STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8047

ORDER PROMULGATING AMENDMENTS TO THE RULES OF EVIDENCE

The Supreme Court Advisory Committee on the Rules of Evidence recommended amendments to Rules 404, 702, and 1101 of the Rules of Evidence, and also recommended adoption of a new rule governing disclosures covered by the attorney-client privilege or work-product doctrine. We opened a public-comment period, and written comments were filed in support of and in opposition to the committee's recommendations. We held a public hearing on June 19, 2018, at which representatives of four organizations spoke, in addition to the committee chair.

We have carefully considered the committee's recommendations for rule amendments, and have thoroughly evaluated the oral and written comments in support of and in opposition to those recommendations. After that review, we have concluded that the recommended amendments to Rules of Evidence will be adopted in part and rejected in part, for the reasons explained in the accompanying memorandum.

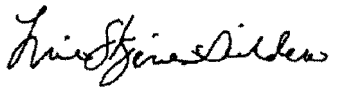
Based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the attached amendments to the Rules of Evidence be, and the same are, prescribed and promulgated to be effective as of January 1, 2019. The rules as promulgated will be effective in all cases filed on or after the effective date.

The advisory committee comments are included for convenience and do not reflect court approval of the statements made therein.

Dated: November 16, 2018

BY THE COURT:



Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

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MEMORANDUM

PER CURIAM.

The Supreme Court Advisory Committee for the Rules of Evidence has, in recent years, monitored, studied, and evaluated issues regarding the admissibility of evidence in three general categories. First, the committee considered procedural and substantive issues regarding the admissibility of evidence of "another crime, wrong, or act." *See* Minn. R. Evid. 404(b). Second, the committee considered the need for a rule that addresses the impact of waiver and inadvertent disclosure on communications otherwise protected by the attorney-client privilege or work-product doctrine. Third, the committee conducted research and studied the standards that govern the admissibility of expert testimony. *See* Minn. R. Evid. 702. In February 2018, the committee filed a report and recommendations regarding proposed amendments to Rules 404(b) and 702, and its recommendation to adopt a new rule to govern disclosures subject to the attorney-client privilege and work-product doctrine.[1]

We opened a public-comment period, and received seven written comments. We

[1] The committee also recommended amendments to Minn. R. Evid. 1101, which are stylistic and intended only to clarify the rule. There were no comments regarding this recommendation, and we agree that the committee's proposed amendments eliminate redundant language without altering existing law. Thus, the amendments to this rule are adopted.

also held a public hearing, at which representatives of four organizations, in addition to the committee chair, spoke. We have thoroughly studied the committee's recommendations, and carefully considered the comments and input provided in the public-comment period and at the public hearing.[2] Based on that review, we reach the following conclusions.

First, we agree with the committee's recommendation to adopt a specific rule to govern the disclosure of information covered by the attorney-client privilege or work-product doctrine. Minnesota Statutes § 595.02, subd. 1(b) (2016) states that an attorney "cannot, without the consent of the attorney's client," testify about "any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty . . . ." *See also* Minn. Stat. § 481.06(5) (2016) (commanding attorneys to "keep inviolate the confidences of" their clients). The statutes that govern privilege and witness competency are silent, however, on whether the attorney-client privilege can be waived without client consent, and, if so, the effect of such a waiver. Further, neither statute addresses the attorney-work-product doctrine. *See, e.g., O'Connor v. Johnson*, 287 N.W.2d 400, 403 (Minn. 1979) (discussing the development of the work-product doctrine, which is "distinct from and broader than the attorney-client privilege").

The attorney-client privilege can be waived by explicit consent, by implication, or even inadvertently. *See, e.g., State v. Walen*, 563 N.W.2d 742, 752 (Minn. 1997)

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[2] After the hearing, letters were sent to members of the court regarding the respective positions of some organizations to the committee's recommended amendments. As those letters were not filed with the Clerk of the Appellate Courts, *see, e.g.*, Minn. R. Civ. App. P. 125.02 (requiring documents to "be filed with the clerk of the appellate courts at the time of service or immediately thereafter"), and were submitted after the public comment period closed, we have not considered those post-hearing submissions.

(recognizing that "[o]ne type of implicit waiver occurs" when, as contemplated in the Minnesota Rules of Professional Conduct, an attorney reveals confidential communications "necessary 'to defend the lawyer or employees or associates against an accusation of wrongful conduct' " (quoting Minn. R. Prof. Cond. 1.6(b)(5))); *Schwartz v. Wenger*, 124 N.W.2d 489, 492 (Minn. 1963) ("We are of the opinion that where the attorney and client have chosen a public place in which to discuss matters pertaining to their professional relationship, and a third person overhears their conversation without resorting to surreptitious methods, they are deemed to have waived the privilege they might otherwise have enjoyed in so far as the testimony of the third person is concerned."); *State v. Madigan*, 68 N.W. 179, 180 (Minn. 1896) ("[W]e think [the attorney-client] privilege may be waived either by the conduct or consent of the client."). A gap therefore exists between Minn. Stat. § 595.02, subd. 1(b), which precludes testimony by an attorney only in certain instances, and our precedent governing waiver of the privilege. The committee's recommendation provides a rule that eliminates this gap, addresses the separate work-product doctrine, explains waiver and inadvertent disclosure, and clarifies the consequences of a waiver. In this respect, then, the committee's proposed amendment supplements, but does not supplant, existing law. The committee wisely recommended that a rule be adopted to address these issues, and we agree that such a rule is likely to provide beneficial guidance to the district courts and parties.

At the same time, some provisions in the committee's recommended rule that are drawn from Fed. R. Evid. 502 do not mesh well with state-court practice and may not be applicable in proceedings held outside the judicial branch. *Cf.* Minn. Stat. §§ 14.60, subd. 1

(2016) (requiring agencies in contested case hearings to "give effect to the rules of privilege recognized by law"); 176.411, subd. 1 (2016) (stating that, when making an investigation or conducting a hearing, workers' compensation judges are "bound neither by the common law or statutory rules of evidence"). Thus, while we agree that adopting a specific privilege-waiver rule is prudent, we limit Rule 502 as adopted here to the judicial proceedings over which we exercise the responsibility to establish rules that govern the admission of evidence. *See State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983) (explaining that we "[i]nherently . . . have the power to establish rules of evidence"); *see also* Minn. Stat. § 480.0591, subd. 1 (2016) ("The Supreme Court may promulgate rules of evidence regulating all evidentiary matters in civil and criminal actions in all courts of the state.").

Second, we agree that Rule 404(b) will benefit from greater clarity in the notice that must be provided when the prosecutor intends to offer other-crimes evidence. *See* Minn. R. Evid. 404(b) (requiring the prosecutor to "give[] notice of its intent to admit [other-crimes] evidence consistent with the rules of criminal procedure"). The committee's recommended *procedural* amendments enhance this prosecutorial notice by requiring the disclosure of specific information regarding the proposed evidence, which in turn will facilitate consideration of the admissibility issue by the parties and the court. We therefore adopt the amendments to Rule 404(b) that clarify and enhance the notice provided by the prosecutor.

But we reach a different conclusion with respect to the committee's recommended *substantive* amendments to Rule 404, which aim to articulate and distinguish between evidence of a common scheme or plan and propensity evidence. We recognize that the

committee's recommended amendments are intended to respond to the points made in the concurring opinion in *State v. Griffin*, 887 N.W.2d 257, 266 (Minn. 2016) (Stras, J., concurring) (agreeing with the court's decision to uphold the district court's admission of other-crimes evidence, but suggesting that the advisory committee should "fix" a "textual conflict" in the rule). The committee's recommended amendments focus only on "common-scheme-or-plan" evidence, leaving unaddressed other *Spreigl* evidence. *See State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997) (explaining that "[e]vidence of a defendant's other crimes, wrongs, or acts" is "referred to as '*Spreigl*' evidence"); *see also State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

In our view, by focusing its proposed amendments only on common-scheme-or-plan evidence, the committee's recommended amendments may introduce confusion into the law. For example, the recommended amendments do not address the standard we established in *State v. Wermerskirchen* for admitting other-crimes evidence, *see* 497 N.W.2d 235, 241–42 (Minn. 1993) (addressing the admissibility of other-crimes evidence that it is "highly relevant" to establishing the occurrence of a crime when a defense of fabrication or mistaken perception is asserted), and do not address the admissibility of evidence of domestic conduct, *see* Minn. Stat. § 634.20 (2016). Arguably, then, the recommended amendments would overrule *Wermerskirchen* and introduce a potential conflict with section 634.20. Indeed, the public comments acknowledged that the proposed amendment to Rule 404 was at least a "retreat" from *Wermerskirchen.* Further, as the committee acknowledged in its report, the interest in proposing a change to the rule was not unanimous and the recommended amendments were the subject of extensive

debate. In the absence of a compelling case that district courts are admitting evidence that should be excluded under Rule 404 as it now exists, we are reluctant to overrule our precedent or create a conflict with a separate statutory standard through a rule amendment. Thus, we decline to adopt the committee's substantive amendments to Rule 404.[3]

Third, for similar reasons, we decline to adopt the recommended amendments to Rule 702, which governs the admissibility of expert testimony regarding "scientific, technical, or other specialized knowledge." Minn. R. Evid. 702. The committee recommended amendments to Rule 702 to clarify the "framework for assessing the admissibility of expert testimony," using a multifactor test found in the Uniform Rules of Evidence. The committee also offered the proposed amendments as a better match with the approach the committee discerned in our recent decisions that have addressed the admissibility of expert evidence under Rule 702. *See, e.g., Doe v. Archdiocese of Saint Paul*, 817 N.W.2d 150, 164–65 (Minn. 2012) (explaining the "three parts" of Rule 702 that "all expert testimony must satisfy" to be admitted, along with "the fourth part," the *Frye-Mack* standard, that applies only "if the testimony involves a novel scientific theory").

The committee disclaims any intent to adopt the standard used in federal courts, *see Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), but acknowledges that some members of the committee concluded that the proposed amendment "effectively adopts" that standard. Further, although the committee aimed only to clarify the rule and provide

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[3] As a result of this decision, we did not include the committee's advisory comment in this order because as proposed, that comment primarily addressed the "common-plan" issue presented by the concurring opinion in *Griffin*. We invite the committee to consider an alternative advisory comment that can be included with Rule 404 as amended by this order.

language that offered helpful guidance, it acknowledged that the proposed changes to Rule 702 would be "controversial" as reflected at least in part by the "spirited" debate had in the committee.

We rejected the *Daubert* standard in *Goeb v. Tharaldson.* 615 N.W.2d 800, 814 (Minn. 2000) (stating that "we reaffirm our adherence to the *Frye-Mack* standard and reject *Daubert*"). We have continued to apply the *Frye-Mack* standard, *see Doe*, 817 N.W.2d at 164–65; *State v. Loving*, 775 N.W.2d 872, 877–79 (Minn. 2009) (considering a challenge to expert testimony regarding gunshot residue under the *Frye-Mack* standard), and have not suggested that we are ready to reject that standard or that Rule 702 in its current form makes the standard difficult to apply. Yet the public comments view the committee's proposed rule as an effective adoption of the *Daubert* standard. As noted above with respect to the proposed amendments to Rule 404, we are reluctant to overrule our precedent by means of a rule amendment, particularly when the proposed amendment is controversial and unsupported by compelling evidence of a need for a change.

We recognize and appreciate that the committee devoted careful and substantial time to the recommendations regarding Rules 404 and 702. We endorse the comments and suggestions made by the committee and in the public comments regarding the value of additional training on these admissibility issues. Ultimately, however, we conclude that these rules must be read in light of the guidance provided by our decisions on admissibility issues, rather than amending the rules to overrule, retreat from, or blur the lines established by that guidance.

CONCURENCE & DISSENT

THISSEN, Justice (concurring in part, dissenting in part).

I concur with the court's decision to adopt the proposed amendments to Rule 1101, adopt some though not all of the proposed amendments to Rule 502, and reject the proposed amendments to Rule 702. I also agree with the procedural amendment to Rule 404. But I respectfully dissent from the court's decision to refuse to adopt the substantive changes that the Supreme Court Advisory Committee on the Rules of Evidence proposed to Minn. R. Evid. 404.

Rule 404(b)(1) states the general rule that "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Over a century ago, Wigmore explained the danger of evidence of past crimes, wrongs, or acts:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of the crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.

1 John Henry Wigmore, *A Treatise of the System of Evidence in Trials at Common Law*, § 194, at 233 (1904). This rule against the admission of so-called propensity evidence is foundational to a criminal-justice system premised on the idea that a person is presumed innocent until the State proves the person guilty, as well as the basic due-process concept of fair notice. In short, we do not convict people of crimes for which they have not been charged or simply for being a bad person.

Rule 404(b) also lists acceptable bases for allowing evidence of other crimes, wrongs, or acts into evidence. Each of these rationales has a common-law history pre-dating the adoption of the Rules of Evidence in Minnesota. Importantly, as noted in the proposed committee comment, these are not exceptions to the prohibition on propensity evidence but rather proper "non-character uses of other acts evidence." Propensity evidence is not permissible under the plain text of Rule 404.[1]

Yet, as noted by Justice Stras in his concurrence in *State v. Griffin,* some of the additional rationales for admitting evidence of other crimes, wrongs, or acts into evidence have evolved in our case law to swallow the fundamental principle, set forth in Rule 404(b), that such other-acts evidence cannot be used to prove a defendant's propensity to commit

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[1] The *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* handles well the distinction between propensity evidence and the alternative uses of evidence for prior bad acts. It requires specific identification of the alternate purpose for admission and how the evidence may be used in a limited manner in pursuance of that purpose. The jury instruction provides as follows:

> You [are about to hear][have heard] evidence that the defendant (describe evidence the jury is about to hear or has heard). . . .
>
> If you find this evidence has been proved, then you may consider it to help you decide (describe purpose under 404(b) for which evidence has been admitted.) You should give it the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.
>
> Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that [he] [she] committed such an act in this case. You may not convict a person simply because you believe [he] [she] may have omitted similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence of prior acts only on the issue[s] stated above.

8th Cir. Crim. Jury Instr. § 2.08, at 38 (2017) (brackets and parentheses in original) (footnotes omitted).

a crime. 887 N.W.2d 257, 266–70 (Minn. 2016) (Stras, J., concurring). For instance, the rule allowing evidence of other bad acts to show a "plan" originated in the common law to allow evidence that the crime in question was one pre-planned step in a larger overall scheme or plan of criminal behavior. *Id.* at 267 & n.1. In other words, acts committed as part of a common scheme or plan are admissible because of the "intuitive underlying rationale" that "[a] person who has devised a plan is more likely to act consistently with that plan than is a person who does not have such a plan." David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 9.1, at 555 (2009). Over the years, the rule allowing admission of evidence of a bad act that is part of a common scheme has evolved and expanded in our jurisprudence to allow admission of other bad acts upon a showing that "a defendant's prior bad acts be 'markedly similar' to the acts with which he or she is charged . . . ." *Griffin*, 887 N.W.2d at 266 (Stras, J., concurring) (quoting *State v. Ness*, 707 N.W.2d 676, 689 (Minn. 2006)). That is nearly the definition of propensity evidence, and it should not be admissible. The committee's proposal to amend Rule 404 properly restores the common-plan doctrine to its more limited roots. It is an important step toward ensuring—in reality and in public perception—that criminal convictions are based on the charged crime and not on other crimes or for simply being a bad person.

I share the concerns of the court and public commenters that the proposed rule may be a retreat from the standard established in *State v. Wermerskirchen*, 497 N.W.2d 235, 241–42 (Minn. 1993). In that case, the court held that evidence of prior bad acts was

admissible to prove a person's propensity to commit sexual abuse to counter a defense of fabrication or mistake of perception by a victim of sexual abuse. There are strong public-policy arguments that an explicit exception in the Rules of Evidence allowing admission of prior-bad-acts evidence to prove propensity in sexual-assault and sexual-abuse cases should be adopted.[2] But if we adopt an exception allowing propensity evidence in such

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[2] Lynn Hecht Schafran, *Credibility in the Courts: Why is there a Gender Gap?*, Judges' J., Winter 1995, at 5; Christie I. Floyd, Note, *Admissibility of Prior Acts Evidence in Sexual Assault and Child Molestation Cases in Kentucky: A Proposed Solution that Recognizes Cultural Context*, 38 Brandeis L.J. 133 (1999) (arguing Kentucky should adopt such an exception); Jessica D. Khan, Note, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 Vill. L. Rev. 641 (2007) (arguing Pennsylvania should adopt such an exception); Tamara Larsen, Comment, *Sexual Violence is Unique: Why Evidence of Other Crimes Should Be Admissible in Sexual Assault and Child Molestation Cases*, 29 Hamline L. Rev. 177, 192–202 (2006) (laying out the "unique nature of crimes involving sexual violence and victim credibility"); Joyce R. Lombardi, Comment, *Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses,* 34 U. Balt. L. Rev. 103, 117–20 (2004) (arguing Maryland should adopt such an exception); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient,"* 57 U. Pitt. L. Rev. 107 (1995) (defending federal Rule 413); *But see* Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (1995), 159 F.R.D. 51 (urging "Congress to reconsider its decision on the policy questions underlying the new rules"); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. Cin. L. Rev. 795 (2013) (arguing "that rulemakers should look to the disciplines engaged in the empirical study of perpetrator behavior before asserting notions of deviance and recidivism to justify radical changes to evidence law"); G. Adam Cossey, Comment, *A Dangerous Leap: The Admission of Prior Offenses in Sexual-Assault and Child Molestation Cases in Arkansas*, 61 Ark. L. Rev. 107 (2008) (arguing that, because of federal Rules 413–15, "Rule 404 provides little to no protection for sex-crimes defendants). *See also* Joseph R. Biden, Jr., U.S. Senate Judiciary Committee, *The Response to Rape: Detours on the Road to Equal Justice* (1993) (discussing "the causes and effects of violence against women"); Jan Jordan, *Beyond Belief? Police, Rape and Women's Credibility*, 4 Criminology & Crim. Just. 29 (2004) (reviewing "issues concerning perceptions of women's credibility in the context of police responses to sexual assault

cases, it should be done explicitly rather than by attempting to fit a "propensity" peg into a "non-character use of evidence" hole. *See, e.g.*, Fed. R. Evid. 413–15 (providing explicit exceptions for admitting propensity evidence in sexual-assault and sexual-molestation cases); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 Minn. L. Rev. 529 (1994) (reconsidering the rule against other-crimes evidence as it relates to sex offenses); Michael H. Graham, *Other Crime, Wrong, or Act Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger on; Part II. Sexual Battery and Child Molestation*, 49 No. 5 Crim. L. Bull. Art. 9 (2013) (Rule 403 weighing of probative value and prejudicial impact in practice alleviates concerns about admissibility of prior-bad-acts evidence in criminal-sexual-conduct and sexual-abuse cases); Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 Am. J. Crim. L. 327, 374–76 (2012) (proposing an alternative exception for admission of propensity evidence in child sexual-abuse cases).

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complainants"); Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321 (2015) (reviewing "challenges to state rules of evidence that permit the introduction of evidence of a defendant's prior sexual misconduct"); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions,* 24 U.C. Davis L. Rev. 1013 (1991) (discussing "rape myths . . . [and] their effect on judicial and juror attitudes and decision-making in rape prosecutions"); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. Pa. L. Rev. 1 (2017) (describing the "credibility discount," that is, "the legal rules that once formally embedded skepticism of rape complaints, and . . . [the] contemporary outlet for this skepticism in police and prosecutorial responses to sexual violence").

HUDSON, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Thissen

AMENDMENTS TO THE RULES OF EVIDENCE

[*Note: Unless otherwise indicated, in the following amendments, deletions are indicated by a line drawn through the words and additions are indicated by a line drawn under the words.*]

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

* * *

(b) Other crimes, wrongs, or acts.

(1) Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a criminal prosecution, such evidence shall not be admitted unless ~~(1)~~ the prosecutor, consistent with the rules of criminal procedure, gives notice of its intent to offer ~~admit~~ the evidence. The notice must include a summary of the evidence and the specific purpose(s) for which the evidence will be offered. ~~consistent with the rules of criminal procedure; (2) the prosecutor clearly indicates what the evidence will be offered to prove; (3)~~ Such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait; (b) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; ~~(4) the evidence is relevant to the prosecutor's case;~~ and (c~~5~~) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by rule 412.

[*Note: Because the following rule is entirely new, no additions or deletions are noted in this rule.*]

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a State Court Proceeding; Scope of a Waiver. When the disclosure is made in a state court proceeding and waives the attorney-client privilege or

work-product protection, the waiver extends to an undisclosed communication or information in a state court proceeding only if:

(1) the waiver is intentional;

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

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a state court proceeding, the disclosure does not operate as a waiver 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 Minnesota Rule of Civil Procedure 26.02(f)(2).

(c) Controlling Effect of a Court Order. A state 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 state court proceeding.

(d) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a state proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(e) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

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

Committee Comment -- 2018

Rule 502 is modeled closely on Fed. R. Evid. 502. Consistent with Minn. Stat. § 595.02, subd. 1(b), and § 480.0591, subd. 6(1) and (5), this rule is not meant to alter Minnesota law, but to clarify it. In its note to the federal rule, the Supreme Court Advisory Committee explained:

> *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....*

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-

product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

Rule 1101. Rules Applicable

(a) Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state.

~~(b) Rules inapplicable.~~(b) The rules other than those with respect to privileges do not apply in the following situations:

(1) ~~Preliminary questions of fact.~~ The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) ~~Grand jury.~~ Proceedings before grand juries.

(3) ~~Miscellaneous proceedings.~~ Proceedings for extradition or rendition; probable cause hearings; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt proceedings in which the court may act summarily.

Committee Comment–2018

The amendment eliminating the paragraph and clause headers in paragraph (b) is stylistic and is intended to eliminate redundant language, not to alter existing law.