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## Waiver, Work Product, and Worry: A Case for Clarifying the Waiver Doctrine in Oklahoma

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## COMMENT

### Waiver, Work Product, and Worry: A Case for Clarifying the Waiver Doctrine in Oklahoma

#### *I. Introduction*

Complex litigation often puts millions—if not billions—of dollars at stake. Such litigation often involves multiple parties and myriad legal claims and can easily result in a complex web of co-parties and third-party defendants, counterclaims and crossclaims. Danger exists in these suits, however, because the state's complete lack of guidance regarding waiver of the work product protection via voluntary production to third parties leaves Oklahoma's lawyers under the threat of making monumental mistakes. For lawyers prosecuting or defending such suits in Oklahoma state courts, this lurking issue should give pause.

Imagine the following, relatively routine scenario: a corporate client comes to an attorney expecting either to sue or be sued. As the client tells their story, the attorney realizes that at least one other individual or entity is likely to be a party in the possible litigation or shares a common interest with their client. In the course of preparing for the anticipated litigation, the attorney realizes that he or she will need to share information with the third party. Specifically, the attorney wants to share documents or other materials that have been prepared in anticipation of the suit. Obviously, however, the attorney does not want the materials to be discoverable. Cognizant of the fact that, under Oklahoma law, the disclosure of the materials to a third party under these circumstances will waive the attorney-client privilege,<sup>1</sup> the attorney is left reliant on the work product protection. Does disclosure of work-product protected materials to a third party with an interest in anticipated—but unfiled—litigation (specifically, potential joint parties in said litigation) waive the work product protection under Oklahoma's Discovery Code?

Oklahoma courts have not yet addressed the issue, and federal courts and the courts of other states have provided mixed answers. As a result, attorneys are left with a difficult choice: risk disclosure of materials that, if seen by an adversary, may substantially weaken the attorney's case; or refrain from sharing materials with a potential co-party and delay strategizing until the protection is available after the commencement of litigation. Until Oklahoma addresses this issue, attorneys in the state must

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1. *See infra* Part III.

attempt to navigate such troublesome choices without any indication of how the courts will resolve the issue.

This Comment explores this issue and provides a recommendation for the work product protection in Oklahoma that furthers the purpose of the doctrine while also allowing lawyers the flexibility needed to adequately prepare for anticipated multiparty litigation. Part II briefly reviews the history of the work product protection, including its adoption in Oklahoma. Part III provides important context by distinguishing the work product protection from the attorney-client privilege and explaining why waiver of one does not necessarily result in waiver of the other. Part IV discusses the related—but distinguishable—doctrines of subject matter waiver and selective waiver. Parts V and VI examine the majority and minority positions on waiver, respectively. Given Oklahoma's place within the Tenth Circuit, Part VII discusses that court's waiver jurisprudence in greater detail. Finally, Part VIII analyzes Oklahoma's work-product case law and statutes and provides a suggested approach to waiver. Specifically, this Comment suggests that Oklahoma adopt a waiver standard that allows voluntary disclosure of materials protected by the work product protection so long as that disclosure is not to an adversary and does not significantly increase the probability that the information will fall into the hands of an adversary.

## *II. Overview of the Work Product Protection*

The work product doctrine, first recognized by the United States Supreme Court in 1947, allows a lawyer to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."<sup>2</sup> The protection exists "not to protect the evidence from disclosure to the outside world but rather to protect it only from the knowledge of opposing counsel and his client."<sup>3</sup> In its current form, the doctrine protects documents prepared by or for a party or party's representative in anticipation of litigation.<sup>4</sup> Such documents, however, referred to hereinafter as "work product," have not always received such protection.

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2. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

3. 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2024 (3d ed. 2010) (quoting James A. Gardner, *Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (Part II)*, 42 U. DET. L.J. 253, 290 (1965)).

4. *See* FED. R. CIV. P. 26(b)(3).

The Court's decision in *Hickman v. Taylor* establishing the work product doctrine was a watershed moment. Prior to the decision, courts across the country failed to reach a consensus as to whether work product was protected from discovery at all, and those courts finding that work product was protected failed to reach a consensus on the reasoning underlying their decisions.<sup>5</sup> Moreover, many courts held that work product was subject to discovery, allowing enterprising lawyers to take advantage of what was arguably a glaring loophole in the relatively new Federal Rules of Civil Procedure.<sup>6</sup> The problem drew the attention of the Advisory Committee, which, in 1946, proposed an addition to then-Rule 30(b) in order to address the issue of unprotected work product.<sup>7</sup> However, the Court—which had at that point granted certiorari in *Hickman*—rejected the proposed rule, likely determining "that clarification of its views . . . should await the Court's decision."<sup>8</sup>

Shortly after rejecting the proposed rule, the Court delivered its decision in *Hickman*. Closely paralleling the Advisory Committee's proposed rule, the Court held that, presumptively, "written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases."<sup>9</sup> The Court, however, determined that the presumption may be rebutted "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case," in which cases "discovery may properly be had."<sup>10</sup> Over twenty years later, in 1970, the work product doctrine was codified in the Federal Rules of Civil Procedure as Rule

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5. 8 WRIGHT ET AL., *supra* note 3, § 2021.

6. *Id.*

7. *Id.* The proposed amendment read

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

*Id.*

8. Leland L. Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498, 507 (1958).

9. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

10. *Id.*

26(b)(3).<sup>11</sup> The Rule has not been "significantly changed" since its adoption in 1970 and is generally seen as codifying the protections outlined in *Hickman*.<sup>12</sup>

Oklahoma courts were slower to adopt the work product doctrine. In 1966, four years before codification of the federal work product protection and nineteen years after the Supreme Court's decision in *Hickman*, the Oklahoma Supreme Court finally recognized the work product protection.<sup>13</sup> The doctrine was then codified as section 3203 of title 12 in 1982,<sup>14</sup> and moved to its current location in section 3226 of title 12 in 1989.<sup>15</sup> Oklahoma's version of the work product protection is—and historically has

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11. 8 WRIGHT ET AL., *supra* note 3, § 2023. Rule 26(b)(3) currently reads:

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

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

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

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

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

FED. R. CIV. P. 26(b)(3).

12. 8 WRIGHT ET AL., *supra* note 3, § 2023 n.13 ("In 1987, gender-specific language was changed, but without effecting any substantive change in the rule. In 2007, the rule was 'restyled,' but with the avowed purpose not to change its meaning. As amended effective 2010, Rule 26(b)(4) invokes Rule 26(b)(3) protection for interactions between expert witnesses and lawyers.").

13. See *Carman v. Fishel*, 1966 OK 130, ¶¶ 12-16, 418 P.2d 963, 968-70, *overruled on other grounds by Tuller v. Shallcross*, 1994 OK 133, ¶ 15, 886 P.2d 481, 485.

14. See 12 OKLA. STAT. § 3203 (Supp. 1982).

15. See 12 OKLA. STAT. § 3226 (Supp. 1989).

been—almost identical to the federal work product protection, and the differences that do exist are almost exclusively stylistic.<sup>16</sup>

The Oklahoma Supreme Court has summarized its general interpretation of Oklahoma's work product protection, stating that

[o]rdinary work product consists of factual information garnered by counsel acting in a professional capacity in anticipation of litigation. It includes facts gathered from the parties and witnesses, and materials discovered through investigations of counsel or his/her agents. Although ordinary work product is cloaked with a qualified immunity, it may be discovered upon a showing of the inability to secure the substantial equivalent of the materials without undue hardship. The opinion work product area is carved out to protect the right of counsel to privacy in the analysis and preparation of the client's case. Opinion work product includes the lawyer's trial strategies, theories, and inferences drawn from the research and investigative efforts of counsel. Historically, the thoughts of an attorney have been free

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16. Section 3226(B)(3) currently reads:

a. Unless as provided by paragraph 4 of this subsection, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent. Subject to paragraph 4 of this subsection, such materials may be discovered if:

(1) they are otherwise discoverable under paragraph 1 of this subsection, and

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

b. If the court orders discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.

c. A party or other person may, upon request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and the provisions of paragraph 4 of subsection A of Section 3237 of this title apply to the award of expenses. A previous statement is either:

(1) a written statement that the person has signed or otherwise adopted or approved, or

(2) a contemporaneous stenographic, mechanical, electrical, or other recording, or a transcription thereof, which recites substantially verbatim the person's oral statement.

12 OKLA. STAT. § 3226(B)(3) (Supp. 2014).

from invasion, and the impressions, theories, trial tactics, and opinions of counsel have been sheltered from disclosure. Opinion work product enjoys a virtual immunity from discovery, and it may be discovered only under extraordinary circumstances.<sup>17</sup>

While the court's general interpretation of the doctrine is in line with the federal courts' interpretation of the doctrine, Oklahoma courts, unlike the federal courts, have not yet addressed the issue of whether disclosure of materials otherwise protected by the work product protection to a third party constitutes a waiver of the protection. Given the similarity of Oklahoma's Discovery Code to the federal rules regulating discovery, Oklahoma courts have looked to federal authority when construing comparable provisions in Oklahoma law.<sup>18</sup> Thus, it is necessary to examine federal case law on the subject.

### *III. Distinguishing the Work Product Protection from the Attorney-Client Privilege*

Before engaging in a discussion of waiver of the work product protection, it is important to distinguish the work product protection from the attorney-client privilege. At the federal level, the attorney-client privilege remains uncodified; thus, "[i]n federal criminal cases or in civil cases governed by federal law, the court must apply the common law 'interpreted in the light of reason and experience.'"<sup>19</sup> When applicable, the federal attorney-client privilege

applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii)

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17. *Ellison v. Gray*, 1985 OK 35, ¶ 7, 702 P.2d 360, 363 (footnotes omitted).

18. *See, e.g., Scott v. Peterson*, 2005 OK 84, ¶ 22, 126 P.3d 1232, 1238.

19. 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5473 (1986) (footnotes omitted). The federal common law applies only to "federal criminal cases or in civil cases governed by federal law." *Id.* The Federal Rules of Evidence provide that "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." FED. R. EVID. 501.

assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>20</sup>

Oklahoma also recognizes the attorney-client privilege; however, in contrast to the federal common law, Oklahoma has extensively codified the privilege.<sup>21</sup>

The work product protection and the attorney-client privilege are closely related and often are at issue in the same case. However, “[a]s the [United States Supreme] Court recognized . . . the work-product doctrine is distinct from and broader than the attorney-client privilege.”<sup>22</sup> Indeed, the work product protection and the attorney-client privilege “are independent protections that serve different purposes.”<sup>23</sup> Federal courts have regularly recognized the distinction. As one court noted,

[t]hough they both operate to protect information from discovery, the work-product doctrine and the attorney-client privilege serve different purposes. The purpose behind the attorney-client privilege is to “encourage clients to make full disclosure of facts to counsel so that he may properly, competently, and ethically carry out his representation. The ultimate aim is to promote the proper administration of justice.” The work-product doctrine, by contrast, “promotes the adversary

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20. 8 WRIGHT ET AL., *supra* note 3, § 2017 (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950)).

21. The Oklahoma attorney-client privilege provides, in part, that

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client’s attorney or a representative of the attorney;
2. Between the attorney and a representative of the attorney;
3. By the client or a representative of the client or the client’s attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;
4. Between representatives of the client or between the client and a representative of the client; or
5. Among attorneys and their representatives representing the same client.

12 OKLA. STAT. § 2502(B) (Supp. 2014).

22. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

23. 1 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY Rule 26 (Feb. 2017 update).

system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients."<sup>24</sup>

Put another way, "the attorney-client privilege and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney's litigation preparation from discovery."<sup>25</sup> The Oklahoma Supreme Court has also recognized the distinction, finding that "[a]lthough the two are closely related, an attorney's work product is not synonymous with the attorney-client privilege . . . . [I]nformation which is not protected from discovery by the attorney-client privilege may nonetheless be exempt as work product."<sup>26</sup>

Recognizing the differences and distinct purposes of the attorney-client privilege and the work product protection is important in the context of analyzing the waiver doctrine. Because "[t]he attorney-client privilege has its basis in the confidential nature of the communication . . . the reason for the privilege ordinarily ceases to exist if confidentiality is destroyed by voluntary disclosure to a third person."<sup>27</sup> In other words, because disclosure undermines the privilege's purpose, it logically follows that disclosure to a third party waives the privilege.<sup>28</sup> However, the purpose of the work product protection, as discussed above, is promotion of the adversary process, not strict confidentiality. As such, disclosure to a third party is not necessarily contrary to the purpose of the protection, and waiver is not always the necessary remedy.

In sum, while the work product protection and the attorney-client privilege are often considered in tandem, they are distinct and serve different purposes. When considering the work product protection, importing principles of waiver applicable to the attorney-client privilege would result in an unfairly narrow reading of the protection that is at odds with its purpose. As such, waiver of the work product protection must be considered separately from waiver of the attorney-client privilege.

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24. *In re Chevron Corp.*, 633 F.3d 153, 164 (3d Cir. 2011) (citations omitted).

25. *United States v. Deloitte LLP*, 610 F.3d 129, 139-40 (D.C. Cir. 2010).

26. *Ellison v. Gray*, 1985 OK 35, ¶ 8, 702 P.2d 360, 363.

27. 8 WRIGHT ET AL., *supra* note 3, § 2024.

28. Indeed, it is the rule that waiver results from disclosure of materials protected by the attorney-client privilege to third parties. *See id.* § 2016.4 (citing cases where disclosure resulted in waiver).

*IV. Subject-Matter Waiver and Selective Waiver: Federal Rule of Evidence 502 and Title 12, Section 2502 of the Oklahoma Statutes*

It is also important, prior to discussing waiver of the work product protection, to discuss two tangential issues that are closely related to—though distinct from—voluntary disclosures to third parties: subject-matter waiver and selective waiver.

*A. Subject-Matter Waiver*

The first issue—subject-matter waiver—deals with the scope of waiver once a disclosure has occurred. “The traditional rule is that, where a party has revealed a privileged communication, the court will require the party to reveal not only the communication for which the privilege has been waived, but also any privileged communications on the same subject matter which fairness requires must be revealed.”<sup>29</sup> The traditional rule, however, has been modified in both federal and Oklahoma courts.

Federal Rule of Evidence 502 provides that, under certain circumstances, both purposeful and inadvertent disclosures may not result in waiver.<sup>30</sup> Similarly, title 12, section 2502 of the Oklahoma Statutes, in addition to defining the work product protection, protects both purposeful and inadvertent disclosures.<sup>31</sup> While seemingly broad in scope, Rule 502—and, presumably, the similar language in subsections E and F of section 2502 of the Oklahoma rule—was adopted with a limited purpose. As one author points out,

Rule 502 reflects an attempt by Congress to enable litigants to minimize the extraordinary cost of civil discovery in federal proceedings without risking broad waiver of privilege in either federal or state proceedings. Rule 502 does this in two ways. First, Rule 502 limits subject matter waiver to voluntary disclosures and eliminates subject matter waiver for inadvertent disclosure. Second, Rule 502 enables federal courts to adopt protective orders and confidentiality agreements, including non-waiver provisions, that will be binding in other federal and state proceedings.<sup>32</sup>

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29. 1 DAVID M. GREENWALD ET AL, TESTIMONIAL PRIVILEGES § 1:76 (3d ed. 2015).

30. FED. R. EVID. 502(a)-(c).

31. 12 OKLA. STAT. § 2502(E)-(F) (Supp. 2014).

32. 1 GREENWALD ET AL., *supra* note 29, § 1:76 (footnotes omitted).

Thus, Rule 502 and section 2502 have no bearing on—and should not be interpreted as controlling when—deciding whether voluntary disclosures to third parties of materials protected by the work product protection waive the protection. Rather, as the Senate Judiciary Committee pointed out, the purpose of the Rule is “to limit the consequences of inadvertent disclosure” by providing “that if there is a waiver of privilege, it applies only to the specific information disclosed and not the broader subject matter.”<sup>33</sup>

This approach is a departure from the previous rule of subject matter disclosure, which, under Rule 502, remains largely applicable to voluntary disclosure. Thus, under the traditional rule, if purposeful disclosure of a privileged or protected document results in waiver, it may result in waiver of the privilege with regard to all documents regarding the same subject matter. Such potentially damning consequences make clarity regarding the effects of voluntary disclosure all the more important.

#### *B. Selective Waiver*

A second closely related issue—selective waiver—addresses which parties can take advantage of a waiver of a privilege or protection. Under the doctrine of selective waiver, waiver with regard to one party—generally the government—does not amount to a waiver of the privilege or protection as to other parties. In other words, the doctrine generally dictates that “voluntary disclosures to government agencies should result only in . . . waiver as to the government but not as to third party litigants.”<sup>34</sup> Selective waiver arguments most often appear in the context of government investigations of corporations, in which the corporation wishes to cooperate with the government while avoiding waiver of a privilege or protection with respect to private litigants.<sup>35</sup> Selective waiver is, in a sense, a roundabout way of allowing disclosure to a third party without waiving the privilege as to other parties.

Selective waiver, however, is a distinct issue from voluntary disclosure to a potential joint party. While disclosure to potential joint parties may further the purposes of the adversary system, selective waiver, which would allow disclosure directly to an adversary, arguably contravenes it. Highlighting the difference, “courts that have rejected selective waiver for work product have done so on the grounds that the government is an adversary or potential adversary.”<sup>36</sup> Applying this logic, courts have widely

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33. S. REP. NO. 110-264, at 3 (2008), *as reprinted in* 2008 U.S.C.C.A.N. 1305, 1306-07.

34. 1 GREENWALD ET AL., *supra* note 29, § 1:102.

35. *See, e.g., id.*

36. *Id.*

rejected selective waiver.<sup>37</sup> In the context of the work product protection, even the Eighth Circuit, which decided the seminal case regarding selective waiver of the attorney client privilege,<sup>38</sup> has rejected selective waiver in the context of the work product protection.<sup>39</sup>

Despite the courts' widespread rejection of the doctrine, selective waiver has in some instances been embraced by the legislative branches. At the federal level, when adopting Federal Rule of Evidence 502(a), some commentators argue that Congress may have inadvertently codified the selective waiver doctrine.<sup>40</sup> Although legislative intent suggests that Congress and the Advisory Committee did not intend to codify selective waiver,<sup>41</sup> Rule 502(a) "sounds very much like 'selective waiver', albeit without the name."<sup>42</sup> While many commentators disagree with the contention that Rule 502(a) explicitly adopted the selective waiver doctrine, some have argued that, in operation, Rule 502 may allow selective waiver.<sup>43</sup>

At the state level, Oklahoma has unambiguously written selective waiver into its Discovery Code, providing that "[d]isclosure of a communication or information meeting the requirements of . . . 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."<sup>44</sup>

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37. See, e.g., *In re Qwest Commc'ns. Int'l*, 450 F.3d 1179, 1192 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 306-07 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1429 (3d Cir. 1991).

38. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

39. See *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988); see also *Westinghouse*, 951 F.2d at 1428 (discussing *In re Chrysler Motors Corp.*).

40. See 23 WRIGHT & GRAHAM, *supra* note 19, § 5442; see also 1 GREENWALD ET AL., *supra* note 29, § 1:102.

41. See, e.g., FED. R. EVID. 502 Advisory Committee Explanatory Note, Committee Letter ("The Advisory Committee determined that it would not propose adoption of a selective waiver provision.").

42. 23 WRIGHT & GRAHAM, *supra* note 19, § 5442.

43. See, e.g., 1 GREENWALD ET AL., *supra* note 29, § 1:102 ("Rule 502 may limit the scope of a waiver resulting from disclosure of privileged materials to the government."); Patrick M. Emery, Comment, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J.L. & COM. 231, 293 (2009) ("Generally, 502(a) allows selective, intentional waiver of attorney-client and work product material. This is not selective waiver, it is selective disclosure, but it can become selective waiver when read in conjunction with subsections (d) and (e).").

44. 12 OKLA. STAT. § 2502(F) (Supp. 2014).

In sum, given the continued viability of subject matter waiver with regard to voluntary disclosures, it is crucial that clarity exists regarding the waiver doctrine. Moreover, while this Comment addresses only voluntary disclosure, Oklahoma's adoption of the selective waiver doctrine may impact its analysis of waiver in regard to voluntary disclosure.

#### *V. The Majority Position on Waiver of the Work Product Doctrine*

Even if materials are protected by the work product protection, "[t]he privilege derived from the work-product doctrine is not absolute," and, "[l]ike other qualified privileges, it may be waived."<sup>45</sup> Ultimately, what constitutes a waiver of the work product protection is a matter of policy based on differing understandings of the policies underlying the protection. While the United States Supreme Court has not yet weighed in on the issue, the weight of federal jurisprudence indicates that disclosure to a third party does not waive the protection of the work product doctrine unless the disclosure "has substantially increased the opportunities for potential adversaries to obtain the information."<sup>46</sup> Similarly, many states have found that disclosure does not necessarily result in waiver. The majority position—that waiver of the work product protection occurs only if disclosure "substantially increases" the likelihood that adversaries will obtain the information—is the position most in tune to the purpose of the work product protection: "to protect [evidence] only from the knowledge of opposing counsel and his client."<sup>47</sup>

#### *A. Federal Jurisprudence*

##### *1. D.C. Circuit*

The D.C. Circuit has decided several of the leading cases regarding waiver of the work product protection, including one of the earliest circuit-level decisions—*United States v. American Telephone & Telegraph Co.*<sup>48</sup> American Telephone & Telegraph Co. (AT&T) was party to two antitrust suits, one brought by MCI Communications Corporation and MCI Telecommunications Corporation (MCI) in the Northern District of Illinois ("suit one"), and the other brought by the United States in the District of D.C. ("suit two").<sup>49</sup> MCI furnished certain "database documents" to the

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45. *United States v. Nobles*, 422 U.S. 225, 239 (1975).

46. 8 WRIGHT ET AL., *supra* note 3, § 2024.

47. *Id.* (citation omitted).

48. 642 F.2d 1285 (D.C. Cir. 1980).

49. *Id.* at 1288.

United States “upon an assurance of confidentiality from the Government.”<sup>50</sup> AT&T then sought discovery of the documents from the United States in suit two.<sup>51</sup> Following a decision by a special master finding on several grounds that the database documents were no longer protected by the work product protection, the United States appealed the decision to the district court, and MCI moved to intervene.<sup>52</sup> The district court denied both the appeal and the motion, holding that MCI had waived the work product protection by disclosing the database documents to the United States.<sup>53</sup> MCI then appealed the denial of its motion to intervene and the discovery order requiring disclosure of the database documents.<sup>54</sup>

On appeal, the D.C. Circuit first looked to decisions of several district courts, finding that “[s]everal of the decisions have turned on whether the transferor has ‘common interests’ with the transferee.”<sup>55</sup> The court then looked to the purpose underlying the work product protection—“to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation”—before holding that “[a] disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.”<sup>56</sup> The court further elaborated on the circumstances under which waiver was inappropriate, stating that

[t]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But “common interests” should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate

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50. *Id.* at 1289.

51. *Id.*

52. *Id.* at 1289-90.

53. *Id.* at 1290.

54. *Id.*

55. *Id.* at 1298.

In applying [the common interest] standard courts have held the work product privilege not to be waived by disclosures between attorneys for parties “having a mutual interest in litigation,” or between parties which were potential co-defendants to an antitrust suit, or between attorneys representing parties “sharing such a common interest in litigation, actual or prospective,” or between parties one of whose interests in prospective litigation may turn on the success of the other party in a separate litigation.

*Id.* (footnotes omitted).

56. *Id.* at 1299.

litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.<sup>57</sup>

Applying this standard, the court held that MCI had not waived its work product protection when it disclosed the database documents to the United States.<sup>58</sup>

The court recently clarified and refined its waiver jurisprudence in *United States v. Deloitte LLP*.<sup>59</sup> There, Dow Chemical Company ("Dow") provided documents (pertinent here are a memo, an accompanying flow chart, and a tax opinion) to its auditor, Deloitte, prior to the commencement of litigation.<sup>60</sup> During discovery in the subsequent lawsuit by Dow against the United States regarding "the tax treatment of two partnerships owned by Dow . . . and two of its wholly-owned subsidiaries," the United States attempted to compel Deloitte, who was not a party, to produce the documents.<sup>61</sup> Deloitte refused to produce the documents, and Dow intervened.<sup>62</sup> The United States conceded that the materials prepared by Dow were work product, leaving only the issue of "whether disclosing work product to an independent auditor constitutes waiver" for the court's consideration.<sup>63</sup>

The court first considered the purpose of the work product doctrine (to "promote[] the adversary process by insulating an attorney's litigation preparation from discovery") and examined prior cases before determining that "the voluntary disclosure of attorney work product to an adversary or a conduit to an adversary waives work-product protection for that material."<sup>64</sup> For purposes of this analysis, the court determined an "adversary" to be a person or entity who may be an "adversary in the sort of litigation the

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57. *Id.* at 1299-1300.

58. *Id.* at 1301.

59. 610 F.3d 129 (D.C. Cir. 2010).

60. *Id.* at 133.

61. *Id.*

62. *Id.* at 133-34.

63. *Id.* at 139.

64. *Id.* at 139-40.

[documents] address.”<sup>65</sup> If the rule were any different—for example, if “the possibility of a future dispute between [the disclosing party and the party to whom a document was disclosed] render[ed] [the party to whom a document was disclosed] a potential adversary”—then “any voluntary disclosure would constitute waiver,” an outcome at odds with the purpose of the work product doctrine.<sup>66</sup> Whether disclosure is to a “conduit to an adversary” is determined by applying the “maintenance of secrecy” standard.<sup>67</sup>

While the maintenance of secrecy standard is a “fact intensive” one, the D.C. Circuit recognized that courts applying it “have generally made two discrete inquiries in assessing whether disclosure constitutes waiver.”<sup>68</sup> First, courts ask “whether the disclosing party has engaged in self-interested selective disclosure by revealing its work product to some adversaries but not to others.”<sup>69</sup> Such disclosure weighs in favor of waiver.<sup>70</sup> The second prong of the maintenance of secrecy standard requires “examin[ing] whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential.”<sup>71</sup> The court recognized two general ways by which this prong of the maintenance of secrecy test could be satisfied. First, “[a] reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient . . . because when common litigation interests are present, ‘the transferee is not at all likely to disclose the work product material to the adversary.’”<sup>72</sup> Alternatively, the “reasonable expectation of confidentiality” may derive from a “relatively strong and sufficiently unqualified” confidentiality agreement.<sup>73</sup> Generally, the presence of either consideration militates against a finding of waiver. However, the “reasonable expectation of confidentiality” test is likely not restricted to the two considerations defined by the court.

When considering the facts of the case at hand, the court seemed to expand the confidentiality agreement consideration, posing the question as “whether a confidentiality agreement *or similar assurance* gave Dow a

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65. *Id.* at 140.

66. *Id.*

67. *Id.* at 141.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (citation omitted).

73. *Id.*

reasonable expectation that Deloitte would keep its work product confidential.”<sup>74</sup> The court found that the relationship between Dow and Deloitte, its independent auditor, was sufficient to be a “similar assurance” of the reasonable expectation of confidentiality.<sup>75</sup> As such, the court held that the maintenance of secrecy standard had been met; thus Dow’s disclosure to Deloitte had not been a disclosure into a “conduit to an adversary,” and the work product protection had not been waived.

## 2. Seventh Circuit

The D.C. Circuit is far from the only circuit to reach a similar conclusion. In *Appleton Papers, Inc. v. EPA*,<sup>76</sup> the Seventh Circuit determined that waiver of the work product protection occurs when disclosure “substantially increase[s] the opportunities for potential adversaries to obtain the information.”<sup>77</sup> There, the documents at issue were prepared by an environmental consultant for the government in preparation for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) litigation against Appleton Papers and other alleged polluters.<sup>78</sup> The government cited to unreleased portions of the reports prepared by the consultant when preparing consent decrees with regard to other alleged polluters.<sup>79</sup> Appleton Papers, unsuccessful in obtaining the reports by any other means, filed a Freedom of Information Act request, to which the government replied by asserting the work product protection.<sup>80</sup> After determining that the reports were protected by the work product protection, the court determined “that the government waived work product immunity for the portions of the documents it did use in the two consent decrees” because it had substantially increased the chances that Appleton Papers would be able to obtain the information.<sup>81</sup> The court also determined, however, that those portions of the report not cited to in the consent decrees remained protected by the work product protection.<sup>82</sup>

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74. *Id.* at 142 (emphasis added).

75. *Id.*

76. 702 F.3d 1018 (7th Cir. 2012).

77. *Id.* at 1025.

78. *Id.* at 1021.

79. *Id.*

80. *Id.*

81. *Id.* at 1025.

82. *Id.*

### 3. *Fifth Circuit*

The Fifth Circuit has also held that waiver of the work product protection occurs if the disclosure “substantially increase[s] the opportunities for potential adversaries to obtain the information.”<sup>83</sup> In an Ecuadorian proceeding by Ecuadorian plaintiffs against Chevron for alleged pollution of the Amazon, an Ecuadorian court ordered that a neutral expert draft a report on Texaco’s (Chevron’s predecessor in interest) effect on the rainforest.<sup>84</sup> Alleging that the expert had colluded with the plaintiffs, Chevron attempted to engage in discovery in the United States in order to obtain records from 3TM—an environmental consulting firm hired by the plaintiffs.<sup>85</sup> According to Chevron, the expert in the Ecuadorian proceedings had relied on reports prepared by 3TM.<sup>86</sup> In the U.S. discovery proceedings, the Ecuadorian plaintiffs, who intervened on behalf of 3TM, argued, *inter alia*, that 3TM was protected by the work product doctrine.<sup>87</sup> The court determined that, by disclosing the documents to the Ecuadorian expert, 3TM had waived the work product protection.<sup>88</sup> Under U.S. law, the disclosure to the Ecuadorian expert waived the work product protection because “Rule 26(a)(2)(B) provides that when experts testify before a court, they must submit a report disclosing ‘the data or other information’ they have considered in reaching their conclusions,” substantially increasing the likelihood that a potential adversary will obtain that information.<sup>89</sup> The Fifth Circuit has reached similar conclusions on other occasions.<sup>90</sup>

### 4. *Third Circuit*

The Third Circuit agrees that “a disclosure to a third party does not necessarily waive the protection of the work-product doctrine” unless “the disclosure . . . enable[s] an adversary to gain access to the information.”<sup>91</sup> After Westinghouse Electric Corporation was awarded a contract to build the Philippines’s first nuclear power plant, allegations emerged that

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83. *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 378 (5th Cir. 2010) (citation omitted).

84. *Id.* at 375.

85. *Id.* at 376.

86. *Id.*

87. *Id.* at 377.

88. *Id.* at 378.

89. *Id.* (citation omitted).

90. *See, e.g., Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989).

91. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1428 (3d Cir. 1991).

Westinghouse had bribed Philippine officials to obtain the contract.<sup>92</sup> The allegations resulted in an investigation by the Securities and Exchange Commission (SEC), leading Westinghouse to retain outside counsel for the purpose of conducting an internal investigation.<sup>93</sup> The law firm prepared two letters reporting their findings, one of which was shown to the SEC.<sup>94</sup> The Department of Justice (DOJ) subsequently engaged in its own investigation, in which a grand jury subpoenaed the letters prepared by outside counsel reporting the findings of their internal investigation.<sup>95</sup> After entering into a confidentiality agreement, Westinghouse disclosed the letters to the DOJ.<sup>96</sup>

In a subsequent suit by the Philippines against Westinghouse, “the Republic requested that Westinghouse produce the documents that it had made available to the SEC and to the DOJ,” which Westinghouse refused.<sup>97</sup> On appeal, the Third Circuit first discussed the purpose of the work product doctrine—“to protect an attorney’s work product from falling into the hands of an adversary”—before holding that “a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine’s protection only when the disclosure furthers the doctrine’s underlying goal.”<sup>98</sup> Here, the court determined that Westinghouse’s voluntary disclosure of the documents to the government—even if made to rebut erroneous charges or obtain leniency with regard to valid charges—waived the work product protection because the rationale underlying the disclosure was “foreign to the objectives underlying the work-product doctrine.”<sup>99</sup>

### 5. Eleventh Circuit

When private plaintiffs cooperated with the Equal Opportunity Employment Commission (EEOC) during a joint claim, the Eleventh Circuit rejected the defendant’s argument that the private plaintiffs’ disclosure of materials to the EEOC constituted waiver of the work product protection for those materials.<sup>100</sup> The private plaintiffs were later severed after their claims were dismissed.<sup>101</sup> When the defendant attempted to

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92. *Id.* at 1418.

93. *Id.*

94. *Id.*

95. *Id.* at 1419.

96. *Id.*

97. *Id.* at 1420.

98. *Id.* at 1428-29.

99. *Id.* at 1429.

100. *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1466 (11th Cir. 1984).

101. *Id.*

compel disclosure of the shared documents by the EEOC, the court “summarily reject[ed] [their] waiver argument, noting that the transfer was made at the time that the private plaintiffs' attorneys and counsel for the EEOC were engaged in the preparation of a joint trial.”<sup>102</sup> It is worth noting that the court seemed to place special emphasis on the fact that the disclosure by the private plaintiffs took place during joint preparation for trial.<sup>103</sup> While not directly stating the court's view on waiver of the work product doctrine, the outcome of the case necessitates an understanding that the court views disclosure to a third party as not necessarily waiving the work product protection.

### *B. State Jurisprudence*

As discussed above, section 3226 of Oklahoma's Discovery Code closely resembles Rule 26 of the Federal Rules of Civil Procedure.<sup>104</sup> Many other states have likewise adopted discovery rules—particularly, rules regarding the work product protection—that are identical or similar to the federal scheme. Unlike the federal courts, however, which have mostly—though not unanimously—allowed disclosure to non-adversarial third parties without resulting in waiver of the work product protection,<sup>105</sup> state courts have been less consistent. Like the majority of federal courts, several states have found that voluntary disclosure to a third party does not result in waiver of the work product protection.

#### *1. Washington*

Washington Rule of Civil Procedure Rule 26<sup>106</sup> is similar, though not identical, to Federal Rule of Civil Procedure 26.<sup>107</sup> In addition, the

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102. *Id.* (footnote omitted).

103. *Id.* (“Subsequent to that consolidation and, more importantly, prior to the dismissal of the private parties' suits, the attorneys for the private plaintiffs turned over to the EEOC certain witness statements and notes from interviews with witnesses.” (footnote omitted)).

104. *See supra* Part II.

105. *See supra* Section V.A.

106. The Washington Rules of Civil Procedure provide:

Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including a party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required

Washington Rules of Evidence contain a provision relating to waiver of the work product protection.<sup>108</sup> The Washington rule is substantially identical to Federal Rule of Evidence Rule 502.<sup>109</sup>

Given the silence of Washington's Rules of Evidence and Civil Procedure, the issue of waiver by voluntary disclosure was left to Washington's courts. In *Limstrom v. Ladenburg*,<sup>110</sup> the Washington Court of Appeals for the first time considered the effect of disclosure on the work product protection.<sup>111</sup> The issue for the court was whether the prosecutor's "disclosure of fact-gathering documents from its criminal litigation files to criminal defense attorneys . . . waive[d] the work product exemption as to other attorneys and parties *outside* a particular criminal case?"<sup>112</sup> To resolve the issue of first impression, the court looked to other jurisdictions, determining that "generally, a party can waive the attorney work product privilege as a result of its own actions. If a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results."<sup>113</sup> The court then held that the involuntary nature of the disclosures made by the prosecutor resulted in no waiver of the work product protection.<sup>114</sup> In the absence of a statutory directive mandating waiver as the result of voluntary disclosures, Washington courts seem to have interpreted the work product protection as allowing disclosure to third parties so long as there is no "intention that an adversary can see the documents."

## 2. Missouri

Missouri Supreme Court Rule 56.01<sup>115</sup> is similar to the rule governing work product in Washington.<sup>116</sup> Unlike Washington, though, Missouri has

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showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

WASH. SUPER. CT. CIV. R. 26(b)(4).

107. Compare WASH. SUPER. CT. CIV. R. 26(b)(4), with FED. R. CIV. P. 26(b)(3).

108. WASH. R. EVID. 502.

109. Compare WASH. R. EVID. 502, with FED. R. EVID. 502.

110. 39 P.3d 351 (Wash. Ct. App. 2002).

111. *Id.* at 356.

112. *Id.*

113. *Id.* at 357 (citation omitted).

114. *Id.* at 358.

115. Missouri Supreme Court Rule 56.01(b)(3) reads

Subject to the provisions of Rule 56.01(b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or

no rule addressing the effect of voluntary or inadvertent disclosure of materials on the work product protection.

Missouri courts have provided guidance on the effect of voluntary disclosure. In *Edwards v. Missouri State Board of Chiropractic Examiners*,<sup>117</sup> the Missouri Court of Appeals confronted the issue of whether voluntary disclosure of work-product protected materials constituted a waiver of the protection.<sup>118</sup> There, the court decided an appeal by a chiropractor from a trial court's review of the Administrative Hearing Commission (AHC) and the Missouri State Board of Chiropractic Examiners (the "Board").<sup>119</sup> The Board revoked the chiropractor's license after he purported to treat a patient with HIV, resulting in the patient's death and the transmission of the disease to his wife and child.<sup>120</sup> In the course of preparing for the administrative hearing, the Board's attorney wrote several letters to individuals including two doctors, an attorney for a fact witness, and the mother-in-law of the deceased.<sup>121</sup> The Board refused to provide the materials to the chiropractor, claiming the work product protection.<sup>122</sup> The chiropractor argued that, by disclosing the letters to third parties, the Board had waived the protection.<sup>123</sup> The court held that "[w]ork product immunity may be waived by voluntary disclosure of the protected information."<sup>124</sup> However, "[a] disclosure made in the pursuit of trial preparation and not inconsistent with maintaining secrecy against opponents should . . . be allowed without waiver of the work product

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by or for that other party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Mo. SUP. CT. R. 56.01(b)(3).

116. Compare Mo. SUP. CT. R. 56.01(b)(3), with WASH. SUPER. CT. CIV. R. 26(b)(4).

117. 85 S.W.3d 10 (Mo. Ct. App. 2002).

118. *Id.* at 27.

119. *Id.* at 14.

120. *Id.* at 15-20.

121. *Id.* at 25-26.

122. *Id.* at 26.

123. *Id.* at 27.

124. *Id.*

immunity.”<sup>125</sup> The result—that disclosure to non-adversarial parties when made “in pursuit of trial preparation” does not result in waiver—is consistent with the federal majority position and the purpose of the work product protection.

#### *VI. The Minority Position on Waiver of the Work Product Doctrine*

Contrary to the majority position, which allows disclosures to third parties under certain circumstances, at least one circuit court, several district courts, and some state courts have held that disclosure to third parties of materials protected by the work product protection constitutes a waiver of the protection. Wright & Miller suggest that “[d]ecisions to this effect confuse the work-product immunity with the attorney-client privilege.”<sup>126</sup>

##### *A. Federal Jurisprudence*

Contrary to the majority position, in *New Phoenix Sunrise Corp. v. Commissioner*,<sup>127</sup> the Sixth Circuit held that there is no reason to differentiate between the attorney-client privilege and the work product doctrine, finding that both are waived by voluntary disclosure.<sup>128</sup> Following a failed Basis Leveraged Investment Swap Spread (a “BLISS transaction”),<sup>129</sup> New Phoenix claimed losses of \$10,504,462 on its 2001 tax return,<sup>130</sup> in contravention of Department of Treasury regulations issued in 2000 warning that “the purported losses from such offsetting option transactions did not represent bona fide losses reflecting actual economic consequences and that the purported losses were not allowable for Federal tax purposes.”<sup>131</sup> Subsequently, “[t]he IRS issued a notice of deficiency to New Phoenix . . . alleging a deficiency of \$3,355,906 and a penalty . . . of \$1,298,284.”<sup>132</sup> New Phoenix appealed to the Tax Court.<sup>133</sup> During those

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125. *Id.*

126. 8 WRIGHT ET AL., *supra* note 3, § 2024.

127. 408 F. App'x 908 (6th Cir. 2010).

128. *Id.* at 918.

129. A BLISS transaction is a “transaction involv[ing] currency speculation with the theoretical chance of a large windfall, but which also allow[s] a partnership engaging in the speculation to write off large paper losses on tax returns while suffering only small actual losses.” *Id.* at 911.

130. *Id.* at 911-13.

131. *Id.* at 913.

132. *Id.*

133. *Id.* at 914.

proceedings, the Tax Court, over New Phoenix's allegations of attorney-client privilege and work product protection, admitted several documents related to a tax opinion prepared for New Phoenix by New Phoenix's attorneys (for which the work product protection was waived due to New Phoenix's reasonable cause defense) based on a finding of subject matter waiver.<sup>134</sup>

On appeal, the Sixth Circuit began its discussion of the work product protection by declaring that “[b]oth the attorney-client privilege and work-product protection are waived by voluntary disclosure of private communications to third parties.”<sup>135</sup> The court continued, stating that “[t]here is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege.”<sup>136</sup> The court then held that New Phoenix had waived the attorney-client privilege and the work product protection with regard to the tax opinion and thus, via application of Federal Rule of Evidence 502(a), had waived the privilege and protection as to all other materials related to the same subject matter.<sup>137</sup> Although the opinion is unpublished, it serves to show that, while there is a strong majority position, there is also a viable minority position that Oklahoma courts may be inclined to follow. Further, the case serves as an example of the importance of clarity with regard to the waiver doctrine given the potential effects of subject matter waiver under Federal Rule of Evidence 502(a).

In addition to the Sixth Circuit's opinion in *New Phoenix*, several federal district courts have found that disclosure of materials protected by the work product protection to a third party results in waiver of the protection.<sup>138</sup> Each case, however, was decided prior to the codification of the work product protection and, as such, provides little persuasive value.<sup>139</sup>

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134. *Id.* at 914, 918.

135. *Id.* at 918.

136. *Id.* (quoting *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289, 306 (6th Cir. 2002)) (alteration in original). It is worth noting that the court arguably misconstrued the quote, as it came in the context of selective waiver, not waiver generally, and was proceeding by the qualifying statement “[o]ther than the fact that the initial waiver must be to an ‘adversary’ . . . .” *In re Columbia/HCA*, 293 F.3d at 306.

137. *New Phoenix Sunrise Corp.*, 408 F. App'x at 919.

138. 8 WRIGHT ET AL., *supra* note 3, § 2024 (“There are some cases that suggest that any disclosure of a document to a third person waives the work-product immunity to which it would otherwise be entitled.”); *see also id.* § 2024 n.63 (citing cases).

139. *Id.* (citing cases).

### B. State Jurisprudence

While federal law on the issue seems relatively settled, an Oklahoma court may well find a basis for adopting the minority position based on the decisions of other states, where the law seems less settled. Several states have found that voluntary disclosure to a third party results in waiver of the work product protection.

#### 1. Tennessee

Tennessee's Rule 26.02<sup>140</sup> is similar to Federal Rule of Civil Procedure 26 as well as the rules governing discovery in Washington and Missouri, discussed above.<sup>141</sup> Unlike the Federal Rules, which describe the showing needed to overcome the work product protection in negative terms (“[o]rdinarily, a party may not . . . but . . . may”), the Tennessee Rule describes the showing in positive terms (“a party may obtain . . . only upon”).<sup>142</sup> In substance, however, both rules protect documents prepared by or for a party or party's representative in anticipation of litigation from discovery unless the opposing party can show (1) a substantial need for the information contained in the documents and (2) that unfair prejudice would result from inability to discover such information. Tennessee also has an evidentiary rule dealing with waiver of the work product rule, but the rule deals only with inadvertent disclosure.<sup>143</sup>

In *Arnold v. City of Chattanooga*,<sup>144</sup> the City of Chattanooga commissioned the preparation of two reports to determine the viability of

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140. Tennessee Rule of Civil Procedure 26.02(3) reads:

Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

TENN. R. CIV. P. 26.02(3).

141. Compare TENN. R. CIV. P. 26.02(3), with FED. R. CIV. P. 26(b)(3), and WASH. SUPER. CT. CIV. R. 26(b)(4), and MO. SUP. CT. R. 56.01(b)(3).

142. Compare FED. R. CIV. P. 26(b)(3), with TENN. R. CIV. P. 26.02(3).

143. TENN. R. EVID. 502.

144. 19 S.W.3d 779 (Tenn. Ct. App. 1999).

acquiring the privately held company that provided the City's water supply.<sup>145</sup> A local newspaper and the company the City sought to acquire filed separate petitions seeking inspection of the reports under the Tennessee Public Records Act.<sup>146</sup> The trial court found that the reports did not constitute work product.<sup>147</sup> "In order to determine whether the Chancery Court was correct in determining the two reports were subject to disclosure under the Public Records Act," it was necessary for the court of appeals to "determine whether the reports were work products protected against discovery under Rule 26–02(3) or (4) of the Tennessee Rules of Civil Procedure or the common law work product doctrine."<sup>148</sup>

After finding that the reports constituted work product, the court then turned to the issue of whether or not the City had waived the work product protection.<sup>149</sup> Recounting the law of work product protection, the court stated that

[a]n example [of an exception to the work product protection] is where the attorney or client has waived the protection by voluntarily disclosing the work sought to be protected . . . . Disclosure need not be made to the party's adversary in litigation to constitute waiver. It can be made extra-judicially, as in disclosure to the public of part of the confidential material.<sup>150</sup>

The court then held that by using the "reports in a public relations offensive . . . the City ha[d], in effect, waived its right to claim the work product privilege."<sup>151</sup> In sum, the court found that voluntary disclosure resulted in waiver of the work product protection.

## 2. Delaware

Delaware Rule of Civil Procedure Rule 26 is substantially identical the rules governing discovery in Washington, Missouri, and Tennessee.<sup>152</sup> However, unlike the rules of any of the previously discussed states, the Oklahoma rules, or the Federal Rules, the Delaware Rules of Evidence specifically deal with the effect of voluntary disclosure on the work product

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145. *Id.* at 781.

146. *Id.* at 782.

147. *Id.*

148. *Id.*

149. *Id.* at 786.

150. *Id.* at 787 (citation omitted).

151. *Id.* at 788.

152. Compare DEL. R. CIV. P. 26(b)(3), with TENN. R. CIV. P. 26.02(3), and WASH. SUPER. CT. CIV. R. 26(b)(4), and MO. SUP. CT. R. 56.01(b)(3).

protection.<sup>153</sup> Rule 510(a) of the Delaware Rules of Evidence explicitly mandates that “intentional disclosure” of documents covered by the work product protection results in waiver of the protection.<sup>154</sup> While Oklahoma’s Rules of Evidence provide for waiver of privileges via voluntary disclosure, unlike the Delaware Rules of Evidence, the Oklahoma Rules do not include the work product protection in the list of privileges waived via disclosure.<sup>155</sup>

Consistent with Rule 510, Delaware courts have held that disclosure of materials protected by the work product protection waives the protection. For example, in *Citadel Holding Corp. v. Roven*,<sup>156</sup> the Delaware Supreme Court held that “[i]t is clear that the disclosure of even a part of the contents of a privileged communication surrenders the privilege as to those communications.”<sup>157</sup>

### VII. Tenth Circuit Jurisprudence

Unlike many of its sister circuits, the Tenth Circuit has not ruled on a case explicitly deciding whether disclosure of work-product protected materials to a third party waives the protection. The court, however, has discussed the work product protection generally and, in at least one case, seems to have applied the common interest doctrine to the work product protection. While at least one commentator includes the Tenth Circuit in his list of courts having adopted the majority view discussed above,<sup>158</sup> it is

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153. The Delaware Rules of Evidence provide

A person waives a privilege conferred by these rules or work-product protection if such person or such person's predecessor while holder of the privilege or while entitled to work-product protection intentionally discloses or consents to disclosure of any significant part of the privileged or protected communication or information. This rule does not apply if the disclosure itself is privileged or protected.

DEL. R. EVID. 510(a).

154. *Id.*

155. Compare 12 OKLA. STAT. § 2511 (2011), with DEL. R. EVID. 510(a). Unlike Delaware Rule 510(a), section 2511 of the Oklahoma Evidence Code provides

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 disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged.

12 OKLA. STAT. § 2511.

156. 603 A.2d 818 (Del. 1992).

157. *Id.* at 825.

158. See 1 GREENWALD ET AL., *supra* note 29, § 2:28 n.1.

unclear from the court's decisions how the court would decide a potential waiver case. Despite the court's lack of guidance, given that the court's geographic jurisdiction encompasses Oklahoma, it is possible that an Oklahoma court seeking guidance on construing waiver of the work product protection would turn to the Tenth Circuit for direction.

*A. Work Product Generally*

The Tenth Circuit, in accord with other courts, has stated the purpose of the work product doctrine as “enabl[ing] counsel to prepare a case in privacy.”<sup>159</sup> Moreover, the doctrine should be interpreted in light of the fact that “[i]t ‘is an intensely practical [doctrine], grounded in the realities of the litigation in our adversary system.’”<sup>160</sup> Like other courts, the court recognizes that “[t]he work product privilege *may* be waived by the voluntary release of materials otherwise protected by it.”<sup>161</sup> Importantly, like courts adopting the majority view, the Tenth Circuit, in *In re Qwest Communications International*, has recognized that whether or not disclosure is made to an adversary “affect[s]” the work product doctrine.<sup>162</sup> Moreover, in the same case, the court differentiated between purposeful disclosure, inadvertent disclosure, disclosure to non-adverse parties, and “disclosure under a confidentiality agreement that prohibits further disclosures without the express agreement of the privilege holder.”<sup>163</sup> However, while the *Qwest* court seemed to indicate an understanding that comports with the majority view, on a separate occasion, in *United States v. Ary*, the court stated that waiver of the work product protection will be implied “when a party claiming the protection has voluntarily disclosed work product to a party not covered by the work-product doctrine.”<sup>164</sup> To further confuse the matter, the *Ary* court referred to *Qwest* as its controlling case on waiver by voluntary disclosure.<sup>165</sup> In sum, while the court has discussed the work product doctrine and waiver in several cases, it has yet

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159. *In re Qwest Commc'ns. Int'l*, 450 F.3d 1179, 1195 (10th Cir. 2006).

160. *Id.* at 1186 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975)).

161. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006) (emphasis added) (quoting *Simmons, Inc. v. Bombardier, Inc.*, 221 F.R.D. 4, 8 (D.D.C. 2004)); *see also Qwest*, 450 F.3d at 1186.

162. *Qwest*, 450 F.3d at 1186 (citing *In re Foster*, 188 F.3d 1259, 1272 (10th Cir. 1999)).

163. *Id.* at 1182. Notably, when discussing disclosure to a non-adverse party, the court cited to a district court case following the majority view. *See id.* (citing *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993)).

164. 518 F.3d 775, 783 (10th Cir. 2008).

165. *Id.* at 782.

to give a clear and controlling example of how it would address a case of voluntary disclosure to a third party.

*B. Qwest and the Common Interest Doctrine*

In addition to the broad discussion of work product summarized above, in *Qwest*, the Tenth Circuit also engaged in a discussion of the “common interest” doctrine and its application to the work product doctrine. In *Qwest*, a corporation disclosed materials to the DOJ and SEC in the course of an investigation.<sup>166</sup> The disclosure was pursuant to a subpoena and subject to confidentiality agreements between *Qwest* and the agencies.<sup>167</sup> When the plaintiffs in pre-existing securities actions against *Qwest* sought discovery of the documents given to the agencies, *Qwest* refused, claiming that the documents were still protected by the attorney-client privilege and the work product protection.<sup>168</sup> After the district court ordered *Qwest* to produce the documents, *Qwest* sought a writ of mandamus from the Tenth Circuit.<sup>169</sup>

The crux of *Qwest*’s argument before the court of appeals was the propriety of the selective waiver doctrine.<sup>170</sup> After a general discussion of the work product protection, the court quickly determined that, in the absence of the adoption of the theory of selective waiver, the disclosure of the documents to the SEC and DOJ would have waived the work product protection.<sup>171</sup> The court went on to reject adoption of the selective waiver theory for both attorney-client privilege and the work product protection.<sup>172</sup>

In the course of rejecting selective waiver, the court engaged in a discussion of the purpose of the work product protection as well as that of the attorney-client privilege.<sup>173</sup> When discussing the “generally recognized exceptions” to the waiver rule—which, according to the court, “tend to serve the purposes of the particular privilege or protection”—the court stated that

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166. *Qwest*, 450 F.3d at 1181.

167. *Id.* Although a subpoena was issued, “[a]t oral argument *Qwest* disclaimed any argument that its production of the Waiver Documents to the agencies was involuntary. Thus, we take it as settled that *Qwest*’s production of the Waiver Documents was voluntary . . .” *Id.* at 1181 n.1.

168. *Id.* at 1182.

169. *Id.*

170. *See supra* Section IV.B. *Qwest* was cited as an example of a court rejecting the selective waiver doctrine. *See cases cited supra* note 37.

171. *Qwest*, 450 F.3d at 1186.

172. *Id.* at 1186-92.

173. *Id.* at 1195.

when the disclosure is to a party with a common interest, the “joint defense” or “common interest” doctrine provides an exception to waiver because disclosure advances the representation of the party and the attorney’s preparation of the case . . . . [E]stablishing the joint-defense privilege requires showing “(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort.”<sup>174</sup>

Nonetheless, the court’s general discussion of the common interest doctrine provides little direction for attorneys seeking to avoid waiver of the work product protection. The court held that Qwest had waived the attorney-client privilege and the work product protection by voluntarily disclosing the documents to the SEC and DOJ.<sup>175</sup> The court has subsequently cited to *Qwest* as its controlling case regarding waiver of the work product protection via voluntary production.<sup>176</sup>

### C. Analysis

As the Tenth Circuit’s jurisprudence currently stands, it is unclear whether the court adheres to the majority view or a different, more restrictive version of the waiver doctrine.<sup>177</sup> A liberal reading of the Tenth Circuit’s case law, especially the court’s opening statement in *Qwest* and subsequent discussion of the common interest doctrine, seems to align closely with the majority view. The court’s more restrictive statements, however, may lend themselves to a restrained reading of the work product doctrine, finding that waiver occurs any time disclosure is made to a party not already “covered by the doctrine.” Such a view would be especially troubling if combined with a restrictive view of the common interest privilege. While the former, broader reading is more consistent with the purposes of the work product doctrine, it is unclear where the Tenth Circuit currently stands, and, thus, how an Oklahoma court would construe the court’s opinions.

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174. *Id.* (citations omitted).

175. *Id.* at 1201.

176. *See* *United States v. Ary*, 518 F.3d 775, 783 n.5 (10th Cir. 2008).

177. The district courts within the Tenth Circuit have not helped to resolve the ambiguity. Some have taken a seemingly restrictive view of the work product protection and common interest privilege, while others have taken a liberal view more in line with the majority position. *Compare* *Stoller v. Funk*, No. CIV-11-1144-C, 2013 WL 5517266 (W.D. Okla. Oct. 1, 2013), *with* *Citizens Progressive All. v. U.S. Bureau of Indian Affairs*, 241 F. Supp. 2d 1342 (D.N.M. 2002).

### VIII. A Suggested Approach for Oklahoma

As mentioned above, Oklahoma lacks statutory or common law authority governing the effects of disclosure to third parties on the work product protection. The Oklahoma Supreme Court's decisions regarding the work product protection generally, however, may provide an insight into how the court may address the issue of waiver.

#### A. Oklahoma Work Product Case Law

In both of the leading cases on the work product protection in Oklahoma, *Ellison v. Gray*<sup>178</sup> and *Scott v. Peterson*,<sup>179</sup> the Oklahoma Supreme Court has closely followed the precedent set by the federal courts. In the former case, Ellison brought suit in the district court of Oklahoma County against An-Son for malicious prosecution following a federal lawsuit prosecuted by An-Son against Ellison regarding a disputed oil and gas lease.<sup>180</sup> An-Son proffered "the defense of good faith reliance on [the] advice of counsel," and Ellison responded by "fil[ing] a motion to compel unlimited production of documents including the client files, timesheets, invoices, calendars, correspondence, telephone and telex records, and all other documents normally classified as ordinary work product."<sup>181</sup> When the district court denied the motion, Ellison sought a writ of mandamus from the Oklahoma Supreme Court "ordering discovery without limitation including some materials which could be classified as opinion work product."<sup>182</sup>

The Oklahoma Supreme Court looked to the federal courts for guidance regarding the degree to which disclosure of opinion work product could be compelled.<sup>183</sup> The court consulted *Hickman v. Taylor*,<sup>184</sup> *Upjohn Co. v. United States*,<sup>185</sup> and several federal district court cases<sup>186</sup> before turning to

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178. 1985 OK 35, 702 P.2d 360.

179. 2005 OK 84, 126 P.3d 1232.

180. *Ellison*, ¶¶ 1-4, 702 P.2d at 361-62.

181. *Id.* ¶¶ 4-5, 702 P.2d at 362.

182. *Id.* ¶ 5, 702 P.2d at 362.

183. *Id.* ¶ 9, 702 P.2d at 363 ("The Oklahoma Discovery Code, 12 O.S. 1982 Supp. § 3203(B)(2) tracks Rule 26(b)(3) of the Federal Rules of Civil Procedure. Even though we have not determined the degree of protection to be afforded attorney work product under § 3203(B)(2), the federal courts have addressed this troublesome issue under Rule 26(b)(3) and its predecessor, Rule 34.") (footnote omitted).

184. 329 U.S. 495 (1947).

185. 449 U.S. 383 (1981).

186. The court cited both *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 736 (N.D. Ill. 1962) and *People v. United States*, 27 F.R.D. 261 (N.D. Cal. 1961).

*Carman v. Fishel*,<sup>187</sup> Oklahoma's seminal work product case.<sup>188</sup> The court then held that

discovery of ordinary work product should be granted only upon a convincing showing that the substantial equivalent of the materials sought cannot be obtained without undue hardship, if at all. In addition, discovery of opinion work product requires exclusivity of relevant knowledge within the control of counsel which has been placed in issue by the party who seeks to prevent disclosure, and pertains only to the extracted prodigy which is communicated to the client or to any communications received by the client from counsel which is interwoven with opinion work product relating to advice of counsel.<sup>189</sup>

Although the case nowhere addresses the issue of waiver, it provides an example of how the Oklahoma Supreme Court addresses uncertain questions regarding the Oklahoma Discovery Code. Moreover—and importantly for waiver—the court confirmed that it recognizes a distinction between the work product protection and the attorney-client privilege.<sup>190</sup>

In *Scott v. Peterson*,<sup>191</sup> the Scotts brought suit against a roofing company for damage to their home sustained during reroofing.<sup>192</sup> The Scotts then sought discovery of the roofing company's insurer's claim file, to which the roofing company and its insurer objected.<sup>193</sup> The roofing company and its insurer sought a protective order, and the Scotts moved to compel disclosure.<sup>194</sup> The district court granted the protective order and denied the Scotts' motion to compel, and the Scotts sought a writ from the Oklahoma Supreme Court to compel production.<sup>195</sup>

The roofing company and its insurer "did not file privilege logs in support of their claimed privilege and exemption from discovery."<sup>196</sup> On appeal, the Scotts argued that the failure to file a privilege log should result in the court compelling disclosure of the file.<sup>197</sup> Again, just as in *Ellison*,

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187. 1966 OK 130, 418 P.2d 963.

188. *Ellison*, ¶¶ 10-15, 702 P.2d at 364-66.

189. *Id.* ¶ 16, 702 P.2d at 366-67.

190. *Id.* ¶ 8, 702 P.2d at 363.

191. 2005 OK 84, 126 P.3d 1232.

192. *Id.* ¶ 2, 126 P.3d at 1233.

193. *Id.* ¶¶ 2-3, 126 P.3d at 1233.

194. *Id.* ¶¶ 3, 5, 126 P.3d at 1233, 1234.

195. *Id.* ¶ 5, 126 P.3d at 1234.

196. *Id.* ¶ 16, 126 P.3d at 1236.

197. *Id.* ¶¶ 22, 26, 126 P.3d at 1238, 1239.

the court turned to federal jurisprudence for guidance.<sup>198</sup> Given, however, the lack of uniformity among federal courts, the court looked to Wright & Miller's *Federal Practice and Procedure*, which the court then reconciled with its interpretation of the Oklahoma statutes involved.<sup>199</sup> While the court declined to rule on the issue due to its hypothetical nature,<sup>200</sup> *Scott v. Peterson* provides yet another example of the Oklahoma Supreme Court looking to federal jurisprudence (and, in this case, a widely respected treatise on practice in the federal courts) interpreting the Federal Rules for guidance when addressing questions regarding the Oklahoma Discovery Code.

### *B. Statutory Considerations*

Title 12, section 2502 may also provide some guidance with regard to how the Oklahoma Supreme Court may rule on the issue of waiver. As discussed above, subsections E and F have no bearing on whether voluntary disclosure results in waiver.<sup>201</sup> The adoption of the selective waiver doctrine in subsection F, however, is a significant departure from the federal scheme, potentially evidencing the Oklahoma Legislature's willingness to split from Oklahoma courts' exhibited desire to take heed of the federal scheme.

Moreover, in two places, section 2502 addresses the common interest doctrine.<sup>202</sup> Neither subsection is directly applicable to the issue of voluntary waiver of the work product protection—subsection (B)(3) deals with the common interest doctrine with regard to the attorney-client privilege, and subsection (D)(6) deals with matters of common interest among clients with an attorney in common. The fact that the Oklahoma statutes directly address the issue of the common interest doctrine in the context of other privileges, however, may suggest a willingness to adopt a similar doctrine with regard to the work product protection. That the legislature has spoken to the common interest doctrine is particularly helpful given the courts' silence on the issue.<sup>203</sup>

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198. *Id.* ¶¶ 22-23, 126 P.3d at 1238 (“The Discovery Code was a [sic] adopted from the federal scheme and we have looked to federal authority construing federal Rule 26 for guidance when applying our similar provision.”).

199. *Id.*

200. *Id.* ¶ 28, 126 P.3d at 1240.

201. *See supra* Part IV.

202. *See* 12 OKLA. STAT. § 2502(B)(3) (Supp. 2014); *see also id.* § 2502(D)(6).

203. *See* *Gilson v. State*, 2000 OK CR 14, ¶ 71, 8 P.3d 883, 909.

### C. Suggested Approach

In the end, it is impossible to predict with any degree of certainty how an Oklahoma court would rule on the issue of waiver of the work product protection via voluntary disclosure to a third party. On the one hand, Oklahoma courts have acknowledged the differences in the work product protection and the attorney client privilege and have relied on federal interpretations of the Federal Rules of Civil Procedure that are similar to provisions of the Oklahoma Discovery Code. The weight of federal precedent suggests that disclosure should result in waiver only in certain circumstances. Moreover, the legislature has demonstrated an acceptance of the common interest doctrine with regard to the attorney-client privilege.

On the other hand, though, Oklahoma's courts have not addressed, even in passing, waiver of the work product protection and have not determined the parameters of the common interest doctrine outside of that which is statutorily required by section 2502. Furthermore, the legislature, via adoption of the selective waiver doctrine, has expressed a willingness to buck overwhelming precedent at the federal level. In addition, several states have rejected the view taken by the federal majority and adopted a more restrictive view of the work product protection. Given the haziness surrounding the doctrine, this Comment seeks only to provide a suggested approach rather than a predicted outcome.

Ultimately, determining whether or not disclosure of work-product protected materials to a third party constitutes waiver is a matter of policy. One could choose—as other states have chosen—a policy that values secrecy over sharing. Conversely, one could choose a policy that balances the need for privacy, rather than absolute secrecy, with the need to share information. The latter view has been embraced by other states and the vast majority of federal courts, largely because it is the view most consistent with the purpose of the work product protection. As the D.C. Circuit made clear, “the *work product privilege* . . . exist[s] . . . to promote the adversary system. . . . The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation.”<sup>204</sup> A policy consistent with this understanding of the work product protection should be adopted in Oklahoma.

Adopting the majority view is not simply blind devotion to the wisdom of the federal courts. Rather, adopting such a policy is the course of action most consistent with Oklahoma's understanding of the work product

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204. *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

doctrine. When Oklahoma adopted the work product protection, it explicitly adopted and endorsed the doctrine as espoused in *Hickman v. Taylor*.<sup>205</sup> Moreover, Oklahoma has consistently chosen to view the work product protection in a way that comports with the federal courts' view of the doctrine.<sup>206</sup> Thus, adopting the majority view not only comports with the view of the doctrine taken by most federal courts, but with the view of the doctrine taken by Oklahoma courts as well. The majority view is the understanding of the work product protection that would best further the purpose of the Oklahoma work product protection.

Specifically, Oklahoma would be wise to implement the approach taken in *United States v. Deloitte*,<sup>207</sup> which provides attorneys with the most flexibility while still furthering the purpose of the work product protection. Under the *Deloitte* framework, only disclosures made directly to an adversary or a conduit to an adversary waive the work product protection. To reiterate, an adversary is a person or entity who may be an "adversary in the sort of litigation the [documents] address."<sup>208</sup> Whether or not disclosure is made to a "conduit" to an adversary is determined by applying the two-part maintenance-of-secrecy standard. The standard is applied by determining "whether the disclosing party has engaged in self-interested selective disclosure by revealing its work product to some adversaries but not to others,"<sup>209</sup> and then "examin[ing] whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential."<sup>210</sup> The reasonable belief in confidentiality can stem either from common litigation interests or a "relatively strong and sufficiently unqualified" confidentiality agreement.<sup>211</sup>

Undoubtedly, this approach is among the most liberal of those endorsed by federal courts. This approach, however, gives attorneys the flexibility necessary to adequately prepare for litigation—a must in the adversarial system—while also preserving the "certain degree of privacy" that *Hickman* sought to ensure. Under this framework, attorneys have the ability to prepare for anticipated multiparty litigation (one of the overarching themes of the work product doctrine) without having to wait for litigation to commence. The framework also protects the doctrine's underlying purpose

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205. See *Carman v. Fishel*, 1966 OK 130, ¶¶ 12-16, 418 P.2d 963, 968-70.

206. See *supra* Section VIII.A.

207. 610 F.3d 129 (D.C. Cir. 2010); see *supra* Section V.A.1.

208. *Deloitte*, 610 F.3d at 140.

209. *Id.* at 141.

210. *Id.*

211. *Id.*

by prohibiting disclosure to adversaries generally or to any party without a common litigation interest or confidentiality agreement.

Clarity in the area of privileges and protections is paramount, and the suggested framework provides a straightforward, easily applied set of rules that removes the guesswork and uncertainty that is currently present due to the ambiguous state of the law. Whether by judicial decision or legislative adoption, Oklahoma should adopt a rule allowing disclosure of work-product protected materials to non-adversarial third parties who share a common interest or who are subject to a strong confidentiality agreement without waiving the protection.

#### *IX. Conclusion*

Oklahoma's attorneys need clarity with regard to the work product protection. Given the existing uncertainty regarding Oklahoma's interpretation of the waiver doctrines, attorneys are (or should be) loath to share sensitive information with third parties, even if sharing such information would further the adversarial process and the attorney's preparation of the case. The status quo is entirely inconsistent with the purpose of the work product protection, and a rule that would require such secrecy is equally inconsistent. Rather, Oklahoma should join other states and the vast majority of federal courts by adopting a rule that, under certain, well-defined circumstances, allows disclosure of materials protected by the work product protection to third parties without resulting in waiver of the protection.

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