privilege law in state court cases that have no connection to federal proceedings.⁷⁹

The Federal Rule's limit on subject matter waiver should mitigate discovery costs by discouraging disputes over privilege claims made to protect against subject matter waiver.⁸⁰ Furthermore, disclosures made in federal proceedings will not result in subject matter waiver in subsequent state proceedings.⁸¹ Inadvertent disclosures will not result in absolute waiver of privilege, but nor will they enjoy absolute immunity from waiver.⁸² This middle-ground approach prevents parties from taking a careless approach to privilege review (by still requiring reasonable steps to have been taken to prevent the disclosure; i.e., some privilege review), while not punishing them for failing to spend every last dime the client has on that privilege review and fighting requests for disclosure.⁸³ Because the Federal Rule applies only when federal proceedings are involved, however, the lowered discovery costs intended from Federal Rule of Evidence 502 and Federal Rule of Civil Procedure 26(b)(2) will not be found in state court, absent similar protections at the state level. This is problematic, as "[t]he costs of discovery can be equally high for state and federal causes of action"⁸⁴

III. Oklahoma's Attorney-Client Privilege Law Was a Barrier to Mitigating Discovery Costs

States have recognized that the skyrocketing costs of discovery are not unique to the federal court system.⁸⁵ This is especially true when a state follows traditional waiver doctrine and has discovery provisions similar to the Federal Rules of Civil Procedure because federal decisions on the Federal

77. *See id.*

78. *See id.* 502(f) advisory committee's note.

79. *See id.* 502 advisory committee's note.

80. *See* Marcus, *supra* note 51, at 1606.

81. *See* FED. R. EVID. 502(a) advisory committee's note.

82. *See id.* 502(b).

83. *See* Broun & Capra, *supra* note 19, at 220-22.

84. FED. R. EVID. 502(f) advisory committee's note.

85. *See Case Law and Rules: State Rules of Civil Procedure*, FIOS, INC., <http://www.fiosinc.com/case-law-rules/e-discovery-state-rules-civil-procedure.aspx> (last visited Feb. 12, 2010) (summarizing by state the status of attempts to enact provisions governing electronic discovery, and hyperlinking to extra-site support).

Rules are likely to influence state decisions on their own rules.⁸⁶ Some states are struggling to combat rising privilege review costs in their own courts, either by adopting approaches similar to those in Federal Rule of Evidence 502⁸⁷ or by adopting their own approach to deal with increased discovery costs.⁸⁸

Prior to the passage of House Bill 1597, Oklahoma had made no substantial changes to its discovery code or to attorney-client privilege law that could effectively combat these rising discovery costs. A disclosure made pursuant to a discovery request would likely result in waiver of privilege as to that disclosure and its related subject matter. Because the amendment does not rescind existing statutes but is instead appended to them, an examination of Oklahoma attorney-client privilege law prior to the amendment's passage is necessary.

A. The State of the Law Prior to November 01, 2009

The Oklahoma Evidence Code controls the law of evidence in both criminal and civil proceedings.⁸⁹ By its own mandate, “[the Oklahoma Evidence Code] shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”⁹⁰ This is substantially the same language as Federal Rule of Evidence 102, and carries the same meaning.⁹¹ The committee chose to draft a code similar to the Federal Rules of Evidence, “largely to assure *uniformity* between the Federal Rules and any Oklahoma code that might be adopted subsequently.”⁹²

86. See Ed Abel & Lynn B. Mares, *Discovery Rule 26—A Practitioner's Guide to State and Federal Rules*, 79 OKLA. B.J. 509, 511 (2008).

87. See, e.g., Harp v. King, 835 A.2d 953, 965-70 (Conn. 2003) (considering the various approaches to inadvertent disclosure and adopting a moderate approach and a five-factor test similar to the test now embodied in Federal Rule of Evidence 502).

88. See, e.g., TEX. R. CIV. P. 193.3(d) (allowing privilege to be asserted and protected after disclosure).

89. 12 OKLA. STAT. § 2103(A) (Supp. 2002).

90. *Id.* § 2102 (2001).

91. See Leo H. Whinery, *The Oklahoma Evidence Code: The Background, and Overview and the General Provisions of Article I*, 32 OKLA. L. REV. 259, 263-64 (1979) (“As with its companion Federal Rule 102, it establishes flexibility as the underlying principle within which the Code is to be applied and interpreted.”) (citation omitted).

92. SUBCOMM. ON EVID. OF THE CODE P.—CIVIL COMM. OF THE OKLA. B. ASS'N, *Proposed Oklahoma Code of Evidence*, 47 OKLA. B.J. 2605, 2606 (1976) [hereinafter SUBCOMM. ON EVID.] (Subcommittee Chairman Ed Abel's introduction to the proposed rules).

Oklahoma's laws governing privilege—sections 2501 through 2513 of Title 12 of the Oklahoma Statutes—are based on those rules that comprise “Article V of the Uniform Rules of Evidence.”⁹³ These rules were not incorporated into the Federal Rules of Evidence due to federalism concerns in the area of the substantive law of privilege.⁹⁴ Because Oklahoma's privilege rules are substantially based on what would have been the Federal Rules, however, it is fair to say that the same policy that underlies the Federal Rules underlies the Oklahoma rules on privilege. That is, the rules adopted by Oklahoma were drafted substantially by the authors of the Federal Rules to be included among those rules, but were not included due to federalism concerns rather than any policy discrepancy.

Attorney-client privilege in Oklahoma was governed by the superseded version of title 12, section 2502, of the Oklahoma Statutes (and remains governed by the same section as amended).⁹⁵ In addition to portions of section 2502, waiver of privilege is also governed by sections 2511 and 2512 of the same title. Section 2511 governs voluntary disclosure,⁹⁶ and section 2512 governs disclosures that are erroneously compelled or made with no opportunity to claim a privilege.⁹⁷

1. The Oklahoma Discovery Code

The Oklahoma Discovery Code⁹⁸ is substantially similar to the discovery provisions of the Federal Rules of Civil Procedure, and tracks those rules in several important respects.⁹⁹ It requires the same liberal disclosure of information in discovery by allowing “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.”¹⁰⁰ Parties claiming privilege must support that claim with a description of “the nature of the . . . things not produced or disclosed in a

93. *Id.* at 2625. These rules were variations on those proposed for, but not incorporated into, the Federal Rules. *See id.*

94. *See* Kenneth N. McKinney, Commentary, *Privileges*, 32 OKLA. L. REV. 307, 309 n.14 (1979) (“[O]ne of the major arguments against enactment of the Supreme Court's proposed rules . . . was the constitutional inability of the Congress to delegate to the Supreme Court rule-making authority as to substantive issues.”).

95. *See* 12 OKLA. STAT. § 2502 (1978) (current version at 12 OKLA. STAT. § 2502 (Supp. 2009)).

96. 12 OKLA. STAT. § 2511 (Supp. 2002).

97. 12 OKLA. STAT. § 2512 (2001).

98. 12 OKLA. STAT. §§ 3224-3237 (2001 & Supp. 2010).

99. *Compare id.*, with FED. R. CIV. P. 1, 26-37. *See also* Abel & Mares, *supra* note 86, at 511; Judge Stephen P. Friot, *Discovery of Electronic Documents and Other Digital Data*, 74 OKLA. B.J. 1463, 1463 (2003).

100. 12 OKLA. STAT. § 3226(B)(1)(a) (Supp. 2010).

manner that, without revealing information itself privileged or protected, will enable other parties to assess the . . . ” claim.¹⁰¹ The court may require a party objecting to discovery on grounds of privilege to file a privilege log.¹⁰² A privilege log includes the author, recipient, origination date, length, nature or purpose, and basis for objection for each document over which privilege is claimed.¹⁰³

Parties may also move for a protective order upon a showing of both good cause and a good faith attempt to confer with the other parties, and the court “may enter any order which justice requires to protect a party from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense.”¹⁰⁴ Although information that is actually privileged is not discoverable, because of the wide discoverability of most information,¹⁰⁵ and the similarity between the Oklahoma Discovery Code and the discovery provisions of the Federal Rules of Civil Procedure,¹⁰⁶ it follows that the Oklahoma Discovery Code favors liberal disclosure.

2. Subject Matter Waiver in Oklahoma

Voluntary disclosure of information otherwise covered by the attorney-client privilege operates as a waiver of that privilege.¹⁰⁷ Waiver “gives effect to the central idea of the privilege that when the holder of the privilege discloses the privileged matter the privilege is destroyed.”¹⁰⁸ In other words, once the cat has been let out of the bag it cannot be returned. This rule is governed by a party’s intent to disclose information, not his or her intent to waive a privilege.¹⁰⁹ As a result, the cases do not seem to treat voluntary

101. *Id.* § 3226(B)(5)(a).

102. *See id.* § 3237(A)(2); *see also* Scott v. Peterson, 2005 OK 84, ¶ 24, 126 P.3d 1232, 1238-39 (holding that a privilege log is not required by title 12, section 3226, but that the “[c]ourt may determine that a privilege log is necessary and order the party objecting to discovery to file the log”).

103. 12 OKLA. STAT. § 3237(A)(2) (Supp. 2010).

104. *Id.* § 3226(C)(1).

105. *See id.* § 3226(B)(1).

106. *See* Abel & Mares, *supra* note 86, at 511; Friot, *supra* note 99, at 1463.

107. 12 OKLA. STAT. § 2511 (Supp. 2002).

108. SUBCOMM. ON EVID., *supra* note 92, at 2633 (Evidence Subcommittee’s Note to proposed rule 510).

109. 12 OKLA. STAT. § 2502(A)(5), (E), (F) (Supp. 2002), *amended by* 12 OKLA. STAT. § 2502(E), (F) (Supp. 2009); *see* 3 WHINERY, *supra* note 8, § 36.08; *see also* Chandler v. Denton, 1987 OK 38, ¶ 21, 741 P.2d 855, 865-66 (“The fact that a client communicates with his attorney within the hearing range of third persons and makes no attempt to prevent the communication from being overheard is indicative that the conversation was not intended to be confidential.”); Jayne v. Bateman, 1942 OK 298, ¶ 23, 129 P.2d 188, 191 (noting that “particular circumstances [may] . . . preserve the confidential character of the communication”); Ratzlaff v. State, 1926

disclosures that *are* intended to be confidential as disclosures which do not waive the privilege so much as they seem to shield them in a legal fiction of not having been disclosures at all; however, either interpretation is feasible. The lack of clarifying case law leaves this an open question, so the rest of this section will presume that both treatments are possible under Oklahoma law. In any event, the result of either treatment is the same: the privilege is not waived. This is the exception, rather than the rule. Voluntary (as in, “intentional”) disclosure of information carries with it other perils than mere waiver of the information disclosed.

Subject matter waiver—or some variation thereof—is recognized in Oklahoma privilege law. Waiver of privileged subject matter occurs when the voluntary disclosure is of “any significant part of the privileged matter.”¹¹⁰ This appears to be based on a policy of fairness.¹¹¹ For courts pursuing this policy, “[t]he difficulty arises in determining the point at which it is unfair for the holder to insist that the privilege be honored.”¹¹² Whinery describes the section 2511 fairness test to determine when “a significant part” has been disclosed as one of flexibility, in contrast to Wigmore, who would find disclosure if any part were disclosed.¹¹³ Oklahoma case law has adopted the former approach, but has not articulated particular factors that courts might consider; rather, the test seems to be some variation of totality-of-the-circumstances, dependent on the facts of the case and the policy supporting the privilege.¹¹⁴

OK 707, ¶ 17, 249 P. 934, 937 (noting that a disclosure made in the presence of a third party may still be privileged if it was “not openly made, but was in the nature of a confidential communication”); *Lively v. Wash. Co. Dist. Ct.*, 1987 OK CR 266, ¶¶ 2, 5, 747 P.2d 320, 321 (holding attorney-client privilege not waived when petitioner was surreptitiously filmed conversing with his attorney over the telephone without having been Miranda-ized and in the presence of two police officers).

110. 12 OKLA. STAT. § 2511.

111. *See* 3 WHINERY, *supra* note 8, § 35.13.

112. *Id.*

113. *See id.* (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 2327, at 636 (John T. McNaughten ed., 1961)).

114. *See* *Hogan v. State*, 2006 OK CR 19, ¶¶ 35-36, 139 P.3d 907, 922 (adopting the Whinery approach and holding that when the defendant and his spouse delivered his untrue alibi to the police, the defendant waived spousal privilege by disclosing a significant part of the conversation); *Hooper v. State*, 1997 OK CR 64, ¶¶ 46-50, 947 P.2d 1090, 1108-09 (holding the defendant’s introduction of a medical report by a past doctor to support another doctor’s testimony on defendant’s mental or psychological condition was a waiver of his privilege not to have the past doctor testify because he voluntarily disclosed information that was based on confidential communications). Despite the flexibility of the Whinery approach, these cases tend to find subject matter waived.

In summation, disclosure is voluntary in Oklahoma when it is made in a situation manifesting no reasonable intention that the communication remain confidential and under no compulsion to disclose. Such a disclosure requires a disclosure of other related privileged information almost always, because the disclosure was voluntary, and the intent to waive plays no part in the protection of privilege.

3. Inadvertent Disclosure in Oklahoma

Prior to the passage of House Bill 1597, Oklahoma had no rule explicitly governing inadvertent disclosure made during proceedings or to government agencies. Absent such a provision, inadvertent disclosures were likely to have been dealt with using the framework provided by Oklahoma's distinction between voluntary disclosures (which constitute waiver) and involuntary disclosures (which do not constitute waiver).

Involuntary disclosures do not constitute a waiver of privilege.¹¹⁵ Involuntary disclosures are those erroneously compelled or made without an opportunity to claim the privilege.¹¹⁶ Erroneously compelled disclosures "may occur when the holder claims the privilege at trial and objects to questions calling for a disclosure of the communication, but nevertheless complies with an adverse ruling by the judge compelling the disclosure."¹¹⁷ Disclosures made without an opportunity to claim the privilege most often tend to be those that are made by third parties:

This includes disclosure by eavesdroppers, by persons used in the transmission of privileged matter, by co-participants in joint defense and pooled information situations, and in group therapy settings, or by data improperly made available from a data bank. It may also include situations where the client has no choice in disclosing the communication to a third person due to ineffective legal counsel.¹¹⁸

Oklahoma case law offers some support for this characterization: "The waiver provided in [section] 2511 cannot be triggered by actions of third persons without the consent of the privilege holder or his or her predecessor."¹¹⁹ That is, such disclosures are not voluntary disclosures that would waive the attorney-client privilege. Therefore, they must be disclosures

115. 12 OKLA. STAT. § 2512 (2001).

116. *Id.*

117. 3 WHINERY, *supra* note 8, § 35.15.

118. *Id.* § 35.16 (footnotes omitted).

119. Frederick v. State, 2001 OK CR 34, ¶ 194, 37 P.3d 908, 956.

made without an opportunity to claim the privilege, and so are protected by section 2512.

Inadvertent can mean either “unintentional” or “inattentive.”¹²⁰ In the context of Federal Rule of Evidence 502, it is likely that inadvertent more often means “inattentive” than “unintentional.”

Although the disclosure of . . . [an inadvertently disclosed] document may be intentional in the sense that the lawyer intends to hand over all documents in its group, it is unintentional in the sense that, if the lawyer had considered the privileged or protected nature of its contents, she would not have disclosed the document.¹²¹

Generally, the party making the inadvertent disclosure is voluntarily making the disclosure, even if that party does not intend that the information contained in the disclosure should be disclosed.¹²² This intent to keep the information contained in the disclosure confidential makes its disclosure seem akin to involuntary disclosure. Claims of inadvertent disclosure, then, reveal the tension between the voluntary and the involuntary as governing principles of waiver in Oklahoma law. The tension seems likely under prior Oklahoma law to have resulted in one of two approaches, either of which the courts might still take in cases that the attorney-client privilege amendments do not reach.

a) Approach A

The disclosure would not waive the privilege. This seems most likely to have occurred in the above examples given by Whinery,¹²³ provided those disclosures were made under circumstances where the disclosure by a third party cannot reasonably have been anticipated;¹²⁴ and provided that these examples could be likened to the paradigmatic inadvertent disclosure, which is made pursuant to a discovery request from an adversary in litigation.

Additionally, a disclosure probably would not waive the privilege in some situations where the party claiming privilege intentionally made the disclosure, but intended that it remain confidential—like those in the cases of *Jayne v.*

120. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1140 (1976).

121. Broun & Capra, *supra* note 19, at 219-20.

122. *See id.*

123. *See* 3 WHINERY, *supra* note 8, § 35.16 (giving as examples eavesdroppers, persons who relay privileged information, joint defendants, group therapy, data improperly made available from a data bank, disclosures due to ineffective counsel).

124. *See id.* § 35.06.

Bateman,¹²⁵ *Ratzlaff v. State*,¹²⁶ or *Lively v. Wash. County Dist. Ct.*¹²⁷ In those cases, the court treated the disclosure almost as if it had not been made.¹²⁸ The inquiry here was not necessarily limited to the reasonableness of steps taken to prevent disclosure, as it is in Federal Rule of Evidence 502(b).¹²⁹ Such steps may have factored into the inquiry's primary focus, however, as indicia of whether the disclosing party intended that the communication remain confidential, because a party that intends communications to remain confidential may take steps to prevent the confidence from being broken.¹³⁰

It must be noted that steps taken to prevent disclosure are not the only means of determining intended confidentiality.¹³¹ Cases characterized by intentional disclosures which are intended to be confidential are somewhat similar to the paradigmatic inadvertent disclosure cases.

Erroneously compelled disclosures are not included in this possible approach to inadvertent disclosures because erroneously compelled disclosures are intentionally, if unwillingly, disclosed.¹³² While compulsion to disclose is inherent in the discovery system which gives rise to inadvertent disclosures, the analysis for erroneously compelled disclosures is not appropriate to inadvertent disclosures. Because these disclosures tend to be compelled specifically, as when a doctor is ordered to testify as to material that she believes to be protected by the physician-patient privilege, it is likely that the party claiming the privilege is very attentive (that is, very *advertent*) to the disclosure of privileged information. This has the same functional result—and possibly the same functional inquiry—as those situations in which the court might treat the disclosure as not a disclosure at all.

b) Approach B

The inadvertent disclosure would waive the privilege. This seems most likely to have occurred in situations where the party claiming the privilege intentionally made the disclosure, and surrounding circumstances did not

125. 1942 OK 298, 129 P.2d 188.

126. 1926 OK 707, 249 P. 934.

127. 1987 OK CR 266, 747 P.2d 320.

128. See *Jayne*, ¶ 24, 129 P.2d at 191; *Ratzlaff*, ¶ 17, 249 P. at 937; *Lively*, ¶¶ 2-3, 747 P.2d at 321.

129. See FED. R. EVID. 502(b).

130. See *Chandler v. Denton*, 1987 OK 38, ¶ 21, 741 P.2d 855, 865-66 (treating the confidential nature of the communication as dependent upon whether the client chooses to disclose information in the presence of unnecessary third parties).

131. See *Lively*, ¶ 3, 747 P.2d at 321 (“[P]etitioner was apparently trying to obtain the advice of counsel, having no knowledge that his conversation was being taped.”).

132. See 3 WHINERY, *supra* note 8, § 35.15.

support any claimed intent that the communication be confidential.¹³³ For example, if no privilege review was conducted prior to disclosure under a discovery request, and the parties had not even attempted to effectuate some form of quick peek or claw-back agreement, it is unlikely (then, as now) that a claim of inadvertent disclosure would have protected the attorney-client privilege in Oklahoma. In some (but not all) cases, this outcome may also have resulted from a disclosure where there was no opportunity to claim the privilege; for example because an eavesdropper overheard the communication and related it to the adversarial party. Although privilege is not waived when there is no opportunity to claim the privilege,¹³⁴ Whinery notes that in the case of an eavesdropper, Oklahoma is consistent with the view that “privilege will not protect communications made under circumstances in which eavesdropping can reasonably be anticipated.”¹³⁵

A modern incarnation of Whinery’s eavesdropper might be the metadata in an electronic document. If a party responds to a discovery request by sending a hastily-reviewed and redacted version of an original electronic document containing confidential communication between the attorney and client, it must reasonably be anticipated that the adversarial party will at the very least use the “track changes” function of modern word processing software to search any deletions that might have occurred, and may resort to outside software to mine for other metadata. Following the eavesdropper example, a court might find that the privilege would not protect such a disclosure. This outcome would be particularly dangerous to a party claiming attorney-client privilege, as an intentional disclosure that waives privilege as to the information communicated may constitute a “significant part of the privileged matter,” resulting in a finding that it is fair to demand subject matter waiver.¹³⁶

c) Probable Outcome

The examples in Approach A are similar to typical inadvertent disclosure cases, in that the client intends communications with an attorney to be confidential and would not reasonably anticipate that the attorney would disclose the privileged communication. On the other hand, similar to the examples in Approach B, the attorney who discloses information in discovery must reasonably anticipate the disclosure of privileged material—hence, the need for privilege review. In the context of discovery, where parties are aware that voluntary disclosure of privileged material constitutes waiver, and have

133. See *Chandler*, ¶ 21, 741 P.2d at 865-66.

134. 12 OKLA. STAT. § 2512 (2001).

135. 3 WHINERY, *supra* note 8, § 35.06 (citing *Lively*, 1987 OK CR 266, 747 P.2d 320, and noting that the conversation in that case was taped without the accused’s knowledge).

136. 12 OKLA. STAT. § 2511 (Supp. 2002).

the statutorily recognized tool of privilege logs at their disposal,¹³⁷ a responsible party prior to the November 2009 amendments must have expected that a court would find waiver if the party attempted to argue for inadvertent disclosure.

4. Court Orders and Party Agreements in Oklahoma

Claw-backs and quick peeks may be used in the Oklahoma court system to mitigate discovery costs thanks to amendments to the discovery code that were proposed and adopted after the amendments to attorney-client privilege.¹³⁸ While not specifically mentioned in the amended Oklahoma statutes, and despite the absence of comments similar to those that accompany the Federal Rules, the broad authority to memorialize party discovery agreements granted to courts almost certainly is intended to permit privilege review agreements.¹³⁹ Also pursuant to statutory authority conferred by the Oklahoma Discovery Code, courts can order the parties involved to refrain from using disclosed information that should remain privileged and can memorialize party agreements as binding on those parties.¹⁴⁰

This authority to issue such court orders at the trial court level probably is not binding on litigants who are not parties to the dispute in which an order protecting privilege over disclosed information is ordered, however. On the one hand, the general applicability of these “non-waiver” orders against non-parties to a dispute in the absence of something like Federal Rule of Evidence 502(d) is questionable, at best.¹⁴¹ Relevant legal doctrines further indicate that absent express authority, a non-waiver order would only bind parties to the

137. 12 OKLA. STAT. § 3226(B)(6) (Supp. 2009), *amended by* Act of Apr. 2, 2010, ch. 50, § 4, 2010 Okla. Sess. Law Serv. 229 (West); *Scott v. Peterson*, 2005 OK 84, ¶ 24, 126 P.3d 1232, 1238-39 (holding that while 12 OKLA. STAT. § 3226 (Supp. 2004), does not require the filing of a privilege log, under 12 OKLA. STAT. § 3237 (Supp. 2002), *amended by* Act of Apr. 2, 2010, ch. 50, § 8, 2010 Okla. Sess. Law Serv. 243 (West) the court may order that a party file a privilege log).

138. *See* S.B. 2039, ch. 50, §§ 4-8, 2010 Okla. Sess. Law Serv. 229-46 (West) (codified at 12 OKLA. STAT. §§ 3226-3237 (Supp. 2010)) (bringing Oklahoma Discovery Code into greater uniformity with the Federal Rules).

139. *See* 12 OKLA. STAT. § 3226(F) (“the court shall enter an order . . . establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters . . . as are necessary for the proper management of discovery in the action.”). *Compare id.*, with FED. R. CIV. P. 16(b), (c)(2), 26(f), and FED. R. CIV. P. 16(b) advisory committee’s note (discussing the 2006 amendment).

140. *See* 12 OKLA. STAT. § 3226(C) (allowing courts to “enter any order which justice requires to protect a party or person from annoyance, harassment, embarrassment, oppression or undue delay, *burden or expense*” (emphasis added) and including, *but not explicitly or implicitly limiting the court to*, several example orders).

141. *See* *Hopson v. Mayor & City Council of Balt.*, 232 F.R.D. 228, 235 (D. Md. 2005).

dispute. For example, the doctrine of issue preclusion applies only to parties and their privies.¹⁴² Voluntary disclosure under a party agreement therefore seems to result in waiver of privilege, at the very least with respect to nonparties to the agreement.¹⁴³

B. The Perceived Need For Waiver Protection in Oklahoma

The same ballooning costs that result from federal discovery provisions—especially electronic discovery—are present in Oklahoma courts; and Oklahoma courts will likely deal with those costs and attempts to mitigate them in a similar fashion to federal courts to the extent our rules permit.¹⁴⁴ Although Oklahoma has recently amended its discovery rules to bring them nearer to uniformity with the 2006 amendments to the Federal Rules of Civil Procedure,¹⁴⁵ at least one significant difference remains. The pretrial conference required by Federal Rule of Civil Procedure 26(f) is mandatory, whereas the pretrial conference allowed by the Oklahoma Discovery Code is optional.¹⁴⁶ As a result, many state court litigators are likely to skip this conference (which is an ideal place to limit the scope of discovery or hammer out claw-back or quick peek agreements). Not only would an otherwise cost-saving claw-back or quick peek agreement in state court expose a party to waiver of attorney-client privilege, but now such an agreement is unlikely to arise in the first place.

Compounding the statutory apathy toward effective cost-suppressing discovery tools and the absence of statutory encouragement (in the form of privilege protection) for using those tools is the dearth of Oklahoma case law in this area. There are relatively few published opinions providing authority for when disclosure constitutes waiver of attorney-client privilege.¹⁴⁷ There

142. See *Salazar v. City of Okla. City*, 1999 OK 20, ¶ 10, 976 P.2d 1056, 1060-61 (explaining that the defense of issue preclusion only applies if the issue previously was litigated between the parties currently litigating the issue when the defense is raised); see also, e.g., 47 AM. JUR. 2D *Judgments* § 464 (2004) (introducing and explaining the doctrine of issue preclusion).

143. It is conceivable that a protective order removing material from the public record pursuant to 12 OKLA. STAT. § 3226(C)(2) could protect the privilege of disclosed material, likely by considering it not to have been a disclosure at all, because it is intended to be confidential, and must be so marked. Such a construction of the statute, however, strains it beyond the likely legislative intent.

144. See Friot, *supra* note 99, at 1470-71.

145. See 12 OKLA. STAT. § 3226.

146. Compare 12 OKLA. STAT. § 3226(F) with FED. R. CIV. P. 26(f).

147. See *Chandler v. Denton*, 1987 OK 38, ¶ 20, 741 P.2d 855, 865 (holding that whether communication overheard by third party was intended to be confidential controls whether attorney-client privilege exists); *Jayne v. Bateman*, 1942 OK 298, ¶¶ 21, 24, 129 P.2d 188, 191 (same); *Ratzlaff v. State*, 1926 OK 707, ¶ 17, 249 P. 934, 937 (same); *Hogan v. State*, 2006 OK

are even fewer cases on the interplay between privileged material and discovery requests.¹⁴⁸ The lack of cases does not, however, indicate the lack of a growing problem, especially in the specific context of electronic discovery.¹⁴⁹

The same tension faced at the federal level between liberal discovery requirements and a relatively narrow extension of attorney-client privilege exists in Oklahoma. This tension led to the drafting of Federal Rule of Evidence 502, but finds no release in Oklahoma. The current lack of statutory authority and cases specific to this issue works against Oklahoma's aim to keep its evidence law similar to the Federal Rules because specific Federal Rules have been adopted to deal with this issue.¹⁵⁰ Furthermore, the lack of Oklahoma authority on point allows the problems experienced at the federal level prior to the enactment of Federal Rule of Evidence 502 to fester in Oklahoma's state courts. It is possible that the recent amendments to attorney-client privilege in Oklahoma were an attempt to alleviate this tension. In light of this possibility, and in the hopes of predicting the success of the amendments, an examination of those amendments is in order.

CR 19, ¶ 35, 139 P.3d 907, 922 (applying fairness test guided by policy underlying the privilege to determine whether and when it is appropriate to find subject matter waiver of spousal privilege); *Gilson v. State*, 2000 OK CR 14, ¶ 73, 8 P.3d 883, 909 (holding that attorney-client privilege exists over subject matter disclosed to an attorney in the presence of a third party when that third party was at the time, but no longer is, a codefendant); *Hooper v. State*, 1997 OK CR 64, ¶ 48, 947 P.2d 1090, 1108-09 (finding subject matter waiver of physician-patient privilege was supported by defendant's disclosure); *Lively v. Wash. Cnty. Dist. Ct.*, 1987 OK CR 266, ¶ 3, 747 P.2d 320, 321 (holding that whether communication overheard by third party was intended to be confidential controls whether attorney-client privilege exists); *Naum v. State*, 1981 OK CR 76, ¶¶ 9-10, 630 P.2d 785, 787-88 (holding that a conversation with a minister about securing a lawyer was not protected under attorney-client privilege); *Thompson v. Box*, 1994 OK CIV APP 183, ¶¶ 11-12, 889 P.2d 1282, 1284-85 (holding that an attorney cannot disclose a previous client's privileged communication in order to support the attorney's tort claim against the client, absent one of the factors listed in 12 OKLA. STAT. § 2502(D) (1991)).

148. See *Crest Infiniti II, LP v. Swinton*, 2007 OK 77, ¶ 16, 174 P.3d 996, 1004 (holding that party objecting to discovery on grounds provided in 12 OKLA. STAT. § 3226(C)(1) (Supp. 2004) has burden of proof to show good cause why material should not be discoverable); *Scott v. Peterson*, 2005 OK 84, ¶ 24, 126 P.3d 1232, 1238-39 (holding court may require party claiming attorney-client privilege or work product protection to file a privilege log to provide evidentiary support for its claim).

149. See, e.g., *Anderson*, *supra* note 60; Jim Calloway, *Tools for Electronic Discovery*, 74 OKLA. B.J. 1529 (2003); *Friot*, *supra* note 99.

150. See FED. R. EVID. 502; FED. R. CIV. P. 26(b)(2)(B),(C).

IV. A Textual Comparison of the Oklahoma Amendments and the Relevant Provisions of Federal Rule of Evidence 502

The purpose of the attorney-client privilege amendments to the Oklahoma Evidence Code apparently is to mitigate the costs of disclosure of privileged material. Presumably, the Federal Rules of Evidence succeed (or will succeed) at this task because they were drafted with the problems of increased requests for disclosure and costly privilege review in mind.¹⁵¹ A comparison of the new law to the pertinent sections of Federal Rule 502 should reveal whether Oklahoma's version is also likely to succeed. For the sake of ease, the text of the rules of evidence pertinent to this argument is gathered in this section.

A. Federal Rule of Evidence 502

The pertinent text of Federal Rule of Evidence 502 follows, and governs subject matter waiver, inadvertent disclosure, and controlling court orders:

Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.¹⁵²

Inadvertent disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).¹⁵³

151. See FED. R. EVID. 502 advisory committee's note.

152. *Id.* 502(a).

153. *Id.* 502(b).

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.¹⁵⁴

B. Amendments to 12 Okla. Stat. § 2502

The new sections of the amended Oklahoma law on attorney-client privilege relate to subject matter waiver and inadvertent disclosure. They read:

Disclosure of a communication or information meeting the requirements of an attorney-client privilege as set forth in this section or the work-product doctrine to a governmental office, agency or political subdivision in the exercise of its regulatory, investigative, or enforcement authority does not operate as a waiver of the privilege or protection in favor of nongovernmental persons or entities. Disclosure of such information does not waive the privilege or protection of undisclosed communications on the same subject unless:

1. The waiver is intentional;
2. The disclosed and undisclosed communications or information concern the same subject matter; and
3. Due to principles of fairness, the disclosed and undisclosed communications or information should be considered together.¹⁵⁵

A disclosure of a communication or information covered by the attorney-client privilege or the work-product doctrine does not operate as a waiver if:

1. The disclosure was inadvertent;
2. The holder of the privilege took reasonable steps to prevent disclosure; and
3. The holder of the privilege took reasonable steps to rectify the error including, but not limited to, information falling within the scope of paragraph 4 of subsection B of Section 3226 of this title, if applicable.¹⁵⁶

154. *Id.* 502(d).

155. 12 OKLA. STAT. § 2502(F) (Supp. 2009).

156. *Id.* § 2502(E).

The notable absence in the Oklahoma amendments of a provision giving greater effect to court orders, and allowing a court to protect the privileged nature of disclosures made in proceedings before it, will be considered below as a recommendation for improving on the new law.

V. Analysis of The Amendment Reveals An Intent to Mitigate Discovery Costs and Provides a Foundation For Corrective Legislation to Actually Effectuate Such a Mitigation in Oklahoma

Federal Rule of Evidence 502 was enacted to mitigate discovery costs related to disclosure of privileged material.¹⁵⁷ It is reasonable to conclude that the amendments to Oklahoma's attorney-client privilege statute, tracking the Federal Rule as they do, share this same intent. Limiting subject matter waiver and protecting inadvertent disclosures are a good start toward mitigating state court costs associated with modern discovery.

It is notable, however, that the Oklahoma protection limiting subject matter waiver is tied to the section permitting selective waiver, and does not extend beyond that subsection.¹⁵⁸ Additionally, the Oklahoma section on inadvertent disclosure appears to govern *all* such disclosures, rather than just those made in proceedings or to government parties.¹⁵⁹ Furthermore, the amended statute contains no provision on the authority of court orders protecting privilege.¹⁶⁰ Whether the amended statute will succeed at its purpose remains to be seen, but closer examination of the differences below may shed some light on this possibility.

A. Analysis of the Amendments

1. Subject Matter Waiver

The statutory limitation on subject matter waiver is a good addition to Oklahoma law because it brings predictability and uniformity with the Federal Rules, and because it should lower discovery costs associated with privilege review. The limitation is quite problematic, however, in that it is part of a provision that also establishes selective waiver in Oklahoma.¹⁶¹ Any reading of the statute consistent with commonly accepted principles of statutory construction will find that the limitation on subject matter waiver is only

157. See FED. R. EVID. 502 advisory committee's note.

158. See 12 OKLA. STAT. § 2502(F).

159. See *id.* § 2502(E).

160. See *id.* § 2502.

161. See *id.* § 2502(F).

applicable in cases of selective waiver; and courts will probably decline to extend the limitation beyond this relatively small subset of cases.

The amendment's language on subject matter waiver is very similar to the language in Federal Rule of Evidence 502,¹⁶² and should result in application of the same test. The Oklahoma test for determining whether subject matter has been waived remains a test of fairness under the new statute. Now, however, the test favors the opposite result. To appreciate this, the old Oklahoma fairness test must be contrasted to the Federal Rule, under which limited subject matter waiver is the default result.¹⁶³ The Federal Rule also utilizes a fairness test; but unlike the fairness test from Oklahoma case law, and like Federal Rule of Evidence 106, the fairness test of Federal Rule of Evidence 502 seems to be focused on whether the disclosure is strategic; that is, whether the disclosure is using the rule to gain unfair advantage.¹⁶⁴

Under the old Oklahoma test (the flexibility of which was noteworthy when contrasted to subject matter waiver under traditional waiver doctrine¹⁶⁵) the fairness test focused on whether waiver of subject matter was fair in light of the facts of the case and the policy behind the privilege.¹⁶⁶ However flexible this test might have been, the cases examining whether it was fair to find subject matter waiver tended to hold that it was.¹⁶⁷ That is, the old test (still applicable in all but selective waiver cases) appears to favor a finding of subject matter waiver.

This is not to say that the results in the cases considering subject matter waiver would have been decided differently had the fairness test from the Federal Rules been in play. In *Hogan v. State*, the court held that it would have been unfair to allow disclosure by parties of an alibi and protect as privileged the duplicitous concoction of the alibi.¹⁶⁸ In *Hooper v. State*, the court held that it would have been unfair to allow disclosure of a written medical report finding mental incompetence and protect as privileged the reporting doctor's rationale for making that diagnosis.¹⁶⁹ However, considering the policy behind most of the privileges is to protect

162. Compare *id.* § 2502(F), with FED. R. EVID. 502(a).

163. See FED. R. EVID. 502(a).

164. See *id.* 502(a) advisory committee's note.

165. See *Hogan v. State*, 2006 OK CR 19, ¶ 35, 139 P.3d 907, 922.

166. See *id.*

167. See *id.* at ¶ 36, 139 P.3d at 922; *Hooper v. State*, 1997 OK CR 64, ¶ 50, 947 P.2d 1090, 1109.

168. See ¶¶ 34, 36, 139 P.3d at 922. This seems to be a contrary result, however, to one that supports a policy protecting the marital relationship and encouraging the open and free flow of communication between spouses.

169. See ¶ 48, 947 P.2d at 1108-09.

confidentiality,¹⁷⁰ it seems that the default result under the old Oklahoma fairness test for any disclosure was subject matter waiver. The new default, at least in selective waiver cases, is that privilege is not waived as to the subject matter of disclosures, and it is this default that should result in discovery cost savings.

2. *Subject Matter Waiver Tied to Selective Waiver*

The first half of the new provision limiting subject matter waiver undermines any potential mitigation of discovery costs on a generally appreciable level, however.¹⁷¹ This provision very clearly ties the limitation on subject matter waiver to selective waiver by first introducing selective waiver, and then applying the subject matter waiver limitation only to the “[d]isclosure of such information.”¹⁷²

With the exception of the Eighth Circuit and some district courts, most federal courts do not allow selective waiver.¹⁷³ Selective waiver was initially proposed as Federal Rule of Evidence 502(c), but was not adopted by Congress.¹⁷⁴ The provision on selective waiver read:

Selective Waiver.-In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.¹⁷⁵

Selective waiver essentially encourages a party to cooperate with a federal agency or a federal investigation by disclosing otherwise privileged

170. See 3 WHINERY, *supra* note 8, § 35.02.

171. See 12 OKLA. STAT. § 2502(F) (Supp. 2009).

172. *Id.*

173. See Broun & Capra, *supra* note 19, at 229.

174. See Richter, *supra* note 14, at 158. Note also that court orders issued pursuant to FED. R. EVID. 502(d) and party agreements pursuant to 502(e) cannot be construed to allow selective waiver. See 154 CONG. REC. H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

175. Proposed FED. R. EVID. 502, *supra* note 14.

information for the use of the federal agency or investigation without thereby waiving that privilege in respect to nongovernment parties.¹⁷⁶

The selective waiver provision in the Oklahoma law is broader in scope than the selective waiver initially proposed for Federal Rule of Evidence 502. The Oklahoma language indicates that selective waiver applies to all disclosures made to “a governmental office, agency, or political subdivision.”¹⁷⁷ The proposed Federal Rule, in contrast, would have applied selective waiver only to disclosures made to the federal government, leaving disclosures made to state governments to be governed by the substantive law of those states.¹⁷⁸

The benefits of selective waiver are better relayed elsewhere,¹⁷⁹ but selective waiver is a welcome addition to Oklahoma privilege law, even if it will not do much to combat overall discovery costs at the Oklahoma state court level. Selective waiver will particularly benefit Oklahoma corporations involved in federal litigation. Because Oklahoma allows selective waiver, Oklahoma law grants a more expansive protection of privilege than the Federal Rule. Federal courts should apply Oklahoma’s selective waiver laws to Oklahoma corporations who cooperate in federal investigations.¹⁸⁰

Selective waiver fails to provide widespread mitigation of discovery costs, however, because of its limited application only to disclosures made to the government. While there are strategic benefits to maintaining privilege with respect to nongovernment parties (litigation is likely to be more successful if a party has not waived the privilege to keep confidential all of his or her damning secrets), selective waiver probably won’t have much impact on discovery costs at the state level because most litigation is civil litigation between private parties. Voluntary disclosure to nongovernment parties still results in waiver of privilege and of subject matter under Oklahoma law.¹⁸¹ Despite its limited application, selective waiver is a good addition to Oklahoma law. It will benefit Oklahoma by providing prosecutors with a legitimate investigative tool without undermining the attorney-client privilege and damning good corporate citizens in civil suits.¹⁸²

176. See Richter, *supra* note 14, at 132.

177. See 12 OKLA. STAT. § 2502(F) (Supp. 2009). A reading of the plain language presumably includes not only the federal and Oklahoma governments, but any other state, local, or foreign government, as well.

178. Proposed FED. R. EVID. 502, *supra* note 14.

179. See, e.g., Richter, *supra* note 14.

180. FED. R. EVID. 502(c).

181. See 12 OKLA. STAT. § 2502(F); 12 OKLA. STAT. § 2511 (Supp. 2002).

182. See Richter, *supra* note 14, at 134.

This same limited application applies to the limitation on subject matter waiver. The old approach to subject matter waiver is still applicable in the majority of cases because limited subject matter waiver is tied to selective waiver, and because title 12, section 2511 remains undisturbed.¹⁸³ Because the rule in Oklahoma remains unchanged for the most part, any intended savings on the cost of discovery from limiting subject matter waiver are likely to be negligible. Furthermore, rather than creating a uniform rule, this tepid attempt at limiting subject matter waiver in Oklahoma results in even less uniformity with the Federal Rules. Now there is more complexity and inconsistency due to the fact that two approaches to subject matter waiver exist in Oklahoma law. Despite the benefits of selective waiver, because of its inapplicability to most litigation, the discovery cost savings that will come to Oklahoma will probably amount to no more than a drop in the bucket. The savings from the new limitation on subject matter waiver, tied as it is to selective waiver, are a molecule of that drop.

3. *Inadvertent Disclosure*

The passage of an amendment specifically clarifying the privileged status of inadvertently disclosed information is a good thing, because it provides predictability and uniformity, and because it mitigates the fallout from such inadvertent disclosures. Unfortunately, the amendment as passed raises some issues of clarity and statutory construction. Relatively minor changes to the provision would allow the attorney-client privilege statute to truly be effective in mitigating discovery costs.

Courts will now judge all inadvertent disclosures by a uniform standard.¹⁸⁴ Because of the similarity of the Oklahoma rule to the Federal Rule, that treatment should mimic the Federal Rule of Evidence 502 approach and take the middle ground between never treating inadvertent disclosure as a waiver and always treating inadvertent disclosure as a waiver. A uniform analysis that courts can apply to claims of inadvertent disclosure will remove some of the uncertainty of litigation; and the closer the new rule is to the Federal Rule, the more case law for persuasive precedent will be at the Oklahoma court's disposal.¹⁸⁵

183. "A person upon whom this Code confers a privilege against disclosure waives the privilege if the person or the person's predecessor voluntarily discloses or consents to disclose any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged." 12 OKLA. STAT. § 2511 (2010).

184. See 12 OKLA. STAT. § 2502(E).

185. See e.g., *Amobi v. D.C. Dep't of Corr.*, No. 08-1501, 2009 WL 4609593, at *1 (D. D.C., Dec. 8, 2009). Currently, there are a limited number of federal court orders and decisions, published and unpublished, that utilize Federal Rule of Evidence 502, and this number will no

Because inadvertent disclosure will not always result in waiver of privilege, costs of discovery should be mitigated by protection for inadvertent disclosures. In proceedings, mandatory discovery encourages disclosure and discourages—through sanctions—withholding information.¹⁸⁶ With the increase in electronic storage and electronic discovery requests, it is likely that material intended to be kept confidential will increasingly be disclosed, even after costly pre-discovery privilege review.

Prior to House Bill 1597, if a party inadvertently disclosed information, there was little certainty that a court would accept the argument that there was intent to keep the information confidential. Inadvertent disclosures in discovery are voluntary disclosures (albeit of information that was not intended to be disclosed), and voluntary disclosure to a non-privileged party is an indicator that there is no intent to keep information confidential.¹⁸⁷ It does not seem likely that a court would have accepted the argument that there was a *de facto* compulsion to disclose (stemming from the ungodly cost of review and probability of sanctions if discovery requests are refused). While such results were indeed possible, the only rational choice a party could make with respect to production during discovery was to be as wary as possible of the court ruling against it and to conduct exhaustive privilege review. By taking the middle path between the “always” and “never” approaches to waiver, the Oklahoma rule will provide a firmer ground for declining to find waiver than treating inadvertent disclosure as not really a disclosure at all.

After the passage of House Bill 1597, however, the court will face a number of problems in cases of inadvertent disclosure. Whereas the Federal Rule applies only to disclosures “made in a Federal proceeding or to a Federal office or agency,”¹⁸⁸ the Oklahoma rule applies to any disclosure.¹⁸⁹ One could argue that the rule artificially binds Oklahoma’s treatment of inadvertent disclosure. By creating a conjunctive test that requires reasonable steps taken to prevent and rectify *every* inadvertent disclosure, the new rule may remove from the Oklahoma Evidence Code some of the flexibility that is its hallmark.¹⁹⁰ In situations where Oklahoma’s law does not track the application of the Federal Rules quite so closely as it does in the discovery context (such as inadvertent disclosures made outside of any government proceeding, as

doubt increase over time.

186. 12 OKLA. STAT. § 3226(B)(1) (Supp. 2009), *amended by* Act of Apr. 2, 2010, ch. 50, § 4, 2010 Okla. Sess. Law Serv. 229 (West); 12 OKLA. STAT. § 3237 (Supp. 2002), *amended by* Act of Apr. 2, 2010, ch. 50, § 8, 2010 Okla. Sess. Law Serv. 243 (West).

187. *Chandler v. Denton*, 1987 OK 38, ¶ 21, 741 P.2d 855, 865-66.

188. FED. R. EVID. 502(b).

189. 12 OKLA. STAT. § 2502(E).

190. *See Whinery*, *supra* note 91, at 263-64.

between individuals, or in the case of an eavesdropper), a party may have acted reasonably, even if the party took no steps to prevent an inadvertent disclosure, and the only step taken to rectify the error was filing a motion to exclude the disclosure as privileged.

Under the new law, however, claims of inadvertent disclosure—even those made outside of discovery—require the party to have taken reasonable steps to prevent and rectify the disclosure.¹⁹¹ This will possibly result in a different disposition of some disclosures than would have resulted under the old “voluntary/involuntary” test. Perhaps this issue could have been avoided if the Oklahoma rule had been limited, similarly to the Federal Rule, to disclosures made in government proceedings and to government agencies. This would have allowed a court to limit its examination to whether the disclosure was intended to be confidential. Having identified this as a problem, however, it should be noted that the concept of inadvertent disclosure was born in discovery,¹⁹² so hopefully there will not be many assertions of inadvertent disclosure outside of that context.

A more pressing issue than the scope of the provision arises from its construction. The Oklahoma rule on inadvertent disclosure, in listing the steps taken to “rectify the error,” includes “information falling within the scope of paragraph 4 of subsection B of Section 3226 of [title 12]”¹⁹³ Two problems (the first of which is really little more than a minor quibble) are immediately apparent in this clause. The first is that the English language does not include among its verbs “information.” It is hard, then, to understand how “information” is something one can do to rectify an error. Compare this with the Federal Rule, which recommends “following” the Federal Rule of Civil Procedure to which it points.¹⁹⁴

The second quibble concerns statutory organization. The paragraph to which the new rule points likely is the paragraph in the superseded version of title 12, section 3226 of the Oklahoma Statutes.¹⁹⁵ On the same day that the new section 2502 went into effect, an amended version of section 3226 also went into effect, pursuant to House Bill 1603.¹⁹⁶ This amended section 3226 added some “tort reform” provisions to the Oklahoma Discovery Code and, relevant to this argument, renumbered other provisions. What was once

191. 12 OKLA. STAT. § 2502(E).

192. See Broun & Capra, *supra* note 19, at 219-20.

193. 12 OKLA. STAT. § 2502(E)(3).

194. FED. R. EVID. 502(b)(3).

195. See 12 OKLA. STAT. § 3226 (Supp. 2004), *amended by* 12 OKLA. STAT. § 3226 (Supp. 2009), *amended by* 12 OKLA. STAT. § 3226 (2010).

196. See Act of May 21, 2009, ch. 228, § 20, 2009 Okla. Sess. Laws 968-72 (codified at 12 OKLA. STAT. § 3226 (Supp. 2009), *amended by* 12 OKLA. STAT. 3226 (2010)).

section 3226, subsection B, paragraph 4, became section 3226, subsection B, paragraph 6.¹⁹⁷ The new “paragraph 4” governed the discovery of what has been called “ordinary work product,”¹⁹⁸ and was numbered as subsection B, paragraph 2 in the old statute.¹⁹⁹ While Oklahoma courts are likely to understand that section 2502(E) is pointing to what became *paragraph 6*, rather than what became paragraph 4, this renumbering created confusion that is going to be present until there is either a corrective recodification of section 2502(E) or an authoritative ruling from the courts. Considering that the 2009 amendments to both section 2502 and section 3226 were offered by the same author²⁰⁰ (Representative Dan Sullivan of the Oklahoma House of Representatives, rather than the Oklahoma Bar Association subcommittees on evidence and civil procedure) and that “work-product” is relevant to the amended section 2502,²⁰¹ this confusion has some basis. An argument that the inadvertent disclosure provision does not point to what became paragraph 6 may, unfortunately, have more validity than it otherwise might.

Indeed, corrective recodification or a ruling from the courts is even more necessary than it was after the 2009 amendments, because *since* those amendments went into effect (and after this article was substantively complete), the Oklahoma Bar Association proposed and the legislature adopted newer amendments to section 3226 (and to most of the Discovery Code) to bring it closer to uniformity with the Federal Rules of Civil Procedure. The newest version of “paragraph 4 of subsection B of section 3226 of [title 12]” concerns discovery and expert witnesses.²⁰² The correct target of section 2502 is *now* title 12, section 3226, subsection B, paragraph 5, subparagraph b.²⁰³

197. Compare 12 OKLA. STAT. § 3226 (Supp. 2009), amended by 12 OKLA. STAT. § 3226 (2010), with 12 OKLA. STAT. § 3226 (Supp. 2004), amended by 12 OKLA. STAT. § 3226 (Supp. 2009).

198. Scott v. Peterson, 2005 OK 84 ¶ 8, 126 P.3d 1232, 1235.

199. See 12 OKLA. STAT. § 3226 (Supp. 2004), amended by 12 OKLA. STAT. § 3226 (Supp. 2009).

200. See Act of Nov. 1, 2009, ch. 251, § 2, 2009 Okla. Sess. Law Serv. 1470, 1470-71 (West) (codified at 12 OKLA. STAT. § 2502 (Supp. 2009)); Act of May 21, 2009, ch. 228, § 20, 2009 Okla. Sess. Laws 968-74 (codified at 12 OKLA. STAT. § 3226 (Supp. 2009), amended by 12 OKLA. STAT. § 3226 (2010)).

201. See 12 OKLA. STAT. § 2502(F) (Supp. 2009).

202. See *id.* § 2502(E); see also 12 OKLA. STAT. § 3226(B)(4)(2010).

203. See 12 OKLA. STAT. § 3226(B)(5)(b) (2010).

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 shall promptly return, sequester, or destroy the specified information and any copies the party has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information

4. Controlling Court Orders and Party Agreements

The amended statute does not contain any language that extends the authority of a court to protect privilege through court orders, or of parties to enter into agreements protecting privilege amongst themselves.²⁰⁴ One of the primary tools of cost mitigation adopted by Federal Rule of Evidence 502 is therefore not available to practitioners in Oklahoma state courts. This omission subverts the presumed “cost saving” intent of the amendments to attorney-client privilege.

B. Recommendations for Further Legislation

The amended statute has the apparent intent to mitigate the rising costs of discovery. The attempt to keep discovery costs down may result in some relief to Oklahoma litigants. Selective waiver seems to be a welcome addition to the law on privilege, and limitations on subject matter waiver, chained though they are to selective waiver, may keep some discovery costs down. A clear intention to protect inadvertent disclosures from constituting waiver is laudable. It appears that this statute is a good faith effort to bring Oklahoma closer to uniformity with the Federal Rules. Because it falls short of this, however, further legislation should be pursued.

1. Subject Matter Waiver

The limitation on subject matter waiver should be untied from selective waiver, and the two provisions moved to separate subsections. Further limiting subject matter waiver, so that the limitations apply not only to selective waiver cases but also to disclosures made in government proceedings or to government offices or agencies, similarly to the Federal Rule, would better mitigate discovery costs. This is because there would be fewer consequences for making a disclosure (unless the disclosure was made to gain an unfair advantage). Privilege review, then, would not need to be as rigorous and demanding as it currently is, and recognition software that has been used

if the party has 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 shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.

Id.

204. *See id.* § 2502.

in federal courts²⁰⁵ could be safely used to screen electronic documents for privileged information prior to disclosure in Oklahoma cases.

If it is untied from selective waiver, limited subject matter waiver is consistent with the Oklahoma policy of considering fairness, because it still allows for subject matter waiver in those cases where it would be unfair *not* to find it.²⁰⁶ A universal limitation on subject matter waiver of information protected by attorney-client privilege would bring clarity and simplicity to Oklahoma's law because it would apply to all cases of disclosure. A rule based on the Federal Rules would also be able to draw on the interpretation of federal courts, which not only have seen but likely will see many more cases on this issue than will Oklahoma's state courts. It would therefore give parties arguing subject matter waiver in Oklahoma courts a test that provides greater predictability than they currently have.

A broad limitation on subject matter waiver would also prevent retrogression in the waiver doctrine that might be indicated by the current Oklahoma cases.²⁰⁷ Although Oklahoma's cases, too, seem to require a test of fairness, so far the courts have more often than not found waiver. More frequent waiver means that parties must jealously guard against disclosures of even potentially privileged information, and at a much higher cost. Increasing costs and decreasing efficiency work against any modernization of the Oklahoma Discovery Code or the Oklahoma Evidence Code, as well as against their stated purposes.²⁰⁸

2. *Inadvertent Disclosure*

The rule on inadvertent disclosure should be linguistically clarified and the scope of the rule narrowed to disclosures made in proceedings.²⁰⁹ The inadvertent disclosure provision in the Evidence Code should also be amended to point to the correct subsection of the Discovery Code. This would provide effective steps that could be taken to rectify inadvertent disclosures.

Oklahoma's section 2502 might better be limited in scope only to disclosures made in government proceedings and to government agencies. This would probably control most disclosures and include all disclosures made during discovery. This limitation would leave Oklahoma courts with the previous rules in place to deal with situations that don't quite fit under the "reasonable steps" test, in which all the given steps are focused on disclosures

205. See FED. R. EVID. 502(b) advisory committee's note.

206. See Broun & Capra, *supra* note 19, at 229.

207. See, e.g., Hogan v. State, 2006 OK CR 19, 139 P.3d 907; Hooper v. State, 1997 OK CR 64, 947 P.2d 1090.

208. See 12 OKLA. STAT. §§ 2102, 3225 (2001).

209. See *id.* § 2502(E).

made during discovery. The courts should be able to apply the older case law in cases that don't apply to discovery—to look to whether there was intent to disclose, or perhaps treat the disclosure as if it weren't a disclosure at all. That way, the new rule, which more clearly pertains to discovery, is less likely to be encumbered with precedent that stretches it to baffling places in order to reach a just result in cases pertaining to disclosures made outside of discovery.

A future amendment should redirect the pointer in the third prong of the inadvertent disclosure test to the appropriate location in the Oklahoma Discovery Code to avoid unnecessary confusion and extended billable hours as research is conducted and legal arguments are crafted. The appropriate location is not the provision on discovery and expert witnesses.

3. Controlling Court Orders

Further legislation tracking Federal Rule of Evidence 502(d) should add controlling effect to court orders (to protect claw-backs and quick peeks) to the Oklahoma Evidence Code. The lack of such an amendment is the most glaring omission from and error in the new section 2502, and the most effective provision that should be added to the Evidence Code to keep discovery costs down. Claw-backs and quick peeks would act as a bigger money saver than selective waiver because they are more generally applicable to litigation. Furthermore, because the use of these tools is generally agreed to by parties themselves, the parties might be less inclined to raise challenges.

If, at a later date, discovery conferences are made mandatory, rather than optional, this would provide further benefit to parties and support the use of claw-backs and quick peeks. Because the parties would of necessity be forced to sit down and talk about the scope of discovery, they might be encouraged to utilize these agreements. Any drafting burden on the courts might also be eased, because the parties would hammer out the agreement, and the court order could simply adopt it. Mandatory conferences would save litigants even more discovery costs in many cases by narrowing the scope of discovery in general, or at least by giving notice to all parties of the discovery conflicts likely to arise.

The rules compel discovery of what can be quite copious amounts of information, and an order protecting quick peeks would certainly reduce the number of documents over which the parties would then be disputing. An order protecting claw-backs might make this compulsory discovery more palatable.

Expanding the authority of a court to issue orders binding other courts to protect the privilege of disclosed information would be not only consistent

with, but representative of, the flexibility of Oklahoma's Evidence Code.²¹⁰ Currently the courts' hands are tied in this respect. This flexibility is embodied by section 3226(C) of Title 12 of the Oklahoma Statutes, under which a court, in the interests of justice, could conceivably craft an order protecting the privilege of disclosed information between parties.²¹¹ Without the authority to bind nonparties or other proceedings on the issue of privilege, discovery costs—specifically costs of privilege review—are not likely to be reduced at all as a result of such an order. Any parties that disclose dependent upon the protection of such a constrained order would win the battle at the expense of the war. While they may be able to prevent their adversarial parties from utilizing disclosed but protected information, it is likely that nonparties will still have a valid claim that the privilege has been waived.²¹²

Under a provision similar to Federal Rule of Evidence 502(d), the court would not be limited to memorializing party agreements, or the lack thereof, in the order it crafted.²¹³ Even if parties could not come to a consensus on the scope of the agreement, or if they craft no agreement at all, a court could unilaterally enter an order protecting privilege in case of the disclosure of certain confidential information.

Note, however, that while the addition of controlling court orders would be consistent with, and representative of, the policy behind the Oklahoma rules, it would also change the current law of privilege by protecting privileges when disclosures are voluntary (and, indeed, very deliberate). This would not drastically depart from Oklahoma's privilege law, however, because such voluntary and deliberate disclosures would be made only when an order protecting privilege existed, in the belief that the disclosure was therefore privileged.²¹⁴ The court orders would not of necessity extend privilege to voluntary disclosures made without the protection of a party agreement or a

210. These privilege protection orders would not automatically protect privilege over disclosed information if subsequent litigation were brought in another state, for obvious reasons. This is not overly problematic, however, because the various approaches to conflicts of law in the several states *already* must deal with cases where information is privileged under the laws of one state and not under the laws of the other. Parties protected by these orders would only be faced with problems in states that would not recognize any of their privileges under Oklahoma law.

211. See 12 OKLA. STAT. § 3226(C) (2010).

212. See Marcus, *supra* note 51, at 1612.

213. See FED. R. EVID. 502(d) advisory committee's note.

214. See, e.g., *Ratzlaff v. State*, 1926 OK 707, ¶ 17, 249 P. 934, 937 (holding that communications "not openly made but . . . in the nature of a confidential communication" are privileged); see also 12 OKLA. STAT. § 2511 (2010) (protecting privilege over a voluntary disclosure when that disclosure is also privileged).

court order. Parties hoping to keep information confidential would still be deterred from disclosing it.

VI. Conclusion

The recent changes to the Oklahoma Evidence Code are necessary to bring the state closer to the degree of uniformity with the Federal Rules of Evidence that the Code embraces.²¹⁵ Oklahoma attorney-client privilege law currently cannot achieve the same results as the Federal Rules without stretching past the breaking point. The skyrocketing cost of discovery—especially of electronically stored information—coupled with the threat of waiver of privilege gave rise to Federal Rule of Evidence 502. These same threats exist in Oklahoma at the state level and could not be adequately dealt with under superseded Oklahoma law. Limiting subject matter waiver and offering some protection for the privileged nature of inadvertently disclosed communications should somewhat mitigate the shortcoming of the superseded law. In addition, the addition of selective waiver to the law of privilege is beneficial, not only for the general public in Oklahoma, but for Oklahoma corporations, or at least for those Oklahoma corporations that respect the law enough to voluntarily assist government entities in its enforcement.

The changes are somewhat problematic, however, because the general limitation on subject matter waiver exists solely in selective waiver cases, and because the provision on inadvertent disclosure is ungrammatical and misdirecting. Further, the changes to title 12, section 2502 are not enough to combat the rising costs of discovery. Without the ability to avoid costly privilege review, especially of electronically stored information, litigating parties in Oklahoma must expect that the costs of any given suit will far exceed the merits of the case, a situation which is contrary to the purpose behind the Evidence and Discovery Codes. Without the ability to issue orders protective of privilege that are binding on nonparties and other courts, Oklahoma courts are also left with the difficult choice between prohibiting costly discovery that might yield important information and requiring costly discovery in spite of the policy of economy and justice that drives the rules.

To fix the shortcomings of the amended law on attorney-client privilege, further legislation should be passed as soon as is practicable. The best model of uniformity for further legislation is Federal Rule of Evidence 502. Limitations on subject matter waiver should be untied from selective waiver and applied generally to all disclosures. The scope of the provision on inadvertent disclosure should be narrowed to disclosures made in government

215. See SUBCOMM. ON EVID., *supra* note 92, at 2606 (Subcommittee Chairman Ed Abel's introduction to the proposed rules).

proceedings or to government offices or agencies. The language should be tweaked, and the statutory pointer the provision provides for rectifying measures should be corrected.

To address the shortcomings in current Oklahoma attorney-client privilege law and the mounting costs of discovery, further legislation should add a provision tracking Federal Rule of Evidence 502(d), under which an Oklahoma court could issue an order protecting the privilege of disclosed information, and that order would bind other courts and non-parties to the original dispute. Preproduction privilege review would then be easier and less costly. Because of the likelihood that such a provision would be more generally useful to the majority of parties litigating in Oklahoma, a provision such as this would reduce the potential costs of discovery for most Oklahoma litigants.

The new law *is* beneficial and indicates a good faith effort to modernize Oklahoma's Evidence Code to deal with the realities of litigation in this century. Unfortunately, the 2009 amendments are not likely to have much effect on the average litigant's pocketbook. Fewer potential litigants will benefit under the new law than otherwise might have, if the other provisions of the Federal Rule had been incorporated. The new law highlights Oklahoma's opportunity and desire to once again "become a leader in the reform of the rules of evidence in the state court systems."²¹⁶ Hopefully this desire will carry us forward to further reform. If it does not, then the half-hearted amendments to the statute will become less a starting block and more a stumbling block, and Oklahoma state court practitioners and their clients will be left trying to catch up to the twenty-first century.

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216. *See id.* at 2607.

