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IS IT SAFE? THE NEED FOR STATE ETHICAL RULES TO KEEP PACE WITH TECHNOLOGICAL ADVANCES

*Ann M. Murphy**

INTRODUCTION

As discussed at the October 5, 2012 Symposium on Federal Rule of Evidence 502,¹ the practice of law has changed dramatically in the past decade, due in part to technological advances. With the tremendous amount of electronically stored information, which continues to grow exponentially, attorney duties have become increasingly difficult. Fortunately, the Federal Rules of Civil Procedure and the Federal Rules of Evidence have been amended to reflect the sea change in the amount of material in cases. Rules of professional conduct, dictated by each individual state, have not kept pace with this change. Changes need to be made, and the sooner the better.

I. PROCEDURES AND COURT ORDERS PERMITTED UNDER RULE 502 IMPLEMENTED RELATIVELY INFREQUENTLY

The purpose of Federal Rule of Evidence 502, according to the Senate Judiciary Committee, was to update privilege law to address the increasing costs of court cases and the burden on attorneys to produce only nonprotected material in the electronic age.² The Senate bill that included the language of Rule 502 “attracted widespread support from major legal organizations representing stakeholders on all sides of modern litigation.”³ During the Symposium, judges, attorneys, and academics met to discuss and determine the effectiveness of the new rule. Apparently the Rule thus far has not been widely effective.

* Professor of Law, Gonzaga University School of Law. Professor Murphy expresses her gratitude to the Judicial Conference Advisory Committee on the Rules of Evidence for its invitation to participate with eminent legal minds on this Rule 502 Symposium. Special thanks to Reed Professor of Law Daniel J. Capra. Additional thanks to Professor Kevin Michels for his valuable insight, to Research Assistant Molly Rose Fehringer, J.D. class of 2013, and to Gonzaga University School of Law. The title is a reference to a memorable scene from *Marathon Man* in which Laurence Olivier, playing a former Nazi SS war criminal, tortures Dustin Hoffman with a dental drill all the while asking, “Is it safe?” See *MARATHON MAN* (Paramount Pictures 1976).

1. Symposium, *Evidence Rules Committee: Symposium on Rule 502*, 81 *FORDHAM L. REV.* 1533 (2013).

2. S. REP. NO. 110-264, at 1–3 (2008).

3. *Id.* at 3.

The consensus among the Symposium participants was that Rule 502 is not being used to its full potential. As indicated by the panelists, there are a number of reasons for this, not the least of which is that many attorneys are not aware of its existence.⁴ Another reason is what was described at the Symposium as attorney “skepticism, cynicism, and suspicion,” and the “inbred reluctance” of attorneys to turn over privileged documents to the other party in a court case.⁵ Certainly, the Rule contemplates a whole new way of doing business. As panelist Chilton Varner indicated, this is a difficult leap of faith to make because lawyers have been trained and “brought up to believe that waiving a privilege was one of the—maybe the worst thing you could do as a lawyer.”⁶

Perhaps there is a very good reason for this “inbred reluctance.” Remember that all lawyers are also bound by their separate state rules of ethics, and Rule 502 does not on its face change or affect lawyers’ ethical obligations. Rule 502 contemplates advertent waiver, inadvertent waiver, agreement of the parties (clawbacks and quick peeks), and court orders with respect to the attorney-client privilege and work-product protection. It is a rule of evidence, and neither it nor Rule 26 of the Federal Rules of Civil Procedure (Duty to Disclose) governs or forgives an attorney’s ethical duty of confidentiality. This is essentially a case of apples and oranges. In fact, “some commentators have suggested that inadvertent disclosure through a misdirected e-mail would almost certainly constitute a breach of legal ethics, or grounds for malpractice.”⁷

II. IS ADVERTENT OR INADVERTENT DISCLOSURE UNDER RULE 502 UNETHICAL?

During the Symposium, U.S. District Court Judge Paul Grimm spoke about three areas of disagreement that percolate in the courts when interpreting Federal Rule of Evidence 502, one of which is the definition of “inadvertent.”⁸ Judge Grimm described how a series of courts had gone through a “multiple-step analysis to include reasonableness to decide if it was inadvertent, and then said it was inadvertent, and then got to the next step under 502(b), which was, was it reasonable?”⁹ He indicated that this “conjoining” of reasonableness in both the pre- and post-production analysis in order to determine whether the disclosure is inadvertent showed that some courts had gone “off track.”¹⁰ Fortunately, according to Judge

4. Panel Discussion, *Reinvigorating Rule 502*, 81 FORDHAM L. REV. 1533, 1548 (2013).

5. *Id.* at 1551, 1555.

6. *Id.* at 1555.

7. Mitchel L. Winick, Brian Burris & Y. Danae Bush, *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications*, 31 TEX. TECH L. REV. 1225, 1255 (2000).

8. Panel Discussion, *supra* note 4, at 1544–47.

9. *Id.* at 1545.

10. *Id.*; see also Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8 (2011).

Grimm, some courts have reached a consensus so that today there is a “common majority view” that inadvertence means essentially a “boo-boo”—in other words a mistake.¹¹ He cited specifically to the *Amobi v. D.C. Department of Corrections*¹² case, decided by another panelist at the Symposium, U.S. Magistrate Judge John Facciola.¹³

In *Amobi*, a corrections officer, Stephen Amobi, was placed on administrative leave, arrested, removed from his position, and ultimately reinstated, after an altercation with an inmate.¹⁴ In his memorandum opinion, Judge Facciola decided five discovery disputes, one of which involved an alleged inadvertent disclosure of protected information.¹⁵ At issue was Rule 502(b), which states the following:

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

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).¹⁶

Judge Facciola indicated that case law prior to the Rule was divided on how to define “inadvertent.”¹⁷ On the one hand, some courts looked at a number of factors, such as the number of documents involved in a case, the level of care exercised, and how the party reacted after learning of the disclosure.¹⁸ On the other hand, different courts “have found that Rule 502(b) provides for a more simple analysis of considering if the party intended to produce a privileged document or if the production was a mistake.”¹⁹ Judge Facciola decided to follow the latter approach, persuaded by the goals of the drafting committee (citing to a letter from U.S. District Court Judge Lee H. Rosenthal, also a panelist at the Symposium), as well as the ordinary definition of the word inadvertent.²⁰ He declared that any other approach would “meld two concepts,” inadvertence and reasonable efforts, and that those two concepts should in fact be distinct.²¹

11. Panel Discussion, *supra* note 4, at 1545.

12. 262 F.R.D. 45 (D.D.C. 2009).

13. *See id.*

14. *Amobi v. District of Columbia*, No. BEL 08-1501, 2012 WL 3217589, at *1–2 (D.D.C. Aug. 9, 2012); *Amobi*, 262 F.R.D. at 48.

15. *See Amobi*, 262 F.R.D. at 48.

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

17. *Amobi*, 262 F.R.D. at 53.

18. *Id.*; *see, e.g.*, *Heriot v. Byrne*, 257 F.R.D. 645 (N.D. Ill. 2009). Although Judge Facciola indicates in *Amobi* that this case was decided “prior to the Rule,” *Amobi*, 262 F.R.D. at 53, it was actually decided after the passage of Rule 502.

19. *Amobi*, 262 F.R.D. at 53; *see, e.g.*, *Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1037–38 (N.D. Ill. 2009) (cited specifically by Judge Facciola).

20. *Amobi*, 262 F.R.D. at 53.

21. *Id.*

Finally, Judge Facciola decided that inadvertent meant mistaken or unintended disclosure, without any analysis of whether the mistaken or unintended disclosure was reasonable.²² On this point, Judges Grimm and Facciola agree. Indeed, a plain reading of the Rule (and it was passed by Congress and thus should be read as a statute) is fully consistent with their view. Part (b) of the Rule has three separate components: inadvertence, reasonable steps to prevent, and reasonable steps to rectify. One hopes that the standard view of courts today is that inadvertence indeed means mistake, pure and simple.²³

But this understanding raises a problem an attorney may face in a different aspect of his or her representation of a client away from the discovery and trial evidence trenches. Has the lawyer, by making a “mistake,” engaged in unethical behavior or even malpractice? This Essay explores this question.

III. COMPARISON OF ETHICAL DUTY OF CONFIDENTIALITY, ATTORNEY-CLIENT PRIVILEGE, AND WORK-PRODUCT DOCTRINE

Before this question can be explored, a basic understanding of the ethical duty of confidentiality, the attorney-client privilege, and the attorney work-product doctrine is required.²⁴ Although related and based on similar policy concerns,²⁵ the attorney-client privilege, the work-product-protection doctrine, and the ethical rule of confidentiality are three distinct legal concepts—each is derived from a different authority, serves a different purpose, and has a different effect on the conduct of lawyers. Part III briefly summarizes each concept and explains the differences between them.

The duty of confidentiality is set forth in the American Bar Association’s Model Rules of Professional Conduct at Rule 1.6.²⁶ Although the Model Rules serve as a national model for state ethical rules they “are not self-executing and carry no independent authority—ultimately a lawyer’s ethical obligations are determined by the laws (or rules) of the state (or states) in which the lawyer is licensed to practice.”²⁷ Every state, with the exception

22. *Id.*

23. Certainly since Congress passed the Rule, courts have taken dramatically different views of the requirements. See Grimm et al., *supra* note 10; Ann M. Murphy, *Federal Rule of Evidence 502: The “Get Out of Jail Free” Provision—or Is It?*, 41 N.M. L. REV. 193 (2011).

24. See generally 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 9.5, at 9-19 (3d ed. 2001) (noting the “continuing confusion” in the legal profession regarding the difference between these concepts).

25. *Id.* § 9.5, at 9-17 (“Professional-ethical rules of confidentiality (like Model Rule 1.6) are closely related to the evidentiary rule of attorney-client privilege and are animated by similar policy concerns.”).

26. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2012).

27. Debra L. Bassett, *E-Pitfalls: Ethics and E-discovery*, 36 N. KY. L. REV. 449, 451 (2009).

of California, has adopted the format of the American Bar Association (ABA) Model Rules, although many states have made changes to them.²⁸

The ethical rule of confidentiality is extraordinarily broad.²⁹ Model Rule 1.6 provides the following: “(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”³⁰ Accordingly, the confidentiality rule prohibits the attorney from revealing *any* information about the representation of a client and is not restricted to legal advice and communication, as is the case with the attorney-client privilege. “The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”³¹

By contrast, the attorney-client privilege is an evidentiary rule. Dean John Henry Wigmore, one of the foremost experts on evidence, defined the attorney-client privilege in the following way:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.³²

28. See *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 15, 2013) (the District of Columbia and the U.S. Virgin Islands have also adopted the format of the Model Rules). In a significant move that will be discussed below, the ABA recently adopted amendments to the Model Rules that are referred to as the “Technology Amendments.” See *infra* notes 77–87 and accompanying text. The Technology Amendments to the Model Rules were adopted on August 6, 2012, and are reflected in 105A and 105B. See AM. BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105A REVISED (Aug. 2012) [hereinafter RESOLUTION 105A REVISED], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105a.authcheckdam.pdf; AM. BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105B (Aug. 2012) [hereinafter RESOLUTION 105B], available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b_filed_may_2012.authcheckdam.pdf. The press release of the ABA is available at: *ABA Adopts Policy on Ethics in the Profession, Criminal Justice Reforms, and Civil Standards in Immigration Detention*, AM. BAR ASS'N (Aug. 7, 2012), <http://www.abanow.org/2012/08/aba-adopts-policy-on-ethics-in-the-profession-criminal-justice-reforms-and-civil-standards-in-immigration-detention/>.

29. See Edward W. Feldman, *Be Careful What You Reveal: Model Rule of Professional Conduct 1.6*, LITIGATION, Summer/Fall 2012, at 33; Jamila Johnson, *Pillow Talk: The Obligations of RPC 1.6*, WASH. ST. BAR NEWS, Nov. 2012, at 11, available at http://www.wsba.org/News-and-Events/Publications-Newsletters-Brochures/~media/Files/News_Events/Publications/Bar%20News/2012%20Full%20Issues/201211NovemberBarNews.ashx.

30. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

31. *Id.* cmt. 3.

32. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (1961); see also Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 855 (1998).

To illustrate the difference between the two concepts, consider a situation where a client seeks legal advice and also business or tax advice from the lawyer. The confidentiality rule prohibits the attorney from revealing any of this information (including actions taken by the attorney or client concerning this business and/or tax advice), but the attorney-client privilege would protect only the legal advice and only actual communication between the lawyer and the client. “[T]he ethical rule of confidentiality is more protective than the attorney-client privilege, because the latter protects only against *compelled* disclosure, and only against disclosure of information *communicated* between client and lawyer.”³³ Underlying facts are not protected by the attorney-client privilege.³⁴

Rule 502 also applies to the work-product doctrine. The work product doctrine as we know it today originated from the U.S. Supreme Court opinion in *Hickman v. Taylor*.³⁵ In *Hickman*, attorneys for a deceased tugboat crewmember sought the tugboat owner’s attorney’s notes of interviews with survivors of the accident.³⁶ The Supreme Court determined that the legal profession would be “demoraliz[ed]” if attorneys were forced to turn over information they gathered, as well as their thoughts and theories about the case that they prepared in anticipation of litigation.³⁷ The concepts of *Hickman* were incorporated in Federal Rule of Civil Procedure (FRCP) Rule 26(b)(3).³⁸

The work-product doctrine is, on the one hand, narrower than the attorney-client privilege because it is a procedural rule, but, on the other hand, is broader than the attorney-client privilege because it applies to more than simply communication between the attorney and client. The attorney-client privilege is nearly absolute in its application and has only a few narrow exceptions, and if the material consists of the attorney’s thoughts, mental impressions, and theories, the work product protection is also virtually absolute.³⁹ However, if the material does not contain the attorney’s mental processes it is not protected to the same degree.⁴⁰ Under either the attorney-client privilege or the work product doctrine, the above scenario would not be protected. It would, however be protected under the duty of confidentiality.

33. 1 HAZARD & HODES, *supra* note 24, § 9.2, at 9-17.

34. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

35. 329 U.S. 495 (1947).

36. *Id.* at 498-99.

37. *Id.* at 511.

38. Steven Allison, Mandana Massoumi & Kate Santon, *Ethical Issues for In-House Counsel: Attorney-Client Privilege, Confidentiality, Work Product Doctrine and Conflicts of Interest*, DORSEY & WHITNEY LLP (2010), http://www.dorsey.com/files/upload/Santon_Ethical_Issues_InHouse_Counsel.pdf.

39. *See Hickman*, 329 U.S. at 508. This is referred to as “opinion work product.” *See Grimm et al.*, *supra* note 10, at 14.

40. *See Hickman*, 329 U.S. at 508. This is referred to as “ordinary work product.” *See Grimm et al.*, *supra* note 10, at 14.

Lay persons, as well as attorneys and judges, frequently confound the doctrines. Due to the confusion, it may be helpful to consider these concepts side by side. Below is a table of comparison.

Ethical Duty of Confidentiality	Attorney-Client Privilege	Work Product Protection
Attorney shall not reveal information “relating to the representation” of a client unless the client gives informed consent or revealing the information is impliedly authorized to carry out representation (or permitted by exceptions).	Attorney not compelled to reveal communication relating to legal advice rendered to a client if made in confidence; privilege may be waived and is subject to limited exceptions. Formal legal proceedings held in response to an attempt to compel testimony. ⁴¹	No discovery allowed of documents and tangible things prepared by an attorney if they are prepared in anticipation of litigation or for trial. May be discovered if (1) they are otherwise discoverable; and (2) the party shows substantial need and is unable to obtain them without undue hardship. However, the court must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of the attorney.

It is clear that the three concepts are intertwined but different. As mentioned above, the ethical duty of confidentiality applies to attorneys who are licensed to practice law, and this duty is dictated by the attorney’s particular state bar association (although nearly every state follows the Model Rules). The attorney-client privilege is a rule of evidence and originates from common law. The work-product protection is governed by FRCP 26. Any change to the Federal Rules of Evidence (such as the addition of Rule 502) will not affect the individual state ethical rules. In fact, these rules address very different concerns. It is true that “the parallel law in the civil litigation context does not merely supplement or complement rules of professional conduct; it is increasingly in tension with the ethics rules, causing several problems.”⁴²

Rule 502 applies to both the attorney-client privilege and the work-product doctrine.⁴³ The impetus for Rule 502 was the exponential growth

41. 1 HAZARD & HODES, *supra* note 24, § 9.5, at 9-20.

42. Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM L. REV. 1965, 1965 (2011).

43. See Grimm et al., *supra* note 10, at 3 (the Rule does not apply to the “vast array” of other privileges).

in electronically-stored information (ESI).⁴⁴ It is estimated that “well over 90% of all information is now created and stored electronically.”⁴⁵ Both the 2006 e-discovery amendments to the FRCP and the addition of Federal Rule of Evidence 502 addressed the challenges raised by ESI.⁴⁶ When it comes to the ethical rules of confidentiality, however, very little has been done to answer the questions raised by the use of ESI. In fact, “many states have no rules governing ESI,”⁴⁷ and some states’ ethical rules of confidentiality do not mention inadvertent disclosure at all.⁴⁸ Inadvertent disclosure is generally mentioned if a state follows Model Rule 4.4(b), which governs the attorney who *receives* inadvertently disclosed material from another attorney.⁴⁹ The Rule does not focus on the attorney who inadvertently discloses the information.

A greater number of attorneys will necessarily be affected by individual state laws because state caseloads (taken together) are larger than the federal caseload.⁵⁰ Unfortunately, state ethical rules do not, by and large, address the difficulties attorneys face with the increasing proliferation of ESI. For example, “Model Rule 1.6—the Confidentiality of Information rule—does not address two emerging confidentiality issues, which include confidential information in metadata and the disclosure of confidential information pursuant to a clawback or quick-peek agreement or order (as contemplated by the new federal rules).”⁵¹ A wonderful resource on guidelines for state practices is the Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, but this contains guidelines for trials and discovery and is not aimed at, nor does it mention, state ethical rules.⁵²

IV. THE ETHICAL DUTY OF CONFIDENTIALITY

The duty of confidentiality has been included in rules and interpreted by the American Bar Association for many years. It was included in Canon 37

44. See Jessica Wang, Comment, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1845 (2009).

45. Milberg LLP & Hausfeld LLP, *E-discovery Today: The Fault Lies Not In Our Rules* . . . , 4 FED. CTS. L. REV. 131, 134 (2011).

46. *Id.* at 134–35.

47. *Id.* at 148.

48. Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need To Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 241 (2010).

49. MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2012) provides the following: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” *Id.*

50. See Milberg LLP & Hausfeld LLP, *supra* note 45, at 17.

51. Schaefer, *supra* note 48, at 196.

52. Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, NAT’L CENTER FOR ST. CTS. (Aug. 2006), <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

of the 1908 Ethical Canons.⁵³ In 1969, the duty was included in Canon 4 of the Model Code of Professional Responsibility (Code).⁵⁴ In 1983, the ABA replaced the Code with the Model Rules.⁵⁵ Again, the duty of confidentiality was included.

As mentioned previously, the Model Rules carry no independent authority, but instead serve as a guide that individual states may and have used and adopted to a great degree. With the passage of the Model Rules, the duty of confidentiality became much stronger than it was under the Code.⁵⁶ In fact, according to experts, “read literally and in isolation, the rule is so stringent as to approach the unworkable and the unrealistic.”⁵⁷ It includes even information that is “generally known.”⁵⁸ For example, in *In re Bryan*,⁵⁹ the court determined that the duty of confidentiality is “not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.”⁶⁰ In their treatise, *The Law of Lawyering*, three experts urge a more commonsense reading of the Model Rule, one that is aligned with the *Restatement of the Law Governing Lawyers (Restatement)*, which they argue is a better approach.⁶¹ The *Restatement* prevents the lawyer from disclosing information “relating to” a client only in the event it is not generally known, for example, if it is known only through special knowledge or acquired with substantial difficulty or expense.⁶² The *Restatement*, produced by the American Law Institute, is not binding authority for courts.⁶³ The Model Rules, the opinions of experts, and the *Restatement* have no binding authority on individual states.

The ethical rule of confidentiality applies even if there is no harm to the client.⁶⁴ This is one of the “remarkable omissions” from the earlier

53. Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles To Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1310 (1999).

54. This provision was DR 4-101(C). *Id.* at 1310–11; see also MODEL RULES OF PROF'L CONDUCT preface, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html.

55. MODEL RULES OF PROF'L CONDUCT preface.

56. See 1 HAZARD & HODES, *supra* note 24, § 9.15, at 9-65.

57. *Id.*

58. See *id.*; Feldman, *supra* note 29; Johnson, *supra* note 29, at 12.

59. 61 P.3d 641 (Kan. 2003).

60. *Id.* at 657 (quoting NCK Org. Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976)).

61. *Id.* These experts are Trustee Professor of Law Geoffrey C. Hazard, Jr., Professor Emeritus of Law W. William Hodes, and attorney Peter R. Jarvis, authors of the two-volume treatise *The Law of Lawyering*. See HAZARD & HODES, *supra* note 24.

62. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000); see also Feldman, *supra* note 29, at 33.

63. See *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, No. 10-4194, 2012 WL 3740685, at *7 (6th Cir. Aug. 29, 2012).

64. See State Bar of Nev., Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 41 (2009), available at http://nvbar.org/sites/default/files/opinion_41.pdf.

provisions of the duty to the current ABA version.⁶⁵ At the very least, it applies when no harm is obvious.⁶⁶ “When the duty of confidentiality does apply, it is treated seriously in the law of lawyering. Its breach is enforceable by civil remedies as well as through the disciplinary process.”⁶⁷ One commentator said the following of the friction between the ethical duty of confidentiality and Rule 502: “Violation of this duty constitutes cause for disbarment or suspension of the attorney’s license to practice. It also may give rise to civil liability for legal malpractice, breach of confidence or other similar tort. Unless, of course, Rule 502(d) preempts state law in each of these areas.”⁶⁸

Just as with the attorney-client privilege, the duty of confidentiality does provide for exceptions to the obligation to maintain information in confidence.⁶⁹ There are six exceptions, one of which is “to comply with other law or a court order.”⁷⁰ This may be extremely helpful in the Rule 502 arena. Certainly a Rule 502(d) order is binding on the parties; however, it protects only in the instance of disclosure of attorney-client privileged information and documents protected under the work-product doctrine. Any other information that is disclosed and happens to be within the realm of any other recognized privilege as well as all nonprivileged material has no protection from a claim by a client or a state ethical board regarding a confidentiality violation.⁷¹

A. *Model Rule 1.6 Confidentiality of Information: Exception (6)—
Other Law or Court Order*

During the Symposium, the panelists consistently mentioned the effectiveness of Rule 502(d), if used by the parties.⁷² In fact, both Professor Capra and this author expressed the belief that it may be an ethical violation *not* to take advantage of a Rule 502(d) order.⁷³ For illustrative purposes, consider a situation in which a large corporation (for instance Adidas Corporation) sues another large corporation (imagine Nike Corporation) for trademark infringement. The potential documents involved number in the millions, and the amount at issue is relatively small. The attorneys for both sides could take advantage of Rule 502(d) and obtain a court order to the effect that neither side waives any attorney-client

65. *Id.* at 2. The three “remarkable omissions” are (1) the information need not be confidential, it applies to *all* information; (2) the information need not be “adverse” to the client; and (3) the duty applies even if the information is generally known or public. *Id.*

66. See 1 HAZARD & HODES, *supra* note 24, § 9.15, at 9-68.

67. *Id.*

68. Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673, 745 (2009).

69. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1)–(6) (2012). Note that California does not recognize many of these exceptions. See Allison et al., *supra* note 38, at 4.

70. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6).

71. Noyes, *supra* note 68, at 747.

72. See, e.g., Panel Discussion, *supra* note 4, at 1544, 1556, 1586.

73. *Id.* at 1582.

privilege or work-product protection in disclosing documents. If the attorney for Nike inadvertently discloses a document protected under the attorney-client privilege, has he or she violated ethical rules? Given the number of documents, it could arguably be more of an ethical violation for the attorney to fail to cooperate with the other party and seek a court order.

One could make a theoretical argument that this exception applies more to a situation in which a court is acting on its own initiative (Rule 502(d)),⁷⁴ rather than one in which the parties reach an agreement and then seek a court's blessing (Rule 502(e)—*if* incorporated into a court order). On the other hand, a court order is a court order, and the facts behind or procedures by which that order came about are irrelevant. Certainly an attorney will be entitled to more protection from an ethical violation or a malpractice claim if he or she acts in accordance with a court order rather than simply by reaching agreement with the other party in a case. There is a specific exception to the duty of confidentiality if an attorney is acting pursuant to a court order, and attorneys are well-advised to obtain one when relying on Rule 502. This offers protection if the attorney makes a "mistake" or a "boo-boo." Of course, one needs to be cognizant that the order only protects attorney-client privileged and work-product-protected information. A more prudent approach for the attorney is to disclose fully all relevant information to the client and obtain the client's "informed consent" under Model Rule 1.6(a). In so doing, the attorney is protected from a claim of a violation of the duty of confidentiality. Of course there must be a full disclosure: "[I]nformed consent . . . requires the attorney to fully and effectively explain to the client the risks and consequences of disclosing privileged and protected information."⁷⁵ This may be easier said than done, as some of the Symposium panelists expressed, particularly if the client is an in-house lawyer for a firm.⁷⁶

B. Technology Amendments to the ABA Model Rules

In August 2012, the ABA House of Delegates approved "Technology Amendments" that were proposed by the ABA Commission on Ethics 20/20, formed in 2009.⁷⁷ The Commission was appointed to "study the impact of technology and globalization on the legal profession."⁷⁸ The

74. "In other words, when a lawyer is faced with the choice of violating . . . a court order, or breaching confidentiality, the lawyer is permitted—but not required—to sacrifice confidentiality." 1 HAZARD & HODES, *supra* note 24, § 9.12, at 9-8 to 9-9.

75. Noyes, *supra* note 68, at 745.

76. See Panel Discussion, *supra* note 4, at 1551–52, 1554, 1569.

77. See RESOLUTION 105A REVISED, *supra* note 28; RESOLUTION 105B, *supra* note 28; JOHN M. BARKETT, JUDITH A. MILLER & SETH A. ROW, TECHNOLOGY AMENDMENTS TO THE MODEL RULES: ANSWERS TO THE QUESTIONS YOU SHOULD BE ASKING (Am. Bar Ass'n Section of Litig. Ethics & Prof'l Responsibility & Ctr. for Prof'l Dev. MP3, rec. Oct. 2, 2012) (on file with author).

78. Debra Cassens Weiss, *Lawyers Have Duty To Stay Current on Technology's Risks and Benefits*, *New Model Ethics Comment Says*, A.B.A. J. (Aug. 6, 2012, 1:46 PM), http://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technology_s_risks_and_benefits.

Commission concluded that the Model Rules of Professional Conduct must “keep pace with social change and the evolution of law practice.”⁷⁹ Specifically, it noted that technology has changed the profession and altered the practice of law in fundamental ways, and attorneys must understand that technology so as to provide competent and cost-effective service.⁸⁰ Although these amendments may strike fear in the hearts of many attorneys, those who take advantage of, or plan to take advantage of, Rule 502 should take comfort, as will be shown below.

Arguably the most onerous new provision of the Technology Amendments is the change to Comment 6 to Rule 1.1 Competence, which now reads as follows: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁸¹

In other words, lawyers are no longer allowed to be Luddites. In reality, Comment 6 does not impose any obligations on an attorney other than those of the earlier incarnation of the Model Rule. It simply reminds lawyers to “remain aware of technology.”⁸²

The Technology Amendments also added Model Rule 1.6(c), which provides the following: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”⁸³ At first blush, this may seem entirely contrary to Rule 502, but the key word here is “reasonable.” This is reiterated in Comment 18 to the Rule, which states that an attorney has not breached this duty if “the lawyer has made reasonable efforts to prevent the access or disclosure.”⁸⁴

In reality, this addition to the Model Rules corresponds perfectly to Rule 502(b), which provides that the disclosure does not operate as a waiver if it is inadvertent, the holder of the privilege took *reasonable* steps to prevent disclosure, and the holder of the privilege took *reasonable* steps to rectify the error. Federal Rule of Evidence 502(b)(2) is essentially the same as new Model Rule 1.6(c). Of course, this is of no consequence if a particular state has not adopted the provisions of new Model Rule 1.6(c), and, thus far, no state has done so. In the area of ESI, ethical implications and

79. ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (Aug. 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_0508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

80. *Id.* at 3.

81. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 6 (2012); *see also* RESOLUTION 105A REVISED, *supra* note 28, at 3 (emphasis added to indicate Technology Amendment change).

82. AM. BAR ASS’N ET AL., REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 105A, 3 (Aug. 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

83. MODEL RULES OF PROF’L CONDUCT R. 1.6(c).

84. *Id.* R. 1.6 cmt. 18.

professional liability are problematic.⁸⁵ The *Restatement* is helpful, but again, it is not binding in any state.⁸⁶ The provisions of the *Restatement* are strikingly similar to the provisions of Rule 502(b), and are the following:

Waiver does not result if the client or other disclosing person took precautions reasonable in the circumstances to guard against such disclosure. What is reasonable depends on circumstances, including: the relative importance of the communication (the more sensitive the communication, the greater the necessary protective measures); the efficacy of precautions taken and of additional precautions that might have been taken; whether there were externally imposed pressures of time or in the volume of required disclosure; whether disclosure was by act of the client or lawyer or by a third person; and the degree of disclosure to nonprivileged persons.⁸⁷

In another similar provision to Rule 502(b), the *Restatement* also states that prompt and reasonable steps must be taken to recover the communication.

It is important to note that the above discussion concerns Rule 502(b). It is another situation entirely when the parties rely on Rule 502(a)—an intentional waiver of the privilege, as well as (e)—a party agreement on disclosure. Neither Model Rule 1.6 nor the Comments to Rule 1.6 address clawback or quick-peek agreements.⁸⁸ In fact, no provision was made for these situations, despite Professor Paula Schaefer's suggestion to the members of the Commission.⁸⁹ Even the Sedona Principles acknowledge that clawback agreements could pose problems for state ethical purposes:

[I]t is possible that questions could arise as to whether voluntarily entering into a 'clawback' production could constitute a violation of Model Rules of Professional Conduct 1.1 . . . or Model Rules of Professional Conduct 1.6 . . . if the manner of the production results in later waivers of privileges and protections.⁹⁰

No protection is provided either, as discussed previously, when an attorney relies on a privilege or protection other than the attorney-client privilege and work-product protection. Professor Schaefer recommends that if

85. See Thomas Y. Allman, *E-discovery in Federal and State Courts: The Impact of the 2006 Federal Amendments*, HINSHAW & CULBERTSON LLP, 76 (June 14, 2012), <http://blog.hinshawlaw.com/practicalediscovery/wp-content/uploads/2012/06/2012FedStateEDiscoveryRulesJune14.pdf>; Charles H. Gardner & Much Shelist, P.C., *Electronically Stored Information, Social Media and the Rules of Professional Conduct: Are You Compliant With Your Duties of Competence and Diligence?*, NAT'L L. REV. (Feb. 13, 2012), <http://www.natlawreview.com/article/electronically-stored-information-social-media-and-rules-professional-conduct-are-yo>.

86. The *Restatement* is "persuasive secondary authority." *A. v. B.*, 726 A.2d 924, 928 (N.J. 1999).

87. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 cmt. h (2000).

88. See ABA COMM'N ON ETHICS 20/20, *supra* note 79.

89. Letter from Paula Schaefer, Assoc. Professor of Law, Univ. of Tenn. Coll. of Law, to Members of the ABA Comm'n on Ethics 20/20 (July 5, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110714_technologyandconfidentiality_comments_all.authcheckdam.pdf.

90. Adjoa Linzy, *The Attorney-Client Privilege and Discovery of Electronically-Stored Information*, 2011 DUKE L. & TECH. REV. 1, ¶ 42 n.83.

attorneys use either Rule 502(d) or (e), they obtain client consent before doing so.⁹¹ She states, “Because the current Confidentiality of Information rule requires counsel to protect client confidences unless informed consent is given by the client to do otherwise, an attorney should not enter a Privilege Disclosure Agreement or seek a related Order without that consent.”⁹²

A different situation is presented if a judge enters a 502(d) order sua sponte or in the absence of a party agreement.⁹³ Presumably, if a client does not agree to disclosure, a quick-peek agreement, or a clawback agreement, his or her attorney may object to a sua sponte order, but of course must follow it.⁹⁴ Should this happen, the attorney should be protected from any ethical violation claim due to the exception in Model Rule 1.6 for following a court order.⁹⁵

It is refreshing that commentators in some states have mentioned the Technology Amendments. In a recent Minnesota Legal Ethics Update, William J. Wernz, who authored a treatise on the Minnesota ethical rules, describes new Rule 1.6(c) and advises that “Minnesota should adopt a counterpart.”⁹⁶ The Utah Bar describes the Technology Amendments as “significant changes,” and warns that “technophobic lawyers can no longer ignore computers and other emerging technologies.”⁹⁷ Likewise, an issue of *Wisconsin Lawyer* mentions the Ethics 20/20 Commission as well as a new proposed (as of the publication of that issue) Rule 1.6(c).⁹⁸ Its author indicates that “several states” have addressed technology issues, although he does not address inadvertent disclosure in particular.⁹⁹ In a District of Columbia Bar publication, an author mentions the new Technology Amendments, stating the following:

Although Bar Counsel cannot speculate as to how any of the specific changes put forth by the ABA might one day be reflected in our own Rules of Professional Conduct, we, like anyone else, can observe that

91. Schaefer, *supra* note 48, at 237.

92. *Id.*

93. See Noyes, *supra* note 68, at 746; Panel Discussion, *supra* note 4, at 1570–71.

94. See Schaefer, *supra* note 48, at 237 n.212.

95. See *id.*

96. William Wernz, *October 2012—Minnesota Ethics Update*, MINN. LAWYERING (Oct. 1, 2012), <http://minnesotalawyering.com/2012/10/october-2012-minnesota-ethics-update/>. Mr. Wernz is the author of MINNESOTA LEGAL ETHICS: A TREATISE (3d ed. 2012).

97. Keith A. Call, *Changes May Be Coming to the RPC—or Are They Already Here?*, UTAH BAR J. (Nov. 12, 2012), http://webster.utahbar.org/barjournal/2012/11/changes_may_be_coming_to_the_r.html.

98. Nerino Petro, Jr., *The Ethics of Cloud-Based Services*, WIS. LAW. (Sept. 2012), http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=113469.

99. *Id.*

these changes reflect new realities. And as realities change, so, too, must the lawyer.¹⁰⁰

According to the *eDiscovery Times*, “the influence of changes to the Model Rules cannot be overstated. Most states usually adopt some variety of changes made to the Model Rules of Professional Conduct.”¹⁰¹

C. States Have Addressed Technological Advances, to a Limited Degree

In 2002, the Model Rules were amended to add Model Rule 4.4(b), which provides the following: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

At least “[t]hirty-two states have adopted Model Rule 4.4(b) or a substantially similar provision.”¹⁰² This rule of course addresses the recipient of the ESI, not the sender. The sender's duty continues to be governed by the confidentiality rule.

State bar associations have also addressed issues related to storage, privacy of client information while using email and other transmission vehicles, and “cloud computing.”¹⁰³ A number of states have addressed the issue of both sending and receiving metadata.¹⁰⁴

One state ethics opinion that has received significant attention is State Bar of California Formal Opinion 2010-179.¹⁰⁵ The question presented concerned the duties of an associate in a law firm who brought his work-issued computer to a coffee shop and his home and used the computer at these locations.¹⁰⁶ At the coffee shop, he used a public wireless Internet connection, and at home he used his own personal wireless system.¹⁰⁷ The California State Bar acknowledged that ethical guidance to attorneys has

100. Joe Perry, *A Recommitment to Education for Newer and Experienced*, D.C. BAR (Oct. 2012), http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/october_2012/barcounsel.cfm.

101. Charles Skamser, *The Legal Profession Found the Twenty-First Century: Ignorance Is Bliss No More*, *EDISCOVERY TIMES* (Aug. 12, 2012), <http://ediscoverytimes.com/the-legal-profession-found-the-twenty-first-century-ignorance-is-bliss-no-longer/>.

102. Michael Z. Green, *Preserving Attorney Client and Work Product Privilege Via E-Mail: Merging Federal Evidence Rule 502 with Discovery and Ethics Rules*, AM. BAR ASS'N, 9 (Nov. 5, 2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/050.authcheckdam.pdf.

103. For an excellent resource listing some of the states which have addressed these issues, see JOHN M. BARKETT ET AL., *ETHICAL CHALLENGES ON THE HORIZON: CONFIDENTIALITY, COMPETENCE AND CLOUD COMPUTING* (Ctr. for Prof'l Dev. & Ctr. for Prof'l Responsibility MP3, rec. July 24, 2012) (on file with author).

104. Metadata is essentially the history and context of ESI—the “DNA” of ESI. See Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, AM. BAR ASS'N (Aug. 2006), <http://apps.americanbar.org/lpm/lpt/articles/tch08061.shtml>.

105. State Bar of Cal., *Standing Comm. on Prof'l Responsibility & Conduct*, Formal Op. 2010-179 (2010).

106. *Id.*

107. *Id.*

not kept pace with technology.¹⁰⁸ Although California does not follow the ABA Model Rules (and in fact the California duty of confidentiality does not contain an exception for disclosures impliedly authorized to carry out the representation of the client), the California Standing Committee on Professional Responsibility and Conduct recognized that information must in fact be transmitted.¹⁰⁹ It listed a number of factors for an attorney to consider when transmitting information, and specifically indicated that the attorney should take steps to strip metadata from any confidential communication.¹¹⁰ The Committee stated the following:

Many attorneys, as with a large contingent of the general public, do not possess much, if any, technological savvy. Although the Committee does not believe that attorneys must develop a mastery of the security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice.¹¹¹

The Bar Associations for Alabama, Arizona, Colorado, the District of Columbia, Florida, Maryland, New Hampshire, New York, Pennsylvania, Vermont, Washington, and Wisconsin have addressed metadata but have not specifically (with the exceptions of Arizona and the District of Columbia) addressed inadvertent disclosure of client information.¹¹²

Arizona and the District of Columbia have addressed the inadvertent disclosure of client information and both have concluded that the attorney must take “reasonable precautions.”¹¹³ In addition, the State Bar of

108. *Id.*

109. *Id.* at 2. Note that the State Bar of California and the California Supreme Court are considering a major restructuring of the state’s ethics rules. The State Bar recommends that the Rules of Professional Conduct be replaced with sixty-seven new rules based upon the American Bar Association’s Model Rules of Professional Conduct. *See* Renee Choy Ohlendorf, *California May Get New Rules of Professional Conduct*, ABA LITIG. NEWS (Sept. 21, 2011), http://apps.americanbar.org/litigation/litigationnews/top_stories/092111-california-ethics-model-rules-of-professional-conduct.html.

110. *Id.* at 4, n.11.

111. *Id.* at 5.

112. *See* J.T. Westermeier, *Recent Ethics Opinion on Metadata Support Best Practice*, 2009 EMERGING ISSUES 3791 (LEXIS); Ethics Comm. of the Colo. Bar Ass’n, Formal Ethics Op. 119 (2008), *available at* <http://www.cobar.org/index.cfm/ID/386/subID/23789/CETH//>; D.C. Bar Ass’n, Legal Ethics Comm., Op. 341 (2007), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm; Pa. Bar Ass’n, Formal Op. 2009-100 (2009), *available at* <http://www.padisiplinaryboard.org/newsletters/2009/pdfs/f2009-100.pdf>; Vt. Bar Ass’n, Advisory Ethics Op. 2009-1 (2009), *available at* <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Electronic%20Documents/09-01.pdf>; Wash. State Bar Ass’n, Rules of Prof’l Conduct Comm., Op. 2216 (2012), *available at* <http://mcle.mywsba.org/IO/print.aspx?ID=1664>; Wis. State Bar Prof’l Ethics Comm., Op. EF-12-01 (2012), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_ethics_opinions&TEMPLAT E=/CM/ContentDisplay.cfm&CONTENTID=113148.

113. *See* State Bar of Ariz., Op. 07-03 (2007), *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=695>; State Bar of Ariz., Op. 05-04 (2005), *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=523>; D.C. Bar Ass’n

Massachusetts has issued an ethics opinion on internet-based storage systems such as Google Docs.¹¹⁴ One lawyer for a company that provides e-discovery services foresees that use of predictive coding will become an ethical obligation.¹¹⁵ Recently, U.S. Magistrate Judge Andrew J. Peck endorsed the use of predictive coding (computer-assisted review),¹¹⁶ and his decision was adopted by U.S. District Court Judge Andrew L. Carter.¹¹⁷

V. PATH FOR THE FUTURE

It is interesting to note that at least one major study revealed that technology-assisted review may be more effective than “eyes-on” manual review of ESI.¹¹⁸ The extraordinary amount of information available has made e-discovery extremely expensive. In a 2009 ABA survey on civil practice, 82 percent of those responding indicated that “discovery is too expensive.”¹¹⁹ A recent study reported that “as much as 75 to 90 percent of additional costs attributable to e-discovery are due to increases in attorney billings for ‘eyes-on’ review of electronic documents.”¹²⁰ The use of Rule 502 is estimated to reduce the costs of this review by 80 percent.¹²¹ Unfortunately, “ethics rules have diverged from the law governing lawyers in civil litigation in the context of inadvertently disclosed privileged documents.”¹²² One commentator has even stated that “when the applicable parallel law is in tension with the Model Rules because of a substantive disagreement and the Model Rule does not serve any disciplinary function, the Model Rule should be deleted.”¹²³ The burden of e-discovery in view of the changes in technology is simply too great given the current model.¹²⁴ Bar associations must be cognizant of the rapid-paced changes in technology and update their rules as necessary. The process may begin with provisions similar to FRCP 26 and Rule 502, as was

Legal Ethics Comm., Op. 256 (1995), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion256.cfm.

114. See Mass. Bar Ass’n, Op. 12-03 (2012), available at <http://www.massbar.org/publications/ethics-opinions/2010-2019/2012/opinion-12-03>.

115. Debra Cassens Weiss, *Lawyer for E-discovery Company Predicts Predictive Coding Will Become an Ethical Obligation*, A.B.A. J. (Dec. 6, 2012, 6:15 AM), http://www.abajournal.com/news/article/lawyer_for_e-discovery_company_predicts_predictive_coding.

116. *Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012).

117. *Moore v. Publicis Groupe*, No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

118. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011).

119. Milberg LLP & Hausfeld LLP, *supra* note 45, at 15.

120. *Id.* at 36.

121. *Id.* at 38.

122. Perlman, *supra* note 42, at 1973.

123. *Id.* at 1976.

124. Anthony Francis Bruno, Note, *Preserving Attorney-Client Privilege in the Age of Electronic Discovery*, 54 N.Y.L. SCH. L. REV. 541 (2009/10).

recently done in North Carolina.¹²⁵ If the procedure and evidence rules are in place, perhaps changes will be made to ethical rules, as happened at the federal level. Coordination between states would be ideal, and a dialogue at the Conference of Chief Justices would be optimal. At present, even a minor inadvertent disclosure is treated in most states as a violation of the duty of confidentiality, as it is a mistake, or a “boo-boo.”

CONCLUSION

As discussed at the Symposium on Federal Rule of Evidence 502, the Rule is not being used to its potential. Certainly this is due to a number of factors. The threat of an ethical violation or malpractice will slow the use of the Rule. Only the states are able to act on the ethical rules, and they should do so as quickly as possible. The states, with few exceptions, have been slow to adopt changes to the ethical rules to address changes in technology. Generally, if a change has been made, it has been reactive, not proactive. Given the explosion of ESI, states do not have the luxury of waiting any longer. The Federal Rules of Civil Procedure and Evidence apply to discovery and trial. Attorneys need to be protected in all aspects of their professional life. The duty of confidentiality is exceptionally broad and attorneys must be free to effectively represent their clients, even in the event of a mistake or “boo-boo” in their use of ESI.

125. North Carolina House Bill 380 has been signed by the Governor. See *House Bill 380/S.L. 2011-199*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=H380> (last visited Feb. 15, 2013). The text of the bill is available at 2011 N.C. Sess. Laws 827. See Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 CAMPBELL L. REV. 233 (2012).