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February 15, 2007

**VIA E-MAIL AND UNITED STATES MAIL**

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

06 - EV - 005

Re: Comments On Subparts (a) And (b) Of Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

We are writing to comment on subparts (a) and (b) of proposed Federal Rule of Evidence 502. We practice in the Jones Day law firm's Cleveland office and have been involved in privilege-related issues for many years in many jurisdictions. The views expressed here are our views and not necessarily those of our firm or our firm's clients.

Proposed Fed. R. Evid. 502(a) and (b) codify the majority federal common law rules regarding (a) when disclosing communications protected by the attorney-client privilege and work product protection creates a waiver extending to other privileged or protected communications concerning the same "subject matter;"[1] and (b) the circumstances under which

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[1] Many circuits have common law subject matter waiver rules under which waiver of the attorney-client privilege extends to additional privileged communications beyond those actually disclosed only when "fairness" requires that result. *E.g., In re Keeper of the Records, XYZ Corp.*, 348 F.3d 16, 24 (1st Cir. 2003); *In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000) ("[w]hether fairness requires disclosure has been decided by courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted"). Implied "waivers are almost invariably premised on fairness concerns" and "extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter." *In re Keeper of the Records, XYZ Corp.*, 348 F.3d at 24 (citations omitted). The D.C. Circuit may have a more rigid subject matter waiver rule, yet even there "[c]ourts ... retain discretion not to impose full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it." *In re Sealed Case*, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982) (citations omitted).

For the work product protection, proposed Fed. R. Evid. 502(a) articulates what appears to be the universal rule that "'broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3).'" *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (citation omitted); *see In re Martin Marietta Corp.*,

inadvertent disclosures of privileged or protected communications waive otherwise applicable claims of privilege or protection.[2] In our view, the common law substantive waiver rules that proposed Fed. R. Evid. 502(a) and (b) codify are the better-reasoned approaches. We are concerned, however, that codifying those common law substantive rules as currently articulated in proposed Fed. R. Evid. 502(a) and (b) may create ambiguities, be misinterpreted, or result in unintended consequences.

First, and although proposed Fed. R. Evid. 502(a) begins with the clause "[i]n federal proceedings," it is not clear whether the proposed rule applies to disclosures of privileged or protected communications in state court proceedings. One interpretation is that "[i]n federal proceedings" means both that the rule applies and the disclosure must have occurred "[i]n federal proceedings." Another interpretation is that, wherever the disclosure occurred, the rule governs whether a disclosure of privileged or protected communications results in a "subject matter" waiver "[i]n federal proceedings." Whatever the Committee's view on whether proposed Fed. R. Evid. 502(a) applies to disclosures that occur in state court proceedings, we suggest that the issue be expressly addressed. Along the same lines, and since document productions often occur simultaneously in federal and state court proceedings, it would be helpful if the Committee explained how both proposed Fed. R. Evid. 502 (a) and (b) apply in those circumstances.

Second, proposed Fed. R. Evid. 502(a) does not bar a state court from finding that, for purposes of the state court proceeding, a disclosure in a federal proceeding results in a subject matter waiver. In this respect, proposed Fed. R. Evid. 502(a) differs from proposed Fed. R. Evid. 502(b), which prevents certain inadvertent disclosures in federal proceedings from resulting in a waiver in either federal or state court proceedings. Based on the controlling effect that federal courts orders would have in state court proceedings under proposed Fed. R. Evid. 502(d), we

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(continued...)

856 F.2d 619, 626 (4th Cir. 1988) (testimonial use resulted in subject matter waiver for ordinary work product, but did "not extend to opinion work product"), *cert. denied*, 490 U.S. 1011 (1989); *see also United States v. A.T.T.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (no waiver from disclosure of work product that was "not inconsistent with maintaining secrecy against opponents").

[2] The "inadvertent disclosure" waiver rule in proposed Fed. R. Evid. 502(b) reflects the majority common law rule. *E.g., Genentech, Inc. v. United States Int'l Trade Comm'n*, 122 F.3d 1409, 1415 (Fed. Cir. 1997) ("the district court found that [privilege-holder's] allegedly inadvertent disclosure was a waiver of privilege because [it] did not use adequate procedures to prevent disclosure"); *Wunderlich-Malec Sys. v. Eisenmann Corp.*, No. 05 C 04343, 2006 U.S. Dist. LEXIS 84889, *20 (N.D. Ill. Nov. 17, 2006) (district courts in the Seventh Circuit "have consistently employed the balancing approach to waiver in inadvertent disclosure cases"). As with the "subject matter" waiver rule, however, at least one circuit applies a "strict waiver" rule under which any inadvertent disclosure results in a waiver. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) ("the privilege is lost '"even if the disclosure is inadvertent"'") (citations omitted).

believe that proposed Fed. R. Evid. 502(a) should bar state courts from using disclosures in federal proceedings as grounds for subject matter waivers in state court proceedings. We suggest that the Committee consider and explain its views on this issue.

Third, while Fed. R. Evid. 101 and 1101 provide that the Federal Rules of Evidence apply only in federal proceedings, proposed Fed. R. Evid. 502(b) applies in state court proceedings by its terms. We suggest that the Committee make it clear that, notwithstanding the language of Fed. R. Evid. 101 and 1101, proposed Fed. R. Evid. 502(b) may apply in state court proceedings under some circumstances.[3]

Fourth, proposed Fed. R. Evid. 502(b) applies to certain inadvertent disclosures "made in connection with *federal litigation or federal administrative proceedings*." (Italics added). It is not clear whether "federal litigation or federal administrative proceedings" are intended to be some subset of "federal proceeding[s]," which is the language used earlier in that sentence, the Committee Note to proposed Fed. R. Evid. 502(b), and proposed Fed. R. Evid. 502(a). For example, some might argue that federal grand jury proceedings are neither "federal litigation" nor "federal administrative proceedings," yet the Committee likely intended that proposed Fed. R. Evid. 502(b) apply to materials produced in federal grand jury proceedings. We suggest the Committee either replace the words "federal litigation or federal administrative proceedings" in proposed Fed. R. Evid. 502(b) with the words "federal proceedings" or, if that is not appropriate, explain the Committee's reasoning.

Fifth, some might argue that proposed Fed. R. Evid. 502(a) establishes a substantive waiver rule that, other than inadvertent disclosures that are addressed in proposed Fed. R. Evid. 502(b), all intentional disclosures of privileged or protected communications to third parties result in waiver.[4] Of course, many disclosures of privileged or protected communications do not result in waiver even as to the disclosed communications, such as compelled disclosures and disclosures to third parties with common legal interests. *See United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (compelled disclosure does not result in a waiver); *In re Regents of Univ. of Calif.*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (disclosure to entity with common interests did not result in waiver), *cert. denied*, 520 U.S. 1193 (1997); *see also United States v. A.T.T.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (disclosure of work product "not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege"). If, as the Committee Note strongly suggests, proposed Fed. R. Evid. 502(a) was not intended to

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[3] Depending on how the Committee resolves the immediately preceding concern, proposed Fed. R. Evid. 502(a) may also apply in state court proceedings in some contexts.

[4] For example, the Committee Note states that "[t]he rule is not intended to displace or modify federal common law concerning waiver of privilege or work product protection where no disclosure has been made." Some might argue based on this language that, when "disclosure has been made," a finding of waiver is required under the rule.

overturn other, well-established rules that some intentional disclosures of privileged or protected communications to third parties do not result in waiver, we suggest that be stated expressly.

Sixth, the interplay between Fed. R. Evid. 501 and proposed Fed. R. Evid. 502(a) and (b) in diversity actions may create uncertainty. Under Fed. R. Evid. 501, state attorney-client privilege law applies in diversity actions,[5] including state law regarding privilege waiver.[6] Some may argue that, in diversity actions, state attorney-client privilege waiver law is the "applicable law" that, under Fed. R. Evid. 502(f)(1), applies, rather than the privilege waiver rules in proposed Fed. R. Evid. 502(a) and (b). It is likely that the Committee intended that proposed Fed. R. Evid. 502(a) and (b) should provide the substantive privilege waiver law in all federal court proceedings, including diversity actions, and that they should supplant Fed. R. Evid. 501 and state attorney-client privilege law in this respect. If so, we suggest the Committee state that expressly.

We recognize that the issues set forth above are technical. Our experience, however, is that modern litigation involves huge document productions proceeding in multiple fora, often simultaneously. In that context, nearly everything that could happen does. If proposed Fed. R. Evid. 502(a) and (b) had been in effect over the past decade, we suspect that every one of the issues set forth above would have arisen at some point in one or more of our cases. Thus, however technical, our concerns are quite real.

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[5] Federal law relating to the work product protection applies in diversity actions. *See Frontier Ref. v. Gorman-Rupp Co.*, 136 F.3d 695, 703 n.10 (10th Cir. 1998) ("'[u]nlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3)'") (*quoting United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988)).

[6] *See In re Avantel, S.A.*, 343 F.3d 311, 323 (5th Cir. 2003) ("[b]ecause we invoke Texas privilege law in this diversity matter, we also employ Texas law regarding waiver of that privilege"); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) ("Nebraska law controls the issue of waiver of attorney-client privilege in this [diversity] case") (footnote omitted).

We thank you in advance for your consideration. Of course, we would be happy to provide any further detail or explanation you request.

Very truly yours,

David Booth Alden

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