my colleagues view this enthusiastically and that it be supported.

The attorney-client privilege and work product protection are crucial to our legal system. They encourage businesses and individuals to obtain legal counsel when appropriate by protecting the confidentiality of communications between clients and their attorneys, and documents prepared by attorneys to assist their clients in litigation. In fact, this is the backbone, the infrastructure of civil and criminal litigation.

These legal protections are not absolute, however. Traditionally, persons seeking to rely on them must maintain the confidentiality of the information involved. If the information is shared outside the circle of confidentiality provided by the law, the legal protection is forfeited, or waived, as the purpose for it no longer applies.

This traditional principle can work unfair results in modern-day litigation when privileged information is disclosed by accident. Fast-moving litigation or expensive and vast litigation has both plaintiff and defendant shooting back and forth various documents, particularly in extensive discovery. In the course of the kind of voluminous discovery that often takes place, this can happen, where a privileged document is seen by the other party.

When vast amounts of documents are transmitted and stored electronically and can be searched and collected in the same manner, it is all too easy for a document containing privileged information to be overlooked, despite careful efforts to prevent it. Even in my practice of some years ago, the technology has made it different. I remember being in a massive case, a personal injury case, where documents were going back and forth, but I might say, Mr. Speaker, that it moved a lot slower than it does today.

Unfortunately, the case law has not kept up with these developments of expedited discovery and the electronic use of passing documents. Outdated legal precedents from an earlier era continue to create uncertainty. There are precedents, for example, holding that an inadvertent disclosure of a single document or communication not only can waive the privilege as to that one item, but can result in a blanket waiver as to all information concerning the same subject. That can collapse a case.

Concern about the potential adverse consequences has in recent years forced clients and their lawyers to undertake exhaustive, time-consuming, and expensive examination of documents item by item, often page by page, before they can be comfortable turning them over in discovery. That impacts, of course, negatively plaintiffs and defendants.

The document reviews can be grossly disproportionate in cost to the stakes of the underlying litigation and significantly impede the efficient processing of cases through the courts.

Courts have developed a balance rule in the case law that appropriately protects confidentiality, while guarding against abuses. But one court's order and one district's order and one circuit's order has uncertain authority, at best, in another court. Only a uniform rule can bring the certainty needed, and a uniform rule in the area of evidentiary privileges can only be achieved by an act of Congress.

The rule we are submitting today, submitted to Congress last year by the Judicial Conference, is a product of careful deliberations in its Advisory Committee on Evidence Rules, informed by years of examination of the issue in its Committee on Rules of Practice and Procedure.

The Advisory Committee enlisted the help of eminent jurists, practitioners, and legal scholars, and sought and obtained extensive public comment both in written submissions and at two hearings. The rule that resulted has wide support in the legal community. I know, Mr. Speaker. I have spent time, my staff has spent time with lawyers on both sides of the bar, and I can assure you their voices were one in arguing for the passage of this change.

In order to more fully explain how the new rule is to be interpreted and applied, the Advisory Committee also prepared an explanatory note, as is customary, for publication alongside the text of the rule. The text of the explanatory note appears in the RECORD in the Senate debate.

The proposed rule has now also undergone careful review in the House, as well as the Senate. During its consideration in the House Judiciary Committee, a number of questions arose regarding the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work product protection. That is a very important and cherished right, to ensure that privilege does not interfere or hamper the rights of a plaintiff, sometimes the underdog, and the defendant.

The Judicial Conference was able to answer all these questions satisfactorily, without need to revise the text of the rule as submitted to Congress. In order to further reduce any potential uncertainty regarding how the rule is to be interpreted and applied, the committee has asked and the Judicial Conference has agreed to augment the explanatory note. I would like to insert the agreed addendum to the explanatory note in the RECORD at this point.

STATEMENT OF CONGRESSIONAL INTENT REGARDING RULE 502 OF THE FEDERAL RULES OF EVIDENCE

During consideration of this rule in Congress, a number of questions were raised about the scope and contours of the effect of the proposed rule on current law regarding attorney-client privilege and work-product protection. These questions were ultimately answered satisfactorily, without need to revise the text of the rule as submitted to Congress by the Judicial Conference.

In general, these questions are answered by keeping in mind the limited though important purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege, or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does not alter the substantive law regarding attorney-client privilege or work-product protection in any other respect, including the burden on the party invoking the privilege (or protection) to prove that the particular information (or communication) qualifies for it. And it is not intended to alter the rules and practices governing use of information outside this evidentiary context.

Some of these questions are addressed more specifically below, in order to help further avoid uncertainty in the interpretation and application of the rule.

Subdivision (a)—Disclosure vs. Use

This subdivision does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context. One situation in which this issue arises, the assertion as a defense in patent-infringement litigation that a party was relying on advice of counsel, is discussed elsewhere in this Note. In this and similar situations, under subdivision (a)(1) the party using an attorney-client communication to its advantage in the litigation has, in so doing, intentionally waived the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed.

Subdivision (b)—Fairness Considerations

The standard set forth in this subdivision for determining whether a disclosure operates as a waiver of the privilege or protection is, as explained elsewhere in this Note, the majority rule in the federal courts. The majority rule has simply been distilled here into a standard designed to be predictable in its application. This distillation is not intended to foreclose notions of fairness from continuing to inform application of the standard in all aspects as appropriate in particular cases—for example, as to whether steps taken to rectify an erroneous inadvertent disclosure were sufficiently prompt under subdivision (b)(3) where the receiving party has relied on the information disclosed.

Subdivisions (a) and (b)—Disclosures to Federal Office or Agency

This rule, as a Federal Rule of Evidence, applies to admissibility of evidence. While subdivisions (a) and (b) are written broadly to apply as appropriate to disclosures of information to a federal office or agency, they do not apply to uses of information—such as routine use in government publications—that fall outside the evidentiary context. Nor do these subdivisions relieve the party seeking to protect the information as privileged from the burden of proving that the privilege applies in the first place.

Subdivision (d)—Court Orders

This subdivision authorizes a court to enter orders only in the context of litigation pending before the court. And it does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information. Therefore, this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a

federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information. This subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege to preclude use in litigation of information disclosed in such discovery. While the benefits of a court order under this subdivision would be equally available in government enforcement actions as in private actions, acquiescence by the disclosing party in use by the federal agency of information disclosed pursuant to such an order would still be treated as under current law for purposes of determining whether the acquiescence in use of the information, as opposed to its mere disclosure, effects a waiver of the privilege. The same applies to acquiescence in use by another private party.

Moreover, whether the order is entered on motion of one or more parties, or on the court's own motion, the court retains its authority to include the conditions it deems appropriate in the circumstances.

Subdivision (e)—Party Agreements

This subdivision simply makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, it is not binding on others unless it is incorporated into a court order. This subdivision does not confer any authority on a court to enter any order regarding the effect of disclosures. That authority must be found in subdivision (d), or elsewhere.

The new rule protects the confidentiality of privileged information against waiver in several ways. It protects information inadvertently disclosed in discovery, as long as the party has taken reasonable efforts to avoid disclosing privileged information and, upon learning of the disclosure, promptly takes reasonable steps to rectify it.

It protects against a waiver extending to other, undisclosed documents except where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party, so that fairness requires that other information regarding the same subject matter also be available.

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And it authorizes courts to enter orders enforceable in all jurisdictions permitting parties to make initial discovery exchanges efficiently without waiving the right to appropriately assert privilege later for documents culled for actual use as evidence.

This is sort of a back-up protection. This is your guarantee. This is an assistance to the idea of protecting privilege. This is extremely important, in that vast majority of documents exchanged in discovery, in some cases running to millions of pages, ultimately prove to be of no interest.

Importantly, the rule does not alter the law regarding when the attorney-client privilege or work product protection applies in the first instance. It is narrowly targeted to address the question of when the specified kinds of litigation-related disclosures do or do not operate as a waiver of the privilege that would otherwise apply.

Mr. Speaker, this legislation enjoys strong support in the House Judiciary Committee and the Senate Judiciary Committee and, of course, the House Judiciary Committee, with both sides of the aisle supporting it. I would like to especially commend Congressman JIM SENSENBRENNER for encouraging the Judicial Conference when he was chairman of the committee to pursue developing a new rule of evidence to address this problem.

I urge my colleagues to support this important legislation.

Mr. Speaker, I reserve the balance of my time.

Mr. KING of Iowa. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, last year the U.S. Judicial Conference submitted a proposed addition to the Rules of Evidence governing waivers of the attorney-client privilege or work product immunity. Rules governing evidentiary privilege must be approved by an act of Congress.

The Judicial Conference concluded that the current law on waivers of privilege and work product is largely responsible for the rising costs of discovery, especially discovery of electronic information. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document, but to other cases and documents as well. The fear of waiver also leads to extravagant claims of privilege.

Mr. Speaker, the Judicial Conference devoted great process to drafting their proposal. For more than a year, the conference's Advisory Committee on Evidentiary Rules conducted hearings that featured testimony that was submitted by eminent judges, lawyers and academics. The advisory committee later coordinated with the Conference of Chief Justices to assure that the evolving draft addressed federalism concerns raised by the individual State court systems.

In April of 2006, the advisory committee held a conference at Fordham Law School at which a selected group of academics and practitioners reviewed the draft. More revisions were developed that resulted in a revised rule that was published for public comment in August of 2006. The advisory committee received more than 70 public comments and heard testimony from 20 witnesses at two hearings.

In April of 2007, further changes were made based on this process, and the new rule 502 was released. This draft was approved by the Committee on Rules of Practice and Procedure and the full Judicial Conference. The text of S. 2450 incorporates the submission developed and approved by the Judicial Conference. The Senate passed the measure on February 27, 2008, by unanimous consent.

The content of the new rule includes the following provisions: If a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information. An inadvertent disclosure does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

If there is a privileged or protected disclosure at the Federal level, then State courts must honor the new rule in subsequent State proceedings. If there is a disclosure in a State proceeding, then admissibility in a subsequent Federal proceeding is determined by the law that is most protective against a waiver. A Federal Court order that a disclosure does not constitute a waiver is enforceable in any Federal or State proceeding.

Finally, Mr. Speaker, parties in a Federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding.

Mr. Speaker, the cost of discovery has spiked in recent years based on the proliferation of e-mail and other forms of electronic recordkeeping. Litigants must constantly sift through a mountain of documents to ensure that privileged material is not inadvertently released. While most documents produced during discovery have little value, attorneys must still conduct exhaustive reviews to prevent disclosures. The cost to litigants is staggering and the time consumed by courts to supervise these activities is excessive.

The system is broken and must be fixed. S. 2450 does just that by providing a predictable standard to govern waivers of privileged information. The legislation improves the efficiency and the discovery process, while it still promotes accountability. It alters neither Federal nor State law on whether the attorney-client privilege or the work product doctrine protects specific information. The bill only modifies the consequences of an inadvertent disclosure once a privilege exists.

The process devoted to the development of new Federal Rule of Evidence 502 by the Judicial Conference was extensive. The Senate has reviewed the measure and approved it by unanimous consent with an accompanying committee report. The House Judiciary Committee spent months informally reviewing S. 2450, a process that included intense discussions with representatives of the judiciary and a Fordham Law School professor who assisted in the drafting of the rule.

Now, Mr. Speaker, it is time to act. I urge my colleagues to support S. 2450.

Mr. Speaker, I yield back the balance of my time.

Ms. JACKSON-LEE of Texas. Mr. Speaker, I thank the gentleman for his