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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing in opposition to the proposed revisions to Article V of the Federal Rules of Evidence. Without codifying the concepts of attorney-client privilege and work product immunity (an undertaking that I also believe is unnecessary) the Advisory Committee has proposed waiver provisions to modify principles that properly have been left to development through the courts under common law principles based on the equities of individual cases. This selective intervention in the common law evolutionary process of the attorney-client privilege is ill-advised for a number of reasons.

Proposed Rule 502 is (1) unnecessary because it is predominantly a codification of existing law in most jurisdictions; (2) unhelpful because it does not address the difficult issues that courts are having to address as the concept of attorney-client privilege and its elements evolve; and (3) inappropriate because (a) it is in conflict with fundamental principles of the common law attorney-client privilege that have never been codified, (b) it is a blatant acquiescence to the desires of the corporate world that has demonstrated no compelling need for legislatively interrupting the common law evolution of the limited principles it addresses, and (c) it unconstitutionally attempts to impose a federal procedural rule on state courts.

First, by codifying privilege rules and thereby wedding courts to specific language, the waiver provisions will retard the evolution of a privilege that has flourished under common law principles over the past thirty plus years. As I discuss in the attached article, P.R. Rice, *Back to the Future With Privileges: Abandon Codification, Not the Common Law*, 38 Loyola of L.A. L. Rev. 739 (2004), our unimpressive experience with codification, compared to the modification of privilege principles under the common law, is striking. Because common law evolution responds only to the equities of individual cases rather than the special interests of lobbying groups, and individual decisions are not binding on all courts (like codification decisions), evolution appears to occur at a much greater speed.

Relative to the individual provisions that have been proposed, all are basically

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codifications of positions that have been taken by a number of courts, and that are evolving at an acceptable rate to everyone but corporate clients. The provision in subsection (a) on the *scope of waiver* serves no purpose since the standard of "fairness" has always determined the scope of waiver. The considerable body of case law and current litigation surrounding this question centers on defining fairness in the context of each case, and this proposed rule in no way assists those determinations.

Judicial attitudes toward *inadvertent disclosures* have been positive throughout the country (in both state and federal courts). The body of case law in the states and the District of Columbia is explored in my state treatise, P.R. Rice, ATTORNEY-CLIENT PRIVILEGE: STATE LAW, §§ 9:70-77 (Rice Publishing 2006) (available on Westlaw). Comparable federal law is discussed in my federal treatise, P.R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, §§ 9:70-77 (West Group 2nd ed. 1999) (available on Westlaw). The proposed rule is little more than a codification of the test that has been universally followed with minimal variations. Therefore, little is furthered by the codification of a rule, and over time, for reasons discussed in my Loyola article, much may be retarded relative to its further evolution.

Limited waiver or *selective waiver* (the client making disclosures and desiring to limit its waiver to specific individuals or entities) has not received a favorable judicial response throughout the country (both state and federal courts) because the concept is inconsistent with the most fundamental principle of the attorney-client privilege – confidentiality. P.R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, §§ 9:87-93 (West Group 2nd ed. 1999). Nonetheless, the courts are accommodating corporations through protective orders, which accomplish the same goal, but with judicial oversight. *Id.* at § 9:92.

Limited or selective waiver also creates an interesting problem that has been neither mentioned in the Committee's Notes nor addressed in its proposals. After disclosures have been made to investigating governmental agencies, and those disclosures are used in enforcement proceedings against either the client or third parties, what happens to the privilege preserved by the proposed provision? Will the government not be permitted to use them? If not, what is the point of encouraging cooperation? If usable, after confidentiality has been destroyed through the initial disclosure, and then broadcast to the world in subsequent proceedings, can the privilege continue to survive? If it does survive, on what basis? Certainly not the existence of confidentiality that historically has been the foundation for this privilege. If it does not survive, why should the Advisory Committee create this labyrinth for a temporary preservation of the privilege?

Second, there is little reason for especially encouraging corporate cooperation with government agencies by recognizing the concept of selective or limited waiver. While encouraging cooperation with governmental agencies is certainly beneficial to the public interest, that interest is often no more compelling than cooperation among

adversaries in private litigation that dominates judicial dockets. In addition, the matters in controversy in many private cases, particularly those that are joined for pretrial discovery purposes under the Multi-District Litigation Act, may have far more at stake and greater implications for segments of society than matters investigated by the government. But even if a convincing argument could be made for cooperating in governmental investigations to the exclusion of private litigation, an existing remedy is available to corporations through a well-established body of law relating to protective orders that these proposals would codify in subsection (d). P.R. Rice, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES, § 11:20 (West Group 2nd ed. 1999) (available on Westlaw). Such protective orders were liberally used in the AT&T divestiture case for documents produced to both the government by AT&T and to AT&T by third parties.

Third, codification brings into play special interest groups whose economic and political power can have too great an influence. These waiver proposals exemplify this concern. Corporate interests reflected in proposals from the ABA and pressure on and through Congress have led to proposed revisions which are designed to accommodate corporate interests when such corporations are investigated by government agencies. These proposals are totally inconsistent with the concept of confidentiality that is being left for development under the common law. If the Advisory Committee is not ready to address the concept of confidentiality that is directly affected by these proposals, it should leave the concept of waiver to development through the judicial opinions, where confidentiality is currently evolving. *See* P.R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. Rev. 101 (1998). Why should the desires of corporate clients be given this attention when individual clients have always faced the same dilemma relative to cooperating with government investigations by waiving privilege protections and, for example, turning state's evidence? Like individuals, if corporate interests want to preserve their privilege, they can refuse to cooperate and suffer the consequences if they are later prosecuted and found guilty.

Another problem is the power of the U.S. Judicial Conference or the U.S. Congress to make evidence rules that are binding on states. In subsection (b), the proposed rule states that inadvertent disclosures do not "operate as a waiver in a *state* or federal proceeding if the disclosure is . . . made in connection with federal litigation or federal administrative proceedings." (Emphasis added). Since the privilege is not a constitutional right, *see Fisher v. United States*, 425 U.S. 391, 401 (1976), how can states be bound by such a rule, particularly since evidence rules are only procedural? While it has been suggested that Congress could enact this provision under the Commerce Clause, it is debatable whether an attorney-client relationship, and the privilege that facilitates it, are "commerce" within the meaning of that clause. Even if it were broadly construed as commerce, it is not clear that Congress can or should pass such a provision if the concept of federalism has any teeth. If the law of any jurisdiction should be superior on the question of the attorney-client privilege, which is tied to the attorney-client relationship and the licensing of attorneys, both of which are controlled and regulated exclusively by

states, why should it not be state law?

These proposals infringe upon many fundamental principles of the attorney-client privilege and will have far reaching consequences beyond the limited interests that they are designed to serve. All of these matters have been, and continue to be, effectively dealt with by our judiciary on an individual case-by-case basis. Therefore, if the operating assumption of this Advisory Committee is that rules should not be codified or changed unless there are problems that need to be addressed ("if it ain't broke, don't fix it"), the Judicial Conference should not intervene in the current evolutionary process, and the common law of attorney-client privilege should not be disturbed.

Sincerely,

Paul R. Rice
Professor of Law
Director, Evidence Project

Enclosure