STATE OF WISCONSIN

SUPREME COURT

In re:

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

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

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

February 20, 2012

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

PETITION

The Judicial Council respectfully requests that the Supreme Court adopt the following rules:

SECTION 1. 804.01 (2) (c) of the statutes is amended to read:

804.01 (2) (c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) 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 that the party seeking discovery 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. <u>This protection is forfeited as to any material disclosed inadvertently in circumstances in which, if the material were a lawyer-client communication, the disclosure would constitute a forfeiture under s. 905.03(5). This protection is waived as to any material disclosed by the party or the party's representative if the disclosure is not inadvertent.</u>

JUDICIAL COUNCIL NOTE:

Sub. (2) (c) is amended to make explicit the effect of different kinds of disclosures of trial preparation materials. An inadvertent disclosure of trial preparation materials is akin to an inadvertent disclosure of a communication protected by the lawyer-client privilege. Whether such a disclosure results in a forfeiture of the protection is determined by the same standards set forth in WIS. STAT. § 905.03(5). A disclosure that is other than

inadvertent is treated as a waiver. The distinction between "waiver" and "forfeiture" is discussed in cases such as *State v. Ndina,* 2009 WI 21, ¶¶ 28-31, 315 Wis. 2d 653.

SECTION 2. 804.01 (7) of the statutes is created to read:

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

JUDICIAL COUNCIL NOTE:

Sub. (7) is modeled on Fed. R. Civ. P. 26(b)(5)(B), the so-called "clawback" provision of the federal rules. The Committee Note of the federal Advisory Committee on Civil Rules regarding the 2006 Amendments to the Federal Rules of Civil Procedure (regarding discovery of electronically stored information) is instructive in understanding the scope and purpose of Wisconsin's version.

SECTION 3. 805.07 (2) (d) of the statutes is created to read:

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

JUDICIAL COUNCIL NOTE:

Sub. (2) (d) is modeled on Fed. R. Civ. P. 45(d)(2)(B), which was amended in 2007 to adopt the wording of Rule 26(b)(5)(B), the so-called "clawback" provision of the federal rules.

SECTION 4. 905.03 (5) of the statutes is created to read:

905.03 (5) FORFEITURE OF PRIVILEGE

(a) *Effect of inadvertent disclosure*. A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if:

1. the disclosure is inadvertent;

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

3. the holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).

(b) *Scope of forfeiture*. A disclosure that constitutes a forfeiture under sub. (a) extends to an undisclosed communication only if:

1. the disclosure is not inadvertent;

2. the disclosed and undisclosed communications concern the same subject matter; and

3. they ought in fairness to be considered together.

JUDICIAL COUNCIL NOTE:

Sub. (5) is modeled on subsections (a) and (b) of Fed. R. Evid. 502. The Statement of Congressional Intent and the Committee Note of the federal Advisory Committee on Evidence Rules regarding Rule 502 are instructive, though not binding, in understanding the scope and purposes of those portions of Rule 502 that are borrowed here.

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

The various approaches available are discussed in the Advisory Committee Note and in *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, ¶¶ 28-32, nn. 15-17, 271 Wis. 2d 610. Sub. (5) represents an "intermediate" or "middle ground" approach, which is also an approach taken in a majority of jurisdictions. Clients and lawyers are free to negotiate more stringent precautions when circumstances warrant.

Sub. (5) is not intended to have the effect of overruling any holding in *Sampson. Sampson* holds that a lawyer's deliberate disclosure, without the consent or knowledge of the client, does not waive the lawyer-client privilege. Neither subpart of sub. (5) alters this rule. Sub. (5)(a) shields certain inadvertent disclosures but does not disturb existing law regarding deliberate disclosures. Deliberate disclosures might come into play under sub. (5)(b), which provides that, when a disclosure is not inadvertent, a privilege forfeiture under sub. (5)(a) may extend to undisclosed communications and information as well. However, such an extension ensues only when fairness warrants. Fairness does not warrant the surrender of additional privileged communications and information if the initial disclosure is neutralized by the *Sampson* rule.

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

Measuring the time taken to rectify an inadvertent disclosure should commence when the producing party first learns, or, with reasonable care, should have learned that a disclosure of protected information was made, rather than when the documents were produced. This standard encourages respect for the privilege without greatly increasing the cost of protecting the privilege.

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

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

Sub. (5) employs a distinction drawn lately between the terms "waiver" and "forfeiture." *See State v. Ndina*, 2009 WI 21, ¶¶ 28-31, 315 Wis. 2d 653.

Out of respect for principles of federalism and comity with other jurisdictions, sub. (5) does not conclusively resolve whether privileged communications inadvertently disclosed in proceedings in other jurisdictions may be used in Wisconsin proceedings; nor whether privileged communications inadvertently disclosed in Wisconsin proceedings may be used in proceedings in other jurisdictions. Sub. (5) states that it applies "regardless of where the disclosure occurs," but to the extent that the law of another jurisdiction controls the question, it is not trumped by sub. (5). The prospect for actual conflicts is minimized because sub. (5) is the same or similar to the rule applied in the majority of jurisdictions that have addressed this issue. If conflicts do arise, for example, because a rule dictates that a disclosure in a jurisdiction other than Wisconsin should be treated as a forfeiture in Wisconsin, or that a disclosure in Wisconsin should be treated as a forfeiture in a jurisdiction other than Wisconsin, a court should consider a choice-of-law analysis. *See Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶ 24-25, 270 Wis. 2d 356.

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

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Notes to proposed WIS. STATS. §§ 804.01 (2) (c), 804.01 (7), 805.07 (2) (d), and 905.03 (5).

CONCLUSION

For more than a decade, litigants and courts have confronted an increase in discovery of electronically stored information, as well as rising discovery costs. The proposed rules are intended to reduce the risk of forfeiting the attorney-client privilege or the attorney work product protection during discovery. The rules are also intended to

reduce the economic burden on litigants that can result from conducting an exhaustive review of information that will be produced in discovery by protecting them against forfeiture by inadvertent disclosure of privileged information.

Therefore, the Wisconsin Judicial Council respectfully urges this Court to amend Wis. Stats. §§ 804.01, 805.07 and 905.03.

Dated February 20, 2012.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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