

STATE OF VERMONT
VERMONT SUPREME COURT
NOVEMBER TERM 2011

Order Amending the Vermont Rules of Evidence

Pursuant to Chapter II, section 37 of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 510 of the Vermont Rules of Evidence be amended as follows (deleted matter struck through; new matter underlined):

**RULE 510. WAIVER OF PRIVILEGE AND WORK-PRODUCT BY
~~VOLUNTARY~~ DISCLOSURE**

(a) **General rule.** A person upon whom these rules confer a privilege against disclosure waives the privilege if ~~he or his~~ that person or that person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) **Limitations on waiver.** Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out below, to disclosure of a communication or other information covered by the lawyer-client privilege or work-product protection.

(1) Disclosure made in a Vermont proceeding or to a Vermont office or agency; scope of waiver. When a disclosure is made in a Vermont proceeding or to a Vermont office or agency and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness be considered together.

(2) Inadvertent disclosure. When made in a Vermont proceeding or to a Vermont office or agency, the disclosure does not operate as a waiver in any proceeding if:

(A) the disclosure is inadvertent;

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

(C) the holder took reasonable steps to rectify the error, including (if applicable) following V.R.C.P. 26(b)(5)(B).

(3) Disclosure made in non-Vermont proceeding. When the disclosure is made in a non-Vermont proceeding and is not the subject of a court order concerning waiver, the disclosure does not operate as a waiver in a Vermont proceeding if the disclosure:

(A) would not be a waiver under this rule if it had been made in a Vermont proceeding; or

(B) is not a waiver under the law of the jurisdiction where the disclosure occurred.

(4) Controlling effect of a court order. A Vermont court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court in which event the disclosure is also not a waiver in any other proceeding.

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

(6) Definitions. In this rule:

(A) “lawyer-client privilege” means the protection that these rules provide for confidential lawyer-client communications; and

(B) “work-product protection” means the protection that the applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(c) Other provisions governing waiver and work-product. The provisions of this rule governing waiver of privilege and work-product are subject to the Uniform Mediation Act, chapter 194 of Title 12 of the Vermont Statutes Annotated, V.R.C.P. 16.3(g), and V.R.C.P. 26(b)(4).

Reporter’s Notes – 2012 Amendment

The amendment is based upon F.R.E. 502 adopted by Congress in 2008. The rule was adopted because of the enormous costs involved in reviewing documents, especially electronic ones, for privileged and work-product protected materials and to resolve disputes regarding subject matter waiver and inadvertent disclosures. Explanatory Note on Rule 502. Vermont has adopted an amendment to the discovery rules which provides for a claw back of inadvertently disclosed information, V.R.C.P. 26(b)(5)(B), but the rule does not control whether the disclosure constitutes a waiver of protection for the information in that or other proceedings. The rule fills the gap and accomplishes the first of the purposes of the federal rule. The rule avoids disputes which will arise in Vermont courts as the scope of electronic evidence continues to expand. Adoption of the amendment

will also harmonize state and federal practice.

The amendment is placed in V.R.E. 510 because that section of the rules governs waiver of privilege. Consequently, the numbering of the Vermont amendment does not follow that of the federal rule. The Vermont rule utilizes the term “attorney-client privilege” rather than the “lawyer-client privilege” terminology from the federal rule for consistency with V.R.E. 502. The title of V.R.E. 510 has been changed to reflect that the waiver rule now encompasses nonvoluntary disclosures and work-product. The amendment governs only certain types of waiver by disclosure. Sections (a) and (b)(6) require that parties must consider whether the disclosure involves privilege or work-product, and also whether a form of disclosure not protected by (b), and falling within the general waiver provisions of (a), might apply under the circumstances.

Section (a) is amended to make the language gender neutral and internally consistent.

Section (b)(1) addresses the scope of waiver. The section generally provides for waiver only of the information actually disclosed, and provides for limited rather than subject matter waiver. It provides that “subject matter waiver (of either privilege or work-product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation to the disadvantage of the adversary.” Explanatory Note on Rule 502.

Section (b)(2) addresses inadvertent waiver. The section adopts the most prevalent approach to the issue of whether such disclosure results in a waiver of the disclosed information. This approach appears consistent with that taken by the Court in *Hartnett v. Medical Center Hospital of Vermont*, 146 Vt. 297, 503 A.2d 1134 (1985). The Court examined the circumstances surrounding disclosure of a document containing work-product and affirmed a trial court determination that the disclosure did not constitute a waiver. The party who made the disclosure will be protected if the court finds the party met the conditions set forth in (b)(2)(B) & (C). The drafters of the federal rule did not attempt to “explicitly codify that test because it is really a set of non-determinative guidelines that vary from case to case.” Explanatory Note on Rule 502. The Note refers readers to considerations identified in the pre-rule cases and suggests two avenues a party may use to advance a claim of reasonable steps: use of advanced analytical software applications and linguistic tools, and adoption of an efficient system of records management before the litigation.

The Explanatory Note explains why the rule extends to offices and agencies: “[T]he consequences of waiver, and the concomitant cost of pre-production review, can be as great with respect to disclosures to offices and agencies as they are in litigation.”

Section (b)(3) provides protection comparable to (b)(2) for parties in Vermont proceedings who make the inadvertent disclosures in another jurisdiction. F.R.E. 502(c) provides that the federal courts will accord that protection to litigants in the federal courts. Rather than leave the question of how Vermont would treat out-of-jurisdiction disclosures to full faith and credit and comity, the Vermont Advisory Committee chose to adopt the clearer federal model to best effectuate the purpose of the rule.

Section (b)(4) provides an important means to control the costs of pre-production review and provide predictability with regard to whether disclosure will result in waiver. The “non-determinative guidelines” of (b)(2) do not ensure that a court will protect an inadvertently disclosing party from a finding of waiver. In spite of the apparent policy of the rule favoring protection against inadvertent disclosure, courts which have decided early cases under F.R.E. 502 have often come to different conclusions about waiver under similar circumstances. See, e.g., P. Oot, The Protective Order Toolkit: Protecting Privilege With Federal Rule Of Evidence 502, 10 Sedona Conf. J. 137 (2009). Section (b)(4) provides predictable protection with a court order even if the party has not taken the care necessary for protection under (b)(2). It provides for protection against nonparties. “[T]he rule contemplates enforcement of ‘claw-back’ and ‘quick peek’ arrangements as a way to avoid the excessive costs of pre-production review for privilege and work-product.” Explanatory Note on Rule 502. To promote predictability and control costs, the section attempts to provide protection embodied in a Vermont court order in other jurisdictions.

A section (b)(5) party agreement provides much more limited protection than a court order, binding only the parties to the agreement.

Section (b)(6) sets forth limits of the amendment. The rule applies only to attorney-client privilege and work-product protection, not other privileges and privilege-like protections. The rule incorporates existing meanings of these two doctrines.

Discovery of intangible work-product in Vermont has traditionally been governed by the common-law principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). The 2011 amendment to V.R.C.P. 26(b)(4) protects as work-product various communications with expert witnesses in both tangible and intangible form. See Reporter’s Notes to that amendment. Likewise, this amendment of Rule 510 makes no distinction between the forms of inadvertent disclosure.

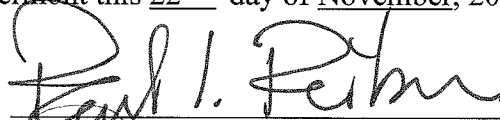
Section (c) advises the bar that the general waiver provisions of Rule 510 are subject to the more specific statute and the civil rules cited. The reference to V.R.C.P. 26(b)(4) is to make it clear that matters deemed work-product under that rule are not waived by counsel’s disclosure of most information to his expert and

preparation of draft disclosures or reports required under Rule 26(b). The Uniform Mediation Act contains restrictive waiver provisions to further the policy of protecting “mediation disclosures.”

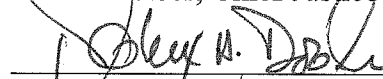
2. That these rules, as amended and added, are prescribed and promulgated effective January 23, 2012. The Reporter’s Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont this 22nd day of November, 2011.



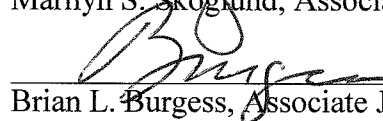
Paul E. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice



Brian L. Burgess, Associate Justice