06 - EV-072

Peter G. Mc Cabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington D.C. 20544

February 8, 2007

re: Proposed Rule 502, F.R.E.

Dear Mr. Mc Cabe:

The Rules Advisory Committee has published for public comment Rule 502, Federal Rules of Evidence. Please accept the attached comments in response to the proposed Rule.

I thank you for your consideration.

Sincerely,

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COMMENTS

We oppose several of the Committee's provisions advanced in the proposed rule. However, we believe some fundamental bases of that opposition can be stated generally.

First, we believe the proposed rule takes too parochial of an approach, focusing on problems in large-scale litigation and investigations. However, the rule would apply to small-scale civil litigation and, more importantly, non-corporate criminal prosecutions. See United States v. Nobles, 422 U.S. 225, 238 n. 12 (1975). Many Article I courts have also incorporated or adopted the Federal Rules of Evidence. The Committee Notes are illustrative of its narrow focus, lacking any discussion of the proposed rule's consequence to or effect on these latter categories of proceedings.

It is unclear why the expressed concerns of Congress and the Committee cannot be adequately addressed through appropriate amendments to discovery rules for complex cases rather than through broad, catch-all evidentiary rules. Moreover, why these corporate entities cannot deal with the problem through better file management and non-disclosure contracts remains unclear. For example, the government flags handfuls of documents as classified in systems of records containing millions of documents.

One fundamental question is who may waive attorney-client privelege or work product protection through disclosure. In the case of a pro se litigant, such post-conviction and civil rights litigation constituting 24 percent of all civil filings in federal court in 2005, (see Administrative Office of United States Courts, Facts and Figures, Table 4.4, 4.6),

it appear clear only the actual party can waive his or her work product. However, in the other 75% of filed cases, and in other matters that fail to result in actual litigation, attorneys, experts, and many other representatives or consultants usually will come into possession of protected work product and attorney-client priveleged information. See In re Grand Jury Subpoena, 220 F.R.D. 130, 141-42, 144 (D. Mass. 2004) (citing Rule 26(b)(3), Fed. R. Civ. P.). Although we recognize that the Committee makes no attempt to define work product or attorney-client privelege, the question of who owns, has legal control and authority over, and is therefore authorized to disclose is, or atleast should be, important to many determinations regarding waiver. Cf. ABA Model Rule 1.6(b). Irrespective of whether intentional or inadvertent, no disclosure should ever constitute waiver unless the disclosure was authorized by the priveleye holder or his or her representative where the authority to determine disclosure is delegated. See, e.g., Restatement (third) of the Law Governing Lawyers §90(1) cmt. c (2000) (When lawyer and client have conflicting wishes or interests with respect to work product material, the lawyer must follow wishes of client).

As explained below, we also suggest that any rule go further than proposed to protect against complet waiver and urge the Committee to adopt in its recommendation not only a selected waiver provision but a limited purpose disclosure provision as well. Indeed, we feel that unless a limited purpose disclosure provision accompanies it, the selected waiver provision should not be adopted.

Finally, we see no legitimate reason why the government should not be treated equally and as any other party under the Rules. Given its uniquely immense

investigative and subpoena powers and their repeatedly demonstrated potential for abuse, we believe the government's ability to benefit from limited purpose disclosures should be restrained to the purposes for which disclosure is authorized. The Committee takes an opposite approach, exempting the government from use prohibitions. Given the government's greater likelihood of abusing its immense authority to access priveleged and protected information, we believe non-governmental entities and especially private citizens require and are entitled to not only a degree of protection from one another but a distinguished and extended protection from the unparalleled power of government.

We do not believe such time-proven necessary protections should be watered down in the cause of easing the burden on government investigations, atleast with respect to non-corporate, private citizens. Indeed, when the awesome powers of government are at mischief, we believe the interests of private parties in maintaining attorney-client and qualified work product priveleges to be so integral to freedom and liberty as to outweigh any contrary interest in easing government investigations to such a degree that the idea of opening that conflict to debate is nothing shy of an affront to that freedom and liberty. We believe the proposed rule is demonstrative of how inaccurately and carelessly we suppose the public's interest, all too often and wrongly assuming it to be synonymous with competing interests of government.

Proposed Rule 502(a)

We object to full subject matter disclosure as to all types of priveleged or protected information, and to a single "ought in fairness" standard applicable to all information and communications. We believe that the attorney-client privelege should be far less violable — indeed, near absolute — than that of work product protection. See In re Sealed Case, 107 F.3d 46, 51 (D.C. Cir. 1997) (work product protection is broader than the attorney-client privelege, but is less absolute).

Similarly, we believe that the rule should distinguish between "opinion" work product and "ordinary" work product. See Restatement, supra, §§87(1)-(2). Unlike "ordinary" work product, courts have also held "opinion" work product protection to be "near absolute." Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000); In re Allen, 106 F.3d 582, 607 (4th Cir. 1997); Hagar v. Bluefield Regional Medical Center, 170 F.R.D. 70, 78 (D.D.C. 1997). Because we believe compelling complete disclosure of attorney-client and "opinion" work product under a mere "ought in fairness" standard will have a multitude of ill effects, certain to chill free and open attorney-client exchanges and record keeping, we believe full subject matter disclosure of these types of priveleged and protected material and information should be distinguished from "ordinary" work product, governed by a different standard, and rarely if ever appropriately compelled. We therefore urge instead a limited waiver rule where, following an authorized partial disclosure, the court may direct release of such additional attorney-client/"opinion" priveleged or protected information or communications on

the subject matter but only to the extent necessary to prevent manifest injustice.

With respect to "ordinary" work product, we see no reason to deviate from the "substantial needs" test of Rule 26(b)(3), Fed. R. Civ. P., simply because a partial disclosure has been made on the subject. In addition, that a disclosure of attorney-client privileged information does not necessarily constitute a disclosure of work product in identical circumstances is further reason to distinguish between that which is attorney-client privileged and "opinion" and "ordinary" work product. See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 314 (6th Cir. 2002) (disclosure to third parties does not waive the work product protection).

Rule 502(b)

By including a section on "inadvertent" disclosure and, possibly "selected waiver," the rule gives the impression that it intends or does delimit all situations in which disclosure may constitute waiver. That is it appears to relegate waiver determinations to 1) whether the disclosure was inadvertent, and, if not, 2) whether the disclosure is subject to a selected waiver exception to further disclosure.

Returning to a point made above, is a disclosure "inadvertent" when made by an attorney or other representative, consultant, or storage facility against the wishes of the actual party? There are a variety of situations in which although disclosure may not have been "inadvertent," waiver is nonetheless inappropriate.

We also suggest a language change, deleting "Federal litigation or federal administrative proceeding" and replacing it with "federal judicial, administrative, or other proceeding," and deleting the remainder of the paragraph. One of our concerns involve disclosure in the absence of an administrative or judicial proceeding being underway. With no litigation underway, there is no tribunal of competent jurisdiction to address a litigant or inadvertent disclosing party's motion "to rectify the error." This in addition to applicability of Rule 26(b)(5)(B), Fed.R.Civ.P., and the rule does nothing to alleviate any of the supposed harms it seeks to prevent. A large or corporate entity cooperating in an investigation or responding to discovery requests must exercise no less diligence and document-by-document review procedures to prevent against inadvertent disclosures because, especially at the investigatory stage, no forum is available through which "to rectify the error." It must prevent disclosure. In deciding whether to release a file or system of records containing a single or handful of priveleged documents the presence of which the privelege-holder is aware, any conscious decision to release that file or system without first sifting through it to locate and remove the priveleged material would appear to be an intentional, not inadvertent, disclosure. And where Rule 26(b)(5)(B) applies, the privelege holder must typically create a privelege log identifying each document withheld as priveleged, offsetting any cost benefit. By incorporating the proposed rule's language, one is still required to take "reasonable precautions to prevent disclosure." Thus, a privelege holder must still take care to not disclose documents wholesale and use resources as necessary to

take the "reasonable precautions" against disclosure. In sum, the provision does nothing to encourage cooperation or to alleviate the cost of discovery or need to preliminarily conduct a thorough review of documents requested by government during investigation.

Rule 502(c)

Should the rule be adopted, we would encourage a "selected waiver" provision, but only if it is accompanied by a "limited purpose disclosure" provision.

As to the language of 502(c), we would require the government activity be "lawful", and replace the hyphenated sentence with the following: "— when made to a federal official, agency, or office in the lawful exercise of a regulatory, investigative, or enforcement authority—." We advocate this change to ensure waiver does not result from disclosures to government when acting fraudulently or ultra vires.

Nonetheless, we do not believe this provision should be adopted unless accompanied by a "limited purpose disclosure" provision. We propose the following:

> Limited purpose disclosures— A disclosure of a communication or information covered by the attorney-client privelege or work product protection when such disclosure is required or compelled by law to be made to a federal official, agency, or office in the lawful exercise of a regulatory, investigative, or enforcement authority, or in voluntary cooperation therewith upon request of a

federal official, agency, or office, or a disclosure made as a requisite to participation in or taking advantage of a benefit or service regulated by the federal government, shall not operate as a waiver of the privelege or protection except for the limited lawful purpose for which disclosure was made or required, unless otherwise provided by law.

We believe this limited purpose disclosure provision will not only offset the dangers a selected waiver provision fails to address, but will have additional benefits in that it addresses a growing problem involving disclosure situations deserving attention.

First, the provision clarifies that a voluntary disclosure to government for one purpose will not operate as a waiver for any other purpose. This will ensure government behaves properly and does not circumvent warrant requirements otherwise applicable under pretense of seeking disclosure for some other purpose. The result will be greater and more relaxed coopecation with government. The disclosing party can rest assured that any disclosures will not be used for any purpose other than for which voluntarily disclosed.

The provision also addresses a growing problem surrounding consentual disclosures made under various forms of duress, such as contingency searches. For example, attorney ABC is flying from Boston to Houston. With him is a briefcase containing priveleged and protected information and documents pertaining to present or anticipated litigation with the government. Attorney ABC is informed by Homeland Security or federal transportation officials that in order to board he must first consent to search of the briefcase for security purposes. The attorney

consents and during the ensuing search officials notice suspicious language in some documents they believe may implicate security concerns. The attorney is detained while the documents are duplicated. Upon further investigation it is determined the attorney poses no threat and he is permitted to board. Has the attorney-client and work product information disclosure resulted in waiver?

An attorney visits her client at the local prison or jail. To be permitted access to her client, she must consent to a search of her file folder, which contains work product and attorney-client communications. Prison officials read the documents as part of the search. Has a waiver resulted? See Sturm v. Clark, 835 F.2d 1009, 1015 n.13 (3d Cir. 1987) (officer's reading of confidential correspondence in visiting attorney's briefcase raised issues of attorney-client privelege).

A Bureau of Prisons detainee is defending against serious charges. Prison officials conduct a routine search of her cell, during which they review a series of sensitive documents covered by attorney-client privelege and/or work product protection. Prison officials photocopy the documents and forward them to prosecutors. Since prisoners have no general expectation of privacy in their prison cells under the Fourth Amendment as the expectation must cede to prison security, (Hudson v. Palmer, 468 U.S. 517, 527-30 (1984)), has a waiver of the privelege or protection occurred by the compelled disclosure? See Knop v. Johnson, 685 F.Supp. 636, 641-42 (W.D. Mich. 1988) (searches of prisoners' legal access program offices must be limited to protect privacy of legal papers); United States v. Moussaoui, 2002 WL 32001771 *2 (E.D. Va. 2002) (assuming prisoner's in-cell "pro se work

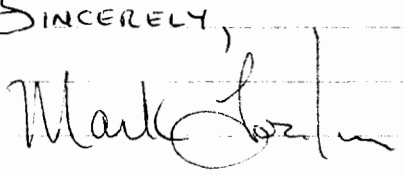
product" protected).

Another prisoner retains an investigator to gather new evidence of his innocence to support a pro se motion for new trial. Pursuant to Bureau of Prisons' regulation, the correspondence and visits between the two are monitored. Has the work product protection been waived? See Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (Enjoining prison officials from invading attorney-client privelege on pretext of investigating violation of prison rule).

Providing for a limited purpose disclosure will encourage cooperation with government toward legitimate purposes and ensure that government regulated activities or benefits are not used as a sword of Damocles made contingent upon consentual disclosure. A selected waiver provision needs a correlating limited purpose disclosure provision to ensure that consentual and voluntary disclosures to government for one purpose will not constitute a waiver for any other purpose. Absent a limited purpose disclosure provision to ensure parties that disclosure will not constitute waiver beyond lawful purposes for which disclosed, the selected waiver provision will certainly fail to "promote cooperation with government regulators." Indeed, under the rule as proposed, and especially in litigation brought by or against the government, parties are clearly best off not making disclosures to their attorneys or creating work product that they do not wish disclosed, thereby failing to serve the purpose of the priveleges. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Wavier still must they be of cooperating with government.

We thank the Committee For its consideration of these comments.

SINCERELY,



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