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"Dan Kohane"
<DDK@hurwitzfine.com>
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To <Rules_Comments@ao.uscourts.gov>
cc
bcc

Subject Request to testify * NYC FRE 502 Hearing

History:  This message has been replied to.

Please include me on the list of those testifying in NY for the FRE 502 hearings. Please advise time and location.

Many thanks.

Dan D. Kohane
President
Federation of Defense & Corporate Counsel
Hurwitz & Fine, P.C.
1300 Liberty Building
Buffalo, NY 14202
Phone: 716.849.8942
Fax: 716.855.0874
E-Mail: ddk@hurwitzfine.com
H&F Website: www.hurwitzfine.com

Federation of Defense & Corporate Counsel



Comments to the Committee on Practice and Procedure
of the
Judicial Conference of the United States

Proposed Revisions to Rule 502

January 29, 2007

Submitted by

**Dan D. Kohane
President**

**Federation of Defense & Corporate Counsel
Hurwitz & Fine, P.C.
1300 Liberty Building
Buffalo, NY 14202
Phone: 716.849.8942
Fax: 716.855-0874**

ddk@hurwitzfine.com

I. The FDCC Generally Supports the Rules Committee Recommendations, with the Exception of the “Selective Waiver” Provisions

The Federation of Defense & Corporate Counsel (FDCC) is pleased to submit these comments to the Advisory Committee on Evidence Rules (the “Committee”) regarding proposals to amend Federal Rule of Evidence 502. The FDCC is an organization of some 1,300 civil defense counsel, corporate attorneys and insurance claims professionals generally representing the interests of those who are sued in civil litigation. We compliment the Committee on the work it has undertaken to strengthen this Rule and, with the exception of proposed Rule change for 502(c) which relates to selective waiver, are in general support of the proposals.

The FDCC is strongly supportive of doing whatever is possible to strengthen and protect the attorney-client privilege and other litigation privileges. We support both federal and state legislation and rules that recognize the historic importance of the long protected and historically guaranteed rights offered our citizenry to rely upon confidential communications with their attorneys and protect documents which are prepared for litigation or comprise attorney work-product.

Gaining clarity and uniformity on the state and federal level is important and leads to consistency and predictability. However, we join with the Lawyers for Civil Justice in advancing the argument that selective waiver does not serve to protect the attorney-client privilege or attorney work-product and, in fact, undermines these privileges.

II. The Importance of Extending Rule 502 Protection to State Courts

Consistency in application is a critical component of protected privileges. An attempt to protect documents from disclosure, or, an inadvertent disclosure in one forum should be treated the same in any other jurisdiction. Treating parties differently in state and federal forums only

puts these privileges in jeopardy and provides inconsistent guidance to attorneys and clients alike.

III. Inadvertent Disclosure of Privileged Information Should Not Operate to Waive the Privileges Protected by Federal or State Rules

Particularly in an age of electronic discovery of significant volumes of data and documents, parties are bound to accidentally disclose materials which are protected by the attorney-client, work-product or other litigation privileges, despite all efforts to avoid doing so. The FDCC supports the Rule changes which would maintain the privileges which attach to those documents inadvertently disclosed.

The present version of the Proposed Amendment would provide that a “voluntary disclosure ... not operate as a waiver if ... the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings – and if the holder of the privilege ... took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error.”

We have heard from more than one member of our organization of *horror stories* associated with inadvertent disclosure. Corporations and their counsel, struggling to comply with short deadlines, are compelled to locate, secure and produce thousands of documents, many of which have not yet been screened for privilege or have been given only cursory review. Using document filters and “people on the ground,” fair attempts are made to identify documents which are privileged so as to produce a privilege log. However, a document or a number of documents or a classification of documents, slip through despite best efforts, under the time constraints provided, to prevent that disclosure. Once discovered, the corporation and its counsel immediately notify the opposing side of the error and seek to retrieve those documents. Are the

interests of justice served by not allowing the error to be corrected? We think not and support Rules changes that would protect the privilege here.

We join with LCJ in suggesting that the term “precautions” is unclear and recommend other, less pejorative words, to describe the efforts made by the privilege owner.

IV. The FDCC Opposes Rules Changes Authorizing “Selective Waiver”

Respectfully, the FDCC does not subscribe to the view that permitting selective waiver of privilege protects the long-protected privileges by common law and statute. Instead, we believe that permitting selective waiver adds unacceptable levels of uncertainty to disclosure of information that has been traditionally protected.

We oppose policies, such as those adopted in the *Thompson Memorandum* which sanctions federal prosecutors to compel companies, under inordinate and unfair pressure, to release privileged information or communication. To the extent that Deputy Attorney General Paul McNulty’s changes to that approach, announced in mid-December, continue to permit such pressures to be placed, our views remain unaltered.

The Federation of Defense & Corporate Counsel does not believe that the current proposal protects the privileges. To the contrary, a selective waiver approach would encourage waiver and underscore the protocols which lead to a *forced* sacrifice of protected materials and communication.

V. Conclusion

The FDCC appreciates the fine and careful work being undertaken by the Committee and thanks the Committee for this opportunity to present comments. We urge the Committee to continue to focus on the importance of litigation and attorney-client privileges as an essential element in our system of justice in America.