

Via Email: Rules\_Comments@ao.uscourts.gov

06 - EV - 067

February 15, 2007

The Honorable Peter G. McCabe  
Secretary of the Committee on Rules  
of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

**Re: Proposed Federal Rule of Evidence 502(b)**

Dear Mr. McCabe:

On behalf of the American Bar Association (“ABA”) and its more than 400,000 members, I write to submit the ABA’s comments on the proposed amendments to Federal Rule of Evidence 502(b).<sup>1</sup> As Chair of the ABA Section of Litigation, I have been authorized to express the Association’s views on this important subject.

As you may know, in August 2006, the ABA adopted a recommendation sponsored by the Section of Litigation to articulate principles to “address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively ‘privilege’).” With the adoption of that recommendation, the principles have become formal ABA policy, embodied in Resolution 120D. For your convenience, a copy of that resolution and the related background Report is attached.<sup>2</sup> We applaud the Advisory Committee for undertaking consideration of these important issues and moving to bring consistency to the law to guide litigants and the courts. The following comments are intended to identify significant areas of disagreement between the ABA policy and the proposed Rule 502(b) and thus to identify those areas where the ABA policy would suggest a revision in the Committee’s approach.

As described in the Committee Notes, the proposed rule has two primary purposes: (1) to resolve disputes in the courts involving the effect of inadvertent disclosure and selective waiver; and (2) to

<sup>1</sup> The ABA also is submitting separate comments on other aspects of proposed Federal Rule of Evidence 502 (dealing with proposed new subsection on “Effect of Disclosure of Factual Summaries of Internal Investigations”) and separate comments on Federal Rule of Criminal Procedure 29. In addition, on January 29, 2007, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure.

<sup>2</sup> The “Recommendation” portion of Resolution 120D, but not the related background “Report,” constitutes official ABA policy.

address concerns that the cost of reviewing material to protect privilege/work product has become prohibitive, particularly where electronically stored information is involved.

According to the Committee Notes, “[t]he rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection.” The rule does not affect federal or state law that determines at the outset whether a document is privileged or protected; nor does it seek to “supplant applicable waiver doctrine generally.” The rule addresses only specific waivers that may arise as a result of disclosure.

The comments below focus specifically on proposed Rule 502(b), which addresses inadvertent disclosure of attorney-client privileged material.

### *The Proposed Two-Part Waiver Test*

Proposed Rule 502(b) sets forth a *two-part* test for determining whether an inadvertent disclosure of privileged materials will result in a waiver of the privilege or protection: such a disclosure “does not operate as a waiver in a state or federal proceeding if . . . the holder of the privilege or work product protection...[1] took reasonable precautions to prevent disclosure and [2] took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error . . . .”

The factors articulated in the proposed rule do not comport with ABA policy, as set forth in the attached Resolution 120D. That policy provides that waiver of privilege as a result of an inadvertent disclosure be determined under a *four-part* test, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error.

The first ABA factor – the reasonableness of the steps taken to avoid disclosure – is reflected in proposed Rule 502(b).

The second and third ABA factors – the scope of discovery and the extent of the inadvertent disclosure – conceivably could be construed as falling within the first factor. The reasonableness of the steps taken to protect against disclosure may depend in part on the size (or scope) of the production, and it may also affect the breadth or extent of the disclosures. We believe, however, that these are important factors bearing on waiver and that they should not be left to be “implied” into the rule by judicial interpretation. Interpretations can – and often do – differ from court to court, and there would be no assurance that all courts would interpret the “reasonableness of steps” to embrace the scope of the discovery in which the disclosure was made and the extent of the inadvertent disclosure.

The best way to ensure that these factors are considered by the courts would be to amend the proposal to explicitly identify them as factors that must be evaluated. This would have the benefit of ensuring consistency in the application of the test from jurisdiction to jurisdiction – one of the primary goals of both the proposed rule *and* the ABA policy. *See* ABA Resolution 120D,

paragraph 1 (“consistent rules [should] be established . . . to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of [privileged] materials”); and related background Report, page 3 (“There should be consistent rules and procedures”).

The fourth ABA factor – the interests of justice – does not appear at all in proposed Rule 502(b). We believe it should. Motions to determine waiver will present a myriad of facts and circumstances, and no listing of factors could anticipate them all. We think it is important for courts to be directed to consider relevant facts that may not fit (or fit neatly) into the other articulated factors but that, in fairness, may bear on the inquiry.

We recognize that explicitly granting courts discretion to make a determination that is consistent with the interests of fairness and justice may cut both ways. That is, it may empower courts to find waiver, in the interests of justice, where the other factors would not point toward a waiver. Conversely, it would permit courts to find no waiver where application of the other parts of the test would support a waiver. In either event, the court would be doing what we expect judges to do: adjudicate the rights and obligations of the parties in accordance with the dictates of fairness and justice. To the extent an open-ended “interest of justice” factor injects a measure of unpredictability into the calculus, we believe it is outweighed by the benefit gained by giving judges flexibility to adapt the rule to each set of unique circumstances presented.

#### **Action Required Following Discovery**

Our other concern with the proposed language of Rule 502(b) involves what is required of the producing party after the error is made. Again, the current proposal is inconsistent with the August 2006 ABA policy contained in attached Resolution 120D.

#### ***“ . . . knew or should have known of the disclosure ”***

Proposed Rule 502(b) requires the remedial steps to be taken after the producing party “knew or *should have known* of the disclosure” (emphasis added). This creates uncertainty and the potential for further dispute over when the producing party “should have known” of the production error.

In large document productions, particularly with the advent of “electronic discovery,” it may be months – even years – before the error is discovered, and determining when an error “should have been discovered” is inherently subjective. It will be fertile ground for litigation and will defeat the purpose of the rule: developing consistent standards to guide litigants and courts in resolving these issues.

The “should have known of the disclosure” standard unduly focuses on the time of production rather than the time when the mistake has been discovered. In one sense, all productions are voluntary acts. The purpose of the rule, however, is to give recognition to the fact that mistakes are made and some protection should be afforded for inadvertence. The “should have known” standard is an invitation to litigate the extent of inadvertence in every case and will destroy the purpose of the rule to provide predictable standards and meaningful protection from inadvertence.

The ABA policy provides that the party’s obligation to act is triggered when it *actually* discovers that a mistake has been made. Requiring action after *actual* knowledge would link the need for

action to a concrete event and would reduce the unpredictable element of subjectivity inherent in the “should have known” standard in the current draft.

We understand that there are those who believe a “should have known” standard better comports with the diligence required of counsel to take steps to preserve privileged information, and that not requiring some measure of diligence will reward the sloppy lawyer. We appreciate this concern but believe the sloppy lawyer will not be immune from waiver, because both the ABA policy and the draft rule take into account the reasonableness of the precautions taken to prevent disclosure.<sup>3</sup> In addition, the privilege belongs to the client. The concept of waiver ordinarily requires the knowing relinquishment of a right. Although the client is chargeable in most instances with counsel’s actions, the critical importance of the attorney-client privilege to our adversarial system of justice would suggest that punishing the client by deeming the privilege waived because of counsel’s inadvertence imposes too high a price.

Existing ABA policy also requires a lawyer to notify opposing counsel when the lawyer knows or has reason to believe that opposing counsel has inadvertently produced privileged material. This assumes that opposing counsel does not know that he or she has produced it (otherwise counsel presumably would have already asked to have it returned). The principle therefore applies regardless of whether opposing counsel “should have known” that he or she produced it.

***“reasonably prompt measures” to rectify the error***

The proposed rule would require the holder of the privilege to take “reasonably prompt measures” to rectify the error.<sup>4</sup> We believe this subjective test may cause more problems than it solves. Because it does not give parties or their counsel specific guidance on what they must do (and when they must do it) to avoid waiver, it is an invitation to the party who received the erroneously-produced documents to litigate whether the remedial steps taken by the disclosing party were both appropriate and “reasonably prompt.” Again, there may be further confusion created by arguments focusing on the delay from the actual production rather than from discovery of the mistake. The result will be to multiply disputes rather than minimize or eliminate them.

In contrast, the ABA policy provides an objective test that would provide greater certainty to the parties and engender fewer disputes: within a specified period of days after learning of the inadvertent production, the producing party should be required to raise the privileged status of the documents by simply giving notice to the opposing party that the materials are protected and amending its discovery responses to identify the materials and the privileges.

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<sup>3</sup> We also understand that the Committee has expressed concern that the “actual knowledge” standard would permit sloppy practitioners to ignore letters from the other side inquiring into whether particular documents were produced in error and then, later, claim a mistake was made. We believe that notice from the other side inquiring whether an error was made with respect to the production of particular documents is sufficient to create actual knowledge and that the note should so state.

<sup>4</sup> We assume that the term “holder of the privilege” is intended to encompass either the technical holder of the privilege (which is the client, in the case of the attorney-client privilege) or its counsel. It may be advisable to make that point explicitly in the definitional portion of the rule.

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The ABA policy does not specify the number of days and we believe that any of a number of reasonable time periods could be selected. Whatever time period is chosen, however, the important point is that the party knows precisely what it must do (give notice to its opposing party and amend its discovery responses) and when it must do it (within the specified period) to preserve its right to assert that the privilege survives the disclosure. This provision therefore would work well in conjunction with newly revised FRCP 26(b)(5)(B), which requires a party receiving notice of an inadvertent production of materials to sequester, return, or destroy the materials pending resolution of the claim of privilege by the courts.

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We appreciate the opportunity to provide our comments and we thank you for considering them. If you would like more information regarding the ABA's position on these issues, please contact me at (214) 939-5579.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kim J. Askew". The signature is fluid and somewhat stylized, with a large loop at the end.

Kim J. Askew  
Chair  
ABA Section of Litigation

Enclosure

## AMERICAN BAR ASSOCIATION

## ADOPTED BY THE HOUSE OF DELEGATES

August 7-8, 2006

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that consistent rules be established throughout the federal, state and territorial courts to address how the courts and counsel should resolve issues involving claims of inadvertent disclosure of materials protected by the attorney-client privilege or attorney work product doctrine (collectively "privilege").

FURTHER RESOLVED, That the American Bar Association recommends that relevant Federal Rules of Evidence and/or Federal Rules of Civil Procedure, and state rules be adopted or amended to provide as follows:

1) A producing party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials and the privileges. The period should commence when the party actually discovers the disclosure has been made, not from when the material was produced.

2) A party receiving notice that any inadvertently disclosed materials have been produced to it should be required to promptly return, sequester or destroy the specified materials and any copies and may not use or disclose the materials until the issue is resolved.

3) Specific grounds for testing the inadvertent disclosure should be set forth and should include the following general provisions:

A) The receiving party should be allowed to challenge the disclosing party's claim that the material is privileged.

B) The receiving party should be allowed to challenge the timeliness of the producing party's notice recalling the material on a claim of privilege.

C) The receiving party should be allowed to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege.

4) In deciding whether privilege has been waived, the court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (a) the reasonableness of the precautions taken to prevent inadvertent disclosure; (b) the scope of discovery; (c) the extent of the disclosure; and (d) whether the interests of justice would be served by relieving the party of its error.

## REPORT

### *Introduction*

Although courts, lawyers and the legal system try to avoid mistakes, they sometimes happen. There have always been situations where, for one reason or another, material or information that one party claims to be privileged is disclosed to the other side. Formal Opinion 05-437 of the American Bar Association's Standing Committee on Ethics and Professional Responsibility therefore takes the position that a lawyer who receives a document, and knows or reasonably should know that the document was inadvertently disclosed, should promptly notify the disclosing party to permit the sender to take some action to deal with the situation.

#### ***Discovery is increasingly subjecting parties to the risk of inadvertently disclosing privileged material***

Discovery has also always posed the risk of the inadvertent production of privileged material. With the advent of electronic discovery – encompassing exponentially more “documents” and electronically stored information – the problem has become more acute. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (in a case involving e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that this review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist on “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

#### ***There are no consistent rules or procedures to deal with inadvertent production of privilege material***

The issue is exacerbated because there is neither a consistent substantive rule nor a consistent procedural mechanism for resolving it. In general, the courts have taken three approaches.

A minority of jurisdictions take the position that any privilege is waived once the information has been disclosed, regardless of whether the disclosure was intentional or inadvertent.

Some other jurisdictions take the opposite position, holding that no waiver occurs unless the party intended to disclose the privileged material.

The third position, adopted by a majority of courts, is to consider all the circumstances of the disclosure to determine, on a case-by-case basis, whether the inadvertent disclosure has waived any privilege. In making this determination, these courts generally apply a multi-factor analysis that considers (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) whether the interests of justice would be served by relieving the party of its error.

Notwithstanding the varying approaches applied by the courts, ethical rules and opinions may impose a duty on the attorney receiving inadvertently disclosed privileged materials to notify the opposing party of the disclosure so the producing party can take remedial steps. Proposed federal rule changes will soon require attorneys to return or segregate these materials when notified by the adverse party until the court is able to rule on the question of waiver.

Because the courts have taken different positions on inadvertent disclosures, litigants who discover or are informed of an inadvertent disclosure may have little idea whether their privileges will continue to be enforced. Inadvertent disclosures are a recurring problem in litigation, especially in complex cases with expansive document production.

We believe that the better reasoned position is that a privilege should not ordinarily be deemed waived unless the waiver was knowing and voluntary. The attorney-client privilege and its companion, the work-product doctrine as codified in Fed. R. Civ. P. 26(b)(3), are too important to the legal system to permit an inadvertent act from overriding them.

### ***There should be consistent rules and procedures***

Courts, attorneys and parties presented with the issue of inadvertently disclosed privileged material should therefore (a) have clear, consistent rules to resolve the issue and (b) also have clear, consistent procedures to do so.

We therefore recommend that, where appropriate, the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure, along with their analogues in state rules of evidence or procedure, be amended to provide that a disclosing party may reassert its privileges by promptly notifying the other parties of the inadvertence of the disclosure and the privileges asserted. On receipt of this notice, the receiving parties must then promptly safeguard and make no further use of the inadvertently disclosed materials, but with the option of being able to then challenging the applicability of the privilege, the inadvertence of the disclosure, the timeliness of the notice, or the waiver of the privilege based on specified relevant factors.

### ***Background***

The ground rule for discovery in the federal courts is Federal Rule of Civil Procedure 26(b)(1): parties “may obtain discovery of any matter, not privileged, that is relevant to the claim or defense of any party . . . .”



Under Federal Rule of Evidence 501, privileges are “governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience,” subject to any requirements imposed by the Constitution, Congress, or the Supreme Court.

For cases where the “rule of decision” for a claim or defense is governed by a state law, Rule 501 requires the federal court to apply the evidentiary privilege as determined by the law of that state.

Fed. R. Civ. P. 26(b) and Fed. R. Evid. 501, however, provide no guidance to judges, attorneys or parties about (a) what materials are exempt from discovery because they are privileged, (b) what happens when privileged material is inadvertently produced or (c) what factors and procedures should be used to decide these issues. Instead of one rule, litigants must look to a body of often conflicting case law developed by the federal and state courts. Faced with the recurring issue of inadvertent disclosures, the courts have developed three general approaches to the problem. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

**First**, some jurisdictions say that an inadvertent disclosure does not waive a claim of privilege. Courts taking this approach generally reason that waiver is a question of intent, and that a truly inadvertent disclosure does not demonstrate the intent required for a true waiver of the privilege. *See, e.g., Redland Soccer Club, Inc. v. Department of Army*, 55 F.3d 827 (3d Cir. 1995); *Corey v. Norman, Hanson & Detroy*, 742 A.2d 933, 940-42 (Me. 1999); *Sterling v. Keidan*, 412 N.W.2d 255, 257-58 (Mich. Ct. App. 1987).

These courts also reason that the privilege belongs to the client, not the attorney, and therefore only the client can voluntarily waive a privilege. *E.g., Herbert v. Anderson*, 681 So.2d 1127, 1128-29 (La. Ct. App. 1991); *Leibel v. General Motors Corp.*, 646 N.W.2d 179, 185-86 (Mich. Ct. App. 2002); *Harold Sampson Children’s Trust v. Linda Gale Sampson 1979 Trust*, 679 N.W.2d 794, 796 (Wis. 2004). At least one state has adopted this “no waiver” approach by placing it directly into the general discovery rules. *See Tex. R. Civ. P. 193.3(d)* (production of material without intending to waive a claim of privilege does not waive the claim if the party amends its discovery responses to assert the privilege within ten days of discovering the production was made).

**Second**, a few courts take the opposite view, holding that even an inadvertent disclosure waives any privilege for the materials disclosed. The finding of waiver is an automatic and necessary result of the materials having been disclosed to an opposing party. *E.g., Ares-Sereno, Inc. v. Organon Int’l B.V.*, 160 F.R.D. 1, 4 (D. Mass. 1994); *FDIC v. Singh*, 140 F.R.D. 252, 253-54 (D. Me. 1992).

**Third**, the majority position (including most federal courts), is to consider all relevant circumstances in determining whether an inadvertent disclosure should result in the waiver of a privilege. Among other factors, these courts examine (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the amount of time taken to remedy the error; (3) the

scope of discovery; (4) the extent of the disclosures; and (5) whether the interests of justice would be served by relieving the party of its error. *See, e.g., Allread v. City of Grenada*, 988 F.2d 1425, 1433-34 (5th Cir. 1993) (governmental attorney-client privilege); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege); *see also Scott v. Glickman*, 199 F.R.D. 174 (E.D.N.C. 2001); *John Blair Communications, Inc. v. Reliance Capital Group, L.P.*, 182 App. Div. 578 (N.Y. Ct. App. 1992); *Dalen v. Ozite Corp.*, 594 N.E.2d 1365, 1371-72 (Ill. Ct. App. 1992).

The American Bar Association's Civil Discovery Standard 28 (August 2004) advises that "[t]he parties should consider stipulating in advance that the inadvertent disclosure of privileged information ordinarily should not be deemed a waiver of that information or of any information that may be derived from it." *See also Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents").

This kind of an agreement can bind only the parties to the agreement. If they want protection against non-parties, for example, in other litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore*, 232 F.R.D. 228, 238 (D.Md. 2005) ("it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Consistent with these principles, recent proposed amendments to the federal discovery rules, which most likely will go into effect on December 1, 2006, therefore encourage parties to discuss entering into agreements on inadvertent privilege waiver as part of early discovery planning and to have those agreements formalized by the Court in the initial scheduling order.

Where the parties do not enter into an agreement, the proposed amendments establish a procedure for the court to resolve claims of privilege after documents have been produced.

The amendments do require that a party that receives notice that the producing party is asserting a claim of privilege must "promptly return, sequester or destroy the specified information and any copies and may not use or disclose the information until the claim is resolved." A receiving party may then "promptly present the information to the Court under seal for a determination of the claim." The proposed amendments require that "[i]f the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it" and "[t]he producing party must preserve the information until the claim is resolved."

We laud these proposed amendments and believe they should be adopted.

General ethical principles also recognize that an attorney who receives privileged material may have an obligation to notify the producing party. Formal Opinion 05-437 of the ABA's Standing Committee on Ethics and Professional Responsibility recently reaffirmed that a lawyer who receives a document, and knows or reasonably should know that the document was inadvertently disclosed, should promptly notify the disclosing party to permit the sender to take remedial action to protect the privilege. Although Formal Opinion 05-437 does not address whether the disclosure waives privilege, it recognizes that inadvertent disclosures are not uncommon in litigation, and that an attorney or party who makes an inadvertent disclosures will usually have a remedy to limit any harm caused by the disclosure. *See also* Formal Op. 94-382 (requiring attorney to notify opposing counsel of receipt of privileged materials); Formal Op. 92-368 (same).

### *Proposed Amendments*

The Section of Litigation recommends that the Federal Rules of Evidence and/or the Federal Rules of Civil Procedure be amended in a fashion that would (i) allow a party to continue to assert privilege for inadvertently disclosed material, (ii) require the return of this material after a timely request to do so and (iii) provide a clear set of consistent factors to be used by the court in determining whether privilege has been waived by inadvertent disclosure.

### *Why Rule Amendments Are Called For*

Inadvertent disclosures are a real and recurring problem, particularly in this day and age of complex cases and discovery that often involves electronic information and/or significant volumes of documents. Even the most thorough screening may not prevent privileged material from slipping through the cracks in a document production. Accidental disclosures may occur for any number of understandable reasons, including (i) the failure to recognize that a communication involves an attorney, (ii) a client's mistaken inclusion of trade secret documents in a file of otherwise discoverable materials and (iii) copying or handling errors occurring after the producing attorney's review of the production documents.

Only a few courts have held that inadvertent disclosure automatically waives the client's privilege. This approach has been rejected by the overwhelming majority of courts, and rightly so. Ordinary waiver principles require that a party intentionally relinquish a known right, which is obviously not the case when a disclosure has been done inadvertently.

Most courts have therefore adopted a multi-step inquiry that considers all relevant circumstances and tends to lean in favor of preserving privilege. Part of this calculus properly includes an assessment of whether the party or counsel took reasonable steps to prevent the disclosure of privileged material. It also provides flexibility where protection of the privilege would lead to an unjust result. (We would note that the balancing-test approach is a default rule – one that the parties can modify in advance by agreement, something that is encouraged by both the ABA Civil Discovery Standards (August 2004) and the proposed amendments to the federal discovery rules.)

# 120D

The applicable rule or rules should have three major features:

*First*, a party should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of actually discovering the disclosure by notifying the other parties and amending its discovery responses to identify the materials and the privileges. The period should run from when the party actually discovers the disclosure has been made, not from when the material was produced. This is consistent with both (a) the policy underlying the privilege and (b) the normal rules of waiver that require an intentional (as opposed to inadvertent) relinquishment of a known right. At the same time, the specified window would require the producing party to act promptly to remedy the disclosure once it has been discovered.

*Second*, any inadvertently disclosed materials should have to be promptly returned to the party that produced them, or destroyed or sequestered, while the issue is being resolved. This “preservation” provision is necessary because some parties might object to a request to return inadvertently disclosed materials, arguing that they are not privileged or that any privilege has been waived. There should therefore be an affirmative obligation on all parties to return, destroy or sequester any disputed materials until the court can consider the applicability of the asserted privileges and whether the privilege has been waived.

*Third*, there should be specific grounds for testing the inadvertent disclosure.

One, the receiving party should be able to challenge the disclosing party’s claim that the material is privileged. (Having already seen the material, the receiving party should be in an excellent position to assess its privileged status.)

Two, the receiving party should also be able to challenge the timeliness of the producing party’s notice recalling the material on a claim of privilege.

Three, the receiving party should be able to assert that the circumstances surrounding the production or disclosure warrant a finding that the disclosing party has waived any claim of privilege. The court should apply the generally accepted multi-factor analysis followed by the majority of federal courts and many state courts that assesses (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of the disclosure; and (4) whether the interests of justice would be served by relieving the party of its error.

We would note, however, that we recommend omitting one of the factors some courts have considered – the amount of time taken to remedy the error – from this list. To provide clarity and certainty (and to comport with the policy underlying privilege and the normal rule of waiver), the sole test in terms of time should be whether the disclosing party has given notice of the inadvertent disclosure within a specified number of days of actually discovering it. If notice was given within this time, it is timely. If not, it is not timely, and the material should no longer be entitled to protection as privileged.

The proposed House of Delegates resolution also calls on the states to adopt analogous state rules so there will be consistency and predictability to this important recurring issue.

We would also note that some commentators have suggested that Congress, pursuant to its Commerce Clause powers, should adopt a nationwide rule that would apply in both federal and state courts. Given litigation has become increasingly “multi-state” and involves courts, parties and issues in more than one state, we would also applaud the adoption of a nationwide standard.

Brad D. Brian, Chair  
Section of Litigation  
August 2006

*Via Email:* Rules\_Comments@ao.uscourts.gov

February 15, 2007

The Honorable Peter G. McCabe  
Secretary of the Committee on Rules  
of Practice and Procedure  
Administrative Office of the United States Courts  
Washington, D.C. 20544

***Re: Proposed Federal Rule of Evidence 502 – Issues of Implied Waiver***

Dear Mr. McCabe:

On behalf of the American Bar Association (“ABA”) and its more than 410,000 members, I write to submit the ABA’s comments on one aspect of Proposed Federal Rule of Evidence Rule 502 (“FRE 502”) currently being considered by the Advisory Committee on Evidence Rules (the “Advisory Committee”) but not currently addressed by the current draft of the proposed rule: the threat of “implied waiver.”<sup>1</sup> The increasingly important function of internal corporate investigations is being seriously impaired by uncertainty regarding whether a purely factual report to an enforcement authority of the results of an investigation could constitute waiver, as to underlying communications and documents on which such report is based, of the attorney-client privilege or attorney work product protection (collectively, (the “Protections”). We believe that this issue of implied waiver is just as problematic as others addressed in FRE 502, and that it could properly be remedied there. The purpose of this letter is to provide suggested text for how the problem could be addressed. As Chair of the ABA Task Force on Attorney-Client Privilege (the “Task Force”),<sup>2</sup> I have been authorized to express the ABA’s views on these important issues.

The impact of implied waiver on internal investigations has come up in communications between the ABA and the Department of Justice. By letter dated May 2, 2006, the President of the ABA encouraged the Attorney General to revise the Justice Department’s corporate cooperation standards outlined in the so-called “Thompson Memorandum”<sup>3</sup> to cover, as one element of cooperation,

<sup>1</sup> The ABA also is submitting separate comments on proposed FRE 502(b) and on Federal Rule of Criminal Procedure 29. In addition, on January 29, 2007, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure.

<sup>2</sup> The activities of the Task Force are regularly reported at its website, which also provides a list of its Members, Liaisons, Advisers, and Staff: <http://www.abanet.org/buslaw/attorneyclient/>.

<sup>3</sup> Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

situations in which a company could provide purely factual information to the Department as long as doing so did not jeopardize the Protections.<sup>4</sup> That proposal was not accepted by the Department when it recently issued the McNulty Memorandum<sup>5</sup> to replace the Thompson Memorandum. We understand that at least one reason the Department of Justice elected not to do so was concern that attorneys would decline to provide such factual information on the basis that doing so might be held to constitute an implied waiver of the Protections with respect to underlying communications or documents. While we do not believe that is an analytically defensible basis for rejecting the proposed revision, it does highlight a point that falls within the scope of efforts regarding FRE 502: minimizing uncertainties with regard to the Protections.<sup>6</sup>

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<sup>4</sup> The rewrite offered by the ABA provided that prosecutors could reasonably consider the following in assessing cooperation:

1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine;
2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine;
3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation;
4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps;
5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine; and
6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation.

The ABA letter to Attorney General Gonzales dated May 2, 2006 and the attached suggested rewrite of the Thompson Memorandum are available at <http://www.abanet.org/poladv/documents/acprivgonz5206.pdf>.

<sup>5</sup> Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (December 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf). The McNulty Memorandum continues to allow prosecutors to request that companies and other organizations waive their attorney-client and/or work product protections so long as the prosecutors first receive approval from the applicable United States Attorney and, in some cases, additional high-level Departmental approval.

<sup>6</sup> Compare, e.g., *In re Woolworth Corporation Securities Class Action Litigation*, 1996 U.S. Dist. LEXIS 7773 (S.D.N.Y. June 7, 1996) [herein "*Woolworth*"], with *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996) [herein "*Kidder*"].

### Proposal

In that context, we urge the Advisory Committee to consider adding the following additional provision to FRE 502:

(x) EFFECT OF DISCLOSURE OF FACTUAL SUMMARIES OF INTERNAL INVESTIGATIONS.—

(1) IN GENERAL.—A covered disclosure shall constitute a waiver as to that document to the extent required under applicable law, but shall not constitute a waiver as to any other communication or document that remains undisclosed to any other party, of the attorney-client privilege or the protection against compelled disclosure of attorney work product, as to any person.

(2) COVERED DISCLOSURE.—In this [subsection], the term “covered disclosure” means the provision, whether orally or in writing, of factual information collected or generated in the course of an internal investigation conducted by an organization, or an attorney or other agent for such organization, to any other party. For these purposes, “factual information” shall not include any excerpt or quotation of a specific communication covered by the attorney-client privilege or a paraphrase of any such communication.

(3) OTHER PARTY.—In this [subsection], the term “other party” means a person who is not an authorized employee, representative, or agent of the organization providing the factual information.

(4) DISCRETION OF DISCLOSING PARTY.—A decision to make a covered disclosure under this subsection, and the content, extent and nature of any covered disclosure, are at the sole discretion of the party doing so and may not be compelled by any person or court based upon the provisions of this subsection. Without limiting the foregoing, no governmental authority may grant a benefit to a party making such disclosure, or withhold a benefit or impose a penalty or sanction based on the failure to do so, in any case where the covered disclosure would itself constitute (with respect to any person) a waiver as to the content thereof of the attorney-client privilege or the protection against compelled disclosure of attorney work product.

(5) EFFECT ON STATE LAW.—

(A) IN GENERAL.—Except as provided in subparagraph (B), nothing contained in this [subsection] shall be deemed to modify, negate, supersede, or preempt any state law on the attorney-client privilege or the protection against compelled disclosure of attorney work product. These provisions shall, however, be observed in all legal proceedings in which state law is applicable and does not prohibit the application of these provisions.

(B) DISCLOSURE TO FEDERAL GOVERNMENT.—In the case of a covered disclosure to the Federal Government in connection with its exercise of regulatory, investigative, or enforcement authority, this [subsection] shall preempt any inconsistent state law on the attorney-client privilege or the protection against compelled disclosure of attorney work product.

We should note that the Task Force began exploring this concept in the context of other potential federal legislative initiatives under consideration. The Task Force may well make additional refinements to this text for those purposes, but we would expect any such changes to be completed expeditiously, and possibly before the Advisory Committee meets in April to discuss comments on



FRE 502. Nonetheless, the Task Force has determined that it would be prudent for the ABA to submit the proposal in its current form within the deadline for public comment, rather than wait to do so in the context of the meeting of the Standing Committee on Rules of Practice and Procedure to be held in June.

### Commentary

We offer the following commentary on the proposal, primarily to illustrate the concepts set forth in it, but also for potential use by the Advisory Committee in preparing Commentary on this portion of FRE 502.

**Covered disclosure.** A covered disclosure can be made to any person, not just federal prosecutors. The disclosures in many of the most prominent implied waiver cases were made not only to the Securities and Exchange Commission,<sup>7</sup> the Internal Revenue Service,<sup>8</sup> Federal Energy Regulatory Commission,<sup>9</sup> and the Commodity Futures Trading Commission,<sup>10</sup> but also in many cases to the general public.<sup>11</sup> They also could be made to state government agencies, to quasi- or nongovernmental entities such as stock exchanges or the National Association of Securities Dealers, to auditors, or even to the news media. A principal goal of this proposal is not to restrict the flexibility of organizations to choose to whom, to what extent, or why to make disclosures. Instead, it is designed (i) to ensure that any possible implied waiver extends *only* to the facts thus provided and not to any underlying communications or documents and, at the same time, (ii) not to provide a basis for demanding disclosure of communications or documents that would otherwise be covered by the Protections.

**Factual information.** This phrase expressly excludes “any excerpt or quotation of a specific communication covered by the attorney-client privilege or a paraphrase of any such communication.” This limitation has several purposes:

- It is meant to codify cases like *Woolworth*<sup>12</sup> and *Natural Gas*<sup>13</sup> that have held disclosure of factual reports not to constitute implied waiver of underlying documents such as witness statements. Those cases, and this limitation, track Supreme Court cases drawing a distinction between facts, the disclosure of which may not waive the attorney-client

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<sup>7</sup> *Kidder*, *supra* note 6; see also *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993).

<sup>8</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>9</sup> See *In re Natural Gas Commodity Litigation*, 2005 U.S. Dist. LEXIS 11950 (S.D.N.Y. June 21, 2005); *aff'd*, 232 F.R.D. 208 (S.D.N.Y. 2005) [herein “*Natural Gas*”].

<sup>10</sup> *Id.*

<sup>11</sup> See *Woolworth* and *Kidder*, *supra* note 6.

<sup>12</sup> See note 6, *supra*, 1996 U.S. Dist. LEXIS at \*6-\*7.

<sup>13</sup> See note 9, *supra*, 232 F.R.D. at 212-13.

privilege or work product protection, and things like witness statements – or paraphrases of them – that may well be covered by the Protections.<sup>14</sup>

- It provides some limited protection to witnesses. Even though witnesses ought to be receiving “Corporate Miranda” warnings that the company may well waive the privilege regarding anything they say, this limitation would at least discourage disclosure of the substance of specific statements by specific individuals (because such disclosures would fall outside the proposal’s protections and possibly trigger implied waiver).

**Protected status of covered disclosures.** The proposal does not have any effect on whether the disclosure itself is privileged, leaving that to existing law in the relevant jurisdiction. This proposal takes no position on the issue, leaving it up to submitting organizations to decide whether they want to try and maintain some sort of protection (*e.g.*, via a confidentiality agreement) or instead to make the disclosure public (as many in relevant cases did<sup>15</sup>). Very significantly, however, this proposal does ensure that, even if the covered disclosure is itself held to be unprotected, that waiver cannot extend to other communications or documents that were not disclosed to any other party.

**Avoidance of a Cooperation “Litmus Test.”** Many observers have expressed concern that any effort that would allow protection for information disclosed to investigative, regulatory, or enforcement agencies might serve as an incentive for those agencies to demand delivery of information in a covered disclosure and use that as a “litmus test” for assessing “cooperation.” Paragraph (4) is intended to militate against that result.

**Preemption.** The proposal preempts state law in the case of disclosures “to the Federal Government in connection with its exercise of regulatory, investigative, or enforcement authority.” In all other disclosures, the proposal would not preempt state law, but would operate in any proceeding in which state law was applicable and would not prohibit its application. This bifurcated approach is modeled on proposed FRE 502(d).

### Conclusion

We are aware that the “selective waiver” provision of proposed FRE 502(c) has not been recommended by the Advisory Committee and instead has been submitted without recommendation to elicit public comment. Although the ABA has not taken a position on that proposal, we believe

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<sup>14</sup> *Hickman v. Taylor* drew a distinction between (i) responses to interrogatories, which the Court said were proper to compel and would not be considered work product, even if they were based on interviews of witnesses conducted by counsel, and (ii) counsel’s mental impressions or memoranda regarding oral statements made by witnesses, which the Court would not allow to be compelled. *See* 329 U.S. 495, 508-512 (1947). The Court in *Upjohn* quoted from this discussion when it contrasted “the underlying facts by those who communicated with the attorney,” which were not privileged, with “oral statements made by witnesses,” which it said were “the sort of material the draftsmen of [FRCP 26] had in mind” when they created the special standard protecting work product revealing “mental impressions, conclusions, opinions or legal theories . . . .” *See* 449 U.S. at 395-402.

<sup>15</sup> *See* note 11, *supra*.

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that the approach set forth in our implied waiver proposal would achieve many of the same potential benefits as selective waiver but with far less controversy.

We appreciate the opportunity to provide our comments and thank the Advisory Committee for considering our proposal. If there are any questions regarding the ABA's position, please contact me at (404) 527-4650 or R. Larson Frisby of the ABA Governmental Office at (202) 662-1098.

Sincerely,

A handwritten signature in black ink that reads "R. William Ide, III". The signature is written in a cursive style with a large, stylized initial "R" and a small "III" at the end.

R. William Ide, III, Chair  
ABA Task Force on Attorney-Client Privilege

cc: All Members and Liaisons of the ABA Task Force on Attorney-Client Privilege  
R. Larson Frisby, ABA Governmental Affairs Office