



Memorandum in Support

NYSBA #20

June 1, 2023

S.7482

By: Senator Ryan
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the Civil Practice Law and Rules, in relation to waiver of privilege.

LAW AND SECTIONS REFERRED TO: new §4550 of Civil Practice Law and Rules

NEW YORK STATE BAR ASSOCIATION **SUPPORTS THIS LEGISLATION**

The New York State Bar Association strongly supports this proposed legislation, which will adopt into law legal protections for the attorney-client privilege and work product. If enacted, New York will join the federal Judiciary as a number of states which have enacted similar or identical protection.

Protection of Attorney-Client Privilege and Work Product

The attorney-client privilege and work product protection are fundamental to our legal system in both civil and criminal proceedings. These protections encourage businesses and individuals to seek and obtain legal advice by safeguarding the confidentiality of communications between those businesses, individuals and their attorneys as well as materials prepared by attorneys to render effective legal aid to their clients and the mental processes of their attorneys in civil and criminal litigation.

However, attorney-client privilege and work product protection are not absolute. Materials subject to these protections must be kept confidential and if any such materials are disclosed to persons not within the reach of the protections, either intentionally or inadvertently, the protections can be deemed to have been waived and the materials lose the protections otherwise afforded. Waiver can have devastating consequences for parties, whether businesses or individuals. Concerns about waiver have only been magnified by the rise of electronic information, which is now a common feature of civil and criminal litigation.

Electronic information is voluminous and varied in its nature and can exist in various locations and forms (in addition to traditional “paper”). This rise of electronic information can impose significant costs on attorneys and their clients to search for discoverable information. Once electronic information is found through search, which can itself impose significant costs, the information must be reviewed to put aside information subject to attorney-client privilege or work product protection. Such “protected” information must be withheld in total or redacted from materials that must be turned over. That review process can also lead to significant costs, as

review should be undertaken by attorneys, although there are electronic means to review information that is voluminous and varied. Once the review is completed, further costs may be imposed when attorneys prepare privilege “logs” of information withheld or redacted.

Unfortunately, when large volumes of electronic information are reviewed, there can be instances when otherwise confidential materials are turned over. Attorneys can overlook materials that should be kept confidential. They can fail to designate materials as confidential, and they turn over materials through electronic means that, for one reason or another, “drop” redactions. These errors, made inadvertently, can lead to waiver of specific materials and to broad waiver of attorney-client privilege and work product protection.

Rather than repeat the purpose of the proposed New York legislation, we adopt and incorporate the “Explanatory Note on Evidence Rule 502,” which is available at https://www.law.cornell.edu/rules/fre/rule_502. Of particular interest to the New York Legislature might be the purposes of the federal rule, which are applicable equally to the proposed legislation here.

This new rule has two major purposes:

- 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product—specifically those disputes involving inadvertent disclosure and subject matter waiver.
- 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.¹ Electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”.

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable.

Based on the foregoing, the New York State Bar Association **SUPPORTS** this legislation.

¹ See, e.g., *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005)