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BY EMAIL

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Comments on Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Proposed Rule 502(d) should be revised to read as follows (additions are underscored, and deletions are lined out):[1]

> **(d) Controlling effect of court orders.** — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the court finds good cause for such an order ~~the order incorporates the agreement of the parties before the court~~.

I. The Requirement For Agreement of the Parties Is an Undue Limitation on Federal Court Powers

It seems distasteful to limit a federal judge's ability to enter an order to the sole instance when the parties have agreed to the order. I am uncomfortable with the idea that a court could not take action absent agreement of the parties. Such a limitation seems to convey a lack of trust in the federal judiciary.

Our federal judges are called upon at all times to resolve disputes and to find appropriate, fair, and just solutions to impasses between parties. Why should that power be rescinded when dealing with privilege issues? It should not.

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[1] No inference should be drawn from the fact that my comments are limited to Rule 502(d).

II. The Rule Should Have a "Good Cause" Requirement

Proposed Rule 502(d) provides no guidance regarding when a court should enter, or deny, a proposed order incorporating parties' agreements. Would courts be required to "so order" all agreements submitted by parties? If not, when would a refusal to enter an agreed-upon order constitute an abuse of discretion? If a court must "so order" all agreements—*i.e.*, has no discretion to deny entry of such an order—why involve a court at all? Why not give intrinsic effect to the parties' agreement?

If we are going to require a court order for parties to benefit from the protection afforded by Rule 502(d), we must expect courts to exercise discretion to ensure that parties' agreements are not too far reaching. Accordingly, Rule 502(d) implicitly contemplates the exercise of judicial discretion—though admittedly the threshold for entry of such an order may be very low.

In the absence of any guidance in Rule 502(d), the obvious place to look is Rule 26(c), which imposes a "good cause" requirement for entry of a protective order. That standard has ample flexibility to allow courts to exercise appropriate discretion.

III. Conclusion

Rule 502(d) should explicitly state a good-cause requirement and should give federal courts the power, even in the absence of agreement of the parties, to enter "privilege protection" orders based upon a showing of good cause.

Very truly yours,

Kevin N. Ainsworth

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