06-EV-046
TESTIFY

"Gregory M. Lederer" <Glederer@simmonsperrine.com>
12/29/2006 12:11 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Rule 502 hearing in NY

Dear Mr. McCabe

I request the opportunity to appear and address the the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States at the hearing in New York on January 29 on proposed Rule of Evidence 502. I am the Immediate Past President of the International Association of Defense Counsel Association and the current Vice-President of Lawyers for Civil Justice.

I understand that I might be a day late in submitting this request, and so I will understand if you cannot accommodate me. Thank you for your consideration of this request.

Happy holidays.

Greg Lederer

Gregory M. Lederer
Simmons Perrine PLC
115 Third Street SE Suite 1200
Cedar Rapids, Iowa 52401-1266
Direct Dial: 319-896-4076
Cell: 319-360-0806
Fax: 319-366-1917
e-mail: glederer@simmonsperrine.com
internet: www.simmonsperrine.com

LAWYERS FOR CIVIL JUSTICE

1140 Connecticut Avenue, N.W. • Suite 503 • Washington, D.C. 20036
Phone: (202) 429-0045 • Fax: (202) 429-6982

Testimony

January 5, 2007

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Suite 4-170
1 Columbus Circle, NE
Washington, DC 20544

Dear Mr. McCabe:

Lawyers for Civil Justice respectfully submits the enclosed Comments in response to the invitation to comment on Federal Rule of Evidence 502. As a nationwide coalition of corporate and defense counsel supporting improvements in the civil justice system, our members are hands on litigators and litigation managers who deal with the civil rules on a regular basis.

We appreciate the action taken by the Advisory Committee on Evidence Rules to address FRE 502 and we encourage you to call upon us if we can provide you with additional information. Thank you for allowing us this opportunity to express our views.

Sincerely,

Barry Bauman
Executive Director, Lawyers for Civil Justice
1140 Connecticut Avenue, Suite 503
Washington, DC 20036
Phone 202/429-0045

encl: LCJ Comment Re: FRE 502

cc: The Honorable Jerry E. Smith
Professor Daniel J. Capra
Professor Kenneth S. Brown

Lawyers for Civil Justice

Comments to the Advisory Committee on Evidence Rules
of the
Judicial Conference of the United States

Re: Proposed Revisions to Rule 502

January 5, 2007

I. OVERVIEW

Lawyers for Civil Justice ("LCJ")[1] respectfully submits these comments to the Advisory Committee on Evidence Rules (the "Committee") regarding proposed new Federal Rule of Evidence 502. We generally support proposed Rule 502, except for 502(c) "selective waiver," which we oppose.

There is a growing consensus that the attorney-client privilege and work product protection face new and dangerous threats. Some threats stem from the increasing complexity of modern technology and multi-forum litigation. A more serious threat stems from a shift in the way governmental officials treat corporate privilege claims in law enforcement and regulatory investigations. In both instances, extensive and needless litigation and untenable choices surround this area of the law.

Strong, effective, and predictable attorney-client privilege and work product protections improve the quality of justice in our court systems and promote the general welfare. In the criminal justice system, these protections are an integral part of the right to counsel. In the civil justice system, they encourage individuals and companies to abide by the rules and regulations that govern their conduct and allow those accused of wrongdoing to seek and obtain legal advice more freely. These protections enhance corporate accountability and compliance with the law. They protect fundamental fairness in regulatory and adjudicative processes. Because of the belief in their vital importance, LCJ applauds the Committee's attempts to safeguard and more

[1] LCJ is a national coalition of corporate counsel and civil defense trial lawyers, including DRI, IADC, and FDCC, supporting improvements in the civil justice system.

clearly define the scope of the attorney-client privilege and work product protection through proposed Federal Rule of Evidence 502.

Because the attorney-client privilege and work product protection are so critical to our system of justice, any changes to the law surrounding them must be scrutinized closely to ensure that such changes promote their underlying purposes. In *Upjohn v. United States*, the Supreme Court explained the purpose underlying the attorney-client privilege:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.[2]

Similarly, *Hickman v. Taylor* declared the need to protect attorney work product:

> In performing his various duties... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[3]

LCJ believes that all but one of the provisions of Proposed Rule 502 enhance and preserve the purposes underlying both protections. Thus, we submit remarks in support of the following provisions of the proposed Rule:

- 502(a) which limits subject matter waiver to instances where undisclosed information "ought in fairness" to be considered with the disclosed communication;
- 502(b) which adopts the majority view on the impact of inadvertent disclosure; and
- 502(d) and (e) which define the controlling effect of court orders and party agreements directed to privilege and disclosure.

Each of the above proposals addresses problematic issues that have resulted from increasingly complex litigation and pretrial discovery, particularly discovery involving electronically stored information.

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[2] 449 U.S. 383, 389 (1981).

[3] 329 U.S. 495, 500 (1947).

LCJ agrees with the Committee's conclusion that undue time and effort is spent in discovery and litigation to avoid waiver of the attorney-client privilege and work product protection. LCJ also agrees that the discovery process would be more efficient and less costly if there were clear and uniform federal rules regarding subject matter waiver, inadvertent disclosure and the authority of courts and parties to enter orders or agreements on such issues. Respectfully, LCJ includes some suggestions for textual revision of the rule, set forth in the discussion below, which we believe would improve and strengthen the Committee's already laudable proposals. In particular, we urge the Committee to create a uniform rule on privilege waiver by revising the proposed rule to make it applicable in both state and federal proceedings, as the Committee initially proposed.

LCJ also writes in opposition to proposed 502(c) — the Committee's bracketed proposal that allows for selective waiver when disclosures are made in the context of federal regulatory, investigatory or law enforcement proceedings. LCJ appreciates the Committee's motivation in submitting this provision for comment and also the Committee's acknowledgement that this issue is complex and controversial. On balance, however, under current circumstances, LCJ believes that selective waiver does not advance the purposes underlying either the attorney-client privilege or work product protection and that selective waiver poses a serious threat to the ability of corporate clients and their constituents to rely on these protections.[4]

As discussed more fully below, the ability of corporate officers and employees to engage in full and frank communication with a corporation's lawyers is evaporating. Almost seventy-

[4] Current Department of Justice policy recently announced by Deputy Attorney General Paul J. McNulty at the LCJ annual membership conference in New York City, www.usdoj.gov/dag/speech/2006/dag/_speech_061212.htm, as set forth in the "McNulty Memorandum", www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (December 12, 2006), appears to provide some additional procedural safeguards beyond the "Thompson Memorandum". The McNulty Memorandum, however, continues to allow prosecutors to request waivers and to consider the assertion of privilege in charging decisions in ways that LCJ believes are detrimental to the attorney-client privilege and work product protection.

five percent (75%) of in-house and outside corporate counsel agree that a "'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections."[5] Selective waiver will embolden some governmental regulators and investigators to pressure privilege waivers from defendants on the grounds that the defendants would be "protected" from third-party discovery and waiver arguments. Other governmental regulators and investigators will treat the selective waiver provision as a standing request for defendants to disclose protected information and will presume that, given the selective waiver provision, defendants have no legitimate reason to withhold such information.

In this atmosphere, selective waiver will neither protect corporations from subsequent third-party waiver claims nor promote the full and frank discussion that gives the attorney-client privilege meaning and makes it a positive force for the public good. As to the latter issue, corporate officers and employees will be loath to bring sensitive issues to counsel's attention when "assured" that their communications will ***"only"*** be disclosed to government investigators — the very people who might ultimately prosecute them.[6] Corporations will lose opportunities for early intervention and self-policing. As to the former issue, the proposed rule, as currently drafted, does not effectively protect against disclosure to state and local law enforcement and regulatory officials, and thus cannot protect against waiver under state law. The rule would be especially problematic in cases in which state and federal authorities are pursuing concurrent investigations or prosecutions.

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[5] The Decline of the Attorney Client Privilege in the Corporate Context: Survey Results (2006) at 3, available at http://www.acca.com/Surveys/attyclient2.pdf.

[6] These same governmental investigators have been known to insist that the corporation abandon its employees and officers, refuse them a defense and eschew joint defense agreements. *See, e.g., U.S. v. Stein*, 435 F.Supp. 2d 330 (S.D.N.Y. 2006).

The *Upjohn* Court had it right: "An uncertain privilege ... is little better than no privilege at all."[7] It remains to be seen how the additional but limited procedural protections in the McNulty Memorandum will be interpreted and applied and whether they will change the practices encouraged by the Thompson Memorandum, the Holder Memorandum, and the Seaboard Report, which have led federal officials to seek waivers. The McNulty Memorandum acknowledges the risks posed by waiver requests but still allows prosecutors to make such requests and still allows prosecutors to consider a corporation's refusal to waive the attorney-client privilege or work product protection in charging decisions. Selective waiver would not address the flaws in these practices. On the contrary, it risks eroding any progress the McNulty Memorandum might represent. The governmental practice of pressuring companies to agree to waivers must be dealt with directly in different venues. Because we believe selective waiver will exacerbate the damage these government policies have inflicted on the time-honored and critical protections at issue, Lawyers for Civil Justice urges the Advisory Committee to withdraw the bracketed proposal contained in 502(c). In the final analysis, the Judiciary and the Congress should establish a policy that strengthens, not weakens, the rights of individuals and corporations to protect privileged communications -- even from the government.

II. PROPOSED RULE 502 SHOULD APPLY TO ALL PROCEEDINGS IN FEDERAL AND STATE COURTS.

Proposed Federal Rule of Evidence 502 seeks to clarify and make uniform the law concerning certain types of waivers of the attorney-client privilege and work product protection and to reduce the substantial costs associated with privilege reviews – especially in the context of

[7] *Upjohn v. United States*, 449 U.S. at 393.

cases involving electronic discovery.[8] Initially, proposed Rule 502 was designed to apply in both state and federal proceedings to accomplish these twin objectives.[9] However, due in a large part to concerns expressed by state court judges, the proposed Rule was redrafted to "scale back" its application in state courts to those situations in which the initial disclosure occurred during litigation in federal court or federal administrative proceedings. LCJ advocates that the Committee return to its prior stance and recommend that Congress make the waiver standards embodied in proposed Rule 502 fully applicable to both state and federal proceedings.[10]

If the waiver limitations proposed in Rule 502 apply only in federal cases, the Advisory Committee's goal of increasing efficiency and lowering the costs of discovery will be substantially lost. Parties will still be subject to inconsistent standards and broad subject matter waivers of the privilege, even when documents are disclosed inadvertently and through no fault of a party. Moreover, parties would not be able to predict in advance the consequences of a decision to disclose privileged information. Parties would simply be subjected to the laws of the particular forum in which a plaintiff chooses to file suit.

As the Advisory Committee's Reporter has previously pointed out, "any rule on waiver must apply in state and federal proceedings. Otherwise the rule could not be relied upon, and clients and lawyers would be back where they started — expending substantial resources to guard against waiver and unnecessarily increasing the cost of litigation; and being subject to a

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[8] *See, e.g., Rowe Entm't, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of 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 such review would take months) (cited in Committee Note to proposed Rule 502).

[9] The prior version of the Committee Note to proposed Rule 502 stated: "As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level."

[10] Specifically, LCJ suggests that the words "or state" be added after the word "federal" in lines 1 (502(a)), 12 and 13 (502(b)) and 32 (502(d)) in the version of the proposed Rule released for public comment. If the bracketed section 502(c) remains in the rule, LCJ also suggests that the words "or state" be added after the word "federal" in line 22 of the proposed Rule.

disincentive for cooperating with government regulators."[11] Therefore, application of the proposed rule to state and federal proceedings meets at least two of the Committee's expressly stated goals: (1) to create uniform rules on privilege waiver; and (2) to reduce the time, effort and cost associated with preserving privileges in litigation. It was for these very reasons that the Committee previously determined that the rule should be applicable to both state and federal proceedings, and LCJ urges the Committee to return to that position.

Since the proposed changes involve a rule of privilege, Congress must approve the proposed rule.[12] Congress has the Constitutional authority to enact a uniform federal law governing attorney-client privilege that would apply in both state and federal courts.[13] Regulation of attorney-client privilege and the work product doctrine falls within the purview of Congress' Commerce Clause power. "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."[14] Where Congress has enacted a federal cause of action that preempts state law, the United States Supreme Court has routinely found that state laws affecting that substantive right are also preempted.[15] Congress may also enact statutes that preempt contrary state regulations and that apply in state court, even when there is no

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[11] *See* Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Committee on Evidence Rules, March 22, 2006, at 37.

[12] 28 U.S.C. § 2074 (b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

[13] *See* Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59 (2002). Glynn spoke on these issues at the Advisory Committee meeting at Fordham University on April 24, 2006. *See* Advisory Committee on Evidence Rules: Hearing on Proposal 502 at 65-74.

[14] *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted).

[15] *See, e.g., Felder v. Casey,* 487 U.S. 131, 138 (1988) (where state law notice-of-claim statute conflicted with both the purpose and effect of § 1983, Supreme Court held that the state statue was preempted); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (holding that validity of releases under Federal Employers' Liability Act is determined by federal rather than state law).

corresponding federal cause of action.[16] For example, under its Commerce Clause authority, Congress federalized the right to enforce arbitration agreements in written contracts involving interstate commerce.[17] More recently, the United States Supreme Court expressly upheld the Constitutionality of the Public Disclosure Act,[18] which protects from discovery or admission into evidence any reports, surveys, schedules, or lists or data compiled or collected by state public works departments or other agencies to identify potential hazardous roadway conditions and participate in federally funded highway safety improvement projects.[19]

Like the activities regulated by the Federal Arbitration Act and Public Disclosure Act, the practice of law has a substantial effect on interstate commerce. "The provision of legal services is usually in exchange for compensation; indeed, the nation's legal industry does a huge amount of business. The attorney client privilege protects communications upon which the industry's article of commerce - the provision of legal services - depends."[20] While each and every attorney-client relationship will not necessarily involve interstate commerce, the case law has not limited the Commerce Clause in such a way as to prevent regulation where an activity is wholly intrastate.[21] To date, the limitations on Congress' Commerce Clause power have been confined to instances in which the activity sought to be regulated has been non-economic.[22] As the

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[16] Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U.L. Rev. 59, 165-66 (2002).

[17] *See* 9 U.S.C. §§ 1-307.

[18] *See* 23 U.S.C. § 409.

[19] *See Pierce County, Wash. v. Guillen,* 537 U.S. 129, 147 (2003).

[20] Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U.L. Rev. 59, 158-59 (2002).

[21] *See, e.g., U.S. v. Darby*, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . .")

[22] *See, e.g., U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000).

practice of law has significant interstate economic implications, the Commerce Clause gives Congress the power to establish uniform rules that regulate the interaction between attorneys and clients, such as rules governing the attorney-client privilege and attorney work product, that would bind both federal and state proceedings.[23]

Proposed Rule 502, however, does not purport to preempt the field of attorney-client privilege entirely; nor does it seek to alter long-standing principles of federal or state law concerning whether materials are protected by the privilege. Instead, Rule 502 governs only those aspects of the law related to waiver by disclosure.[24] Since Congress has the authority to enact federal legislation governing the substantive scope of attorney-client privilege and work product materials, it has the power to take the lesser step of creating a uniform federal law governing waivers by disclosure.[25]

LCJ also suggests that the Committee clarify in the Note that Rule 502 applies to both diversity and federal question actions.[26] The Advisory Committee appears to have intended Rule 502 to apply in all federal actions, whether based on diversity or federal question jurisdiction.

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[23] Congress would also have the power to establish rules as to waiver regarding disclosures in federal proceedings that are at issue in state courts, under Article III, Sec. 1, Article 1, Sec. 8 cls. 9 and 18. *See* Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Committee on Evidence Rules, March 22, 2006, at 19-23.

[24] The proposed Committee Note to proposed Rule 502 clearly states that, "[t]he rule governs only certain waivers by disclosure." Waiver by other means (i.e., advice of counsel or lawyer malpractice action) is not affected by the proposed rule.

[25] As an alternative to redrafting Rule 502 to make its provisions fully applicable in state court proceedings, it has been suggested by legal scholars that Congress enact separate legislation to govern state court proceedings. *See* Memorandum from Dan Capra, Reporter, and Ken Broun, Consultant, to the Advisory Committee on Evidence Rules, March 22, 2006, at 37. Professors Capra and Broun have observed that the federal rules may not be the best vehicle to accomplish the desired objective of having the proposed waiver limitations apply in state courts. For example, Federal Rule of Evidence 1101(a) explicitly states that the Federal Rules of Evidence apply to "the United States district courts." Professors Capra and Broun suggest that it might be more politically palatable simply to codify the waiver limitations in a separate statute in lieu of changing Rules 502 and 1101(a).

[26] More than one quarter of all cases commenced in the federal courts are based on diversity of citizenship. *See* Federal Judicial Caseload Statistics, March 31, 2005, at Table C-2.

Rule 501, however, provides that while federal common law governs privilege in federal question cases, state law of privilege applies in actions based on diversity of citizenship.[27] Because under Rule 501 a federal district court sitting in diversity must apply state law to determine issues of privilege waiver,[28] practitioners might question whether a court should apply Rule 502 in a diversity case, even though new Rule 502 would supersede 501 on such matters. Accordingly, to provide additional guidance to courts and practitioners, the Notes to proposed Rule 502 should be amended to clarify that, notwithstanding the provisions of Rule 501, Rule 502 would apply in both federal question and diversity cases in federal court.

III. WAIVER OF UNDISCLOSED INFORMATION SHOULD OCCUR ONLY WHEN NECESSARY OR ESSENTIAL TO EXPLAIN OR PUT IN CONTEXT PRIVILEGED MATERIALS THE DISCLOSING PARTY SEEKS TO INTRODUCE INTO EVIDENCE

As the Advisory Committee states, one of the goals of proposed Rule 502 is to "respond[] to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information." Accordingly, proposed Rule 502(a) limits the application of a "subject matter" waiver to those rare occasions when the "undisclosed communication or information ought in fairness . . . be considered with the disclosed communication or information."

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[27] Fed. R. Evid. 501.

[28] *See In re Avantel*, 343 F.3d 311, 324 (5th Cir. 2003) (noting that trial court should apply Texas law to determine whether a disclosure was inadvertent); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) (holding that Nebraska law controlled issue of waiver of attorney-client privilege).

While proposed Rule 502(a) strikes a fair balance, the Advisory Committee should strengthen the Notes to the Rule to make clear that subject matter waiver is limited to truly rare situations and to define more clearly the scope of undisclosed communications that "ought in fairness" be produced. Currently, the Note cites *In re United Mine Workers of Am. Employee Benefit Plans Litig.*[29] and states that "a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary."

The key holding of *In re United Mine Workers* is that a litigant should not be allowed to use his privilege as both a "sword and a shield" in order to gain a tactical advantage over an opponent.[30] By contrast, the innocent disclosure of a privileged document should not result in a complete subject matter waiver.[31] A corporation that inadvertently produces a handful of privileged documents in the midst of a large document production should not be found to waive its privilege as to the entire subject matter at issue.[32] Rather, a subject matter waiver should not occur unless and until a party discloses privileged materials in an attempt to mislead the court or

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[29] 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed because the party did not deliberately disclose documents in an attempt to gain a tactical advantage).

[30] *Id.*; *see also In re Keeper of Records*, 348 F.3d 16, 24 (1st Cir. 2003); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94C897, 1995 WL 683777, at *3 (N.D. Ill. Nov. 16, 1995) (subject matter waiver is generally reserved for instances where a selective disclosure is intended to gain a tactical advantage in the context of litigation); *Graco Children's Prods. v. Dressler*, No. 95 C 1303, 1995 WL 360590, at *8 (N.D. Ill. 1995) (no subject matter waiver because no tactical advantage sought or gained by disclosure).

[31] *In re United Mine Workers*, 159 F.R.D. at 312; *see also, Strategem Dev. Corp. v. Heron Int'l*, 153 F.R.D. 535, 544 (S.D.N.Y. 1994).

[32] *See Strategem Dev. Corp.*, 153 F.R.D. at 544 (finding no subject matter waiver where party had made no attempt to affirmatively use privileged materials in the litigation but had merely disclosed certain privileged documents in response to the opposing party's broad discovery requests).

other litigants. Thus, the Notes should distinguish between innocent or inadvertent disclosures and those made or used to gain an unfair advantage.

The Advisory Committee Notes should also clarify the "ought in fairness" language. "Ought in fairness" is taken from Federal Rule of Evidence 106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." District court decisions applying Rule 106 hold that under the "ought in fairness" standard, additional disclosures are not required unless they are necessary or essential to explain evidence already admitted.[33] Similarly, the Committee Notes to Rule 502 should specify that disclosure of additional privileged documents will be required only when it is necessary or essential to explain or put in context privileged materials that the disclosing party seeks to introduce into evidence. Thus, for example, the inadvertent disclosure of privileged material which the disclosing party does not seek to use affirmatively does not waive any protection for undisclosed material. Such an approach strengthens the Rule's underlying purpose of protecting the attorney-client privilege and work product doctrine and provides needed guidance and clarity to the district courts.

[33] *See U.S. v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982) (additional disclosure is only required when it is "necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact") *U.S. v. Graulich*. 35 F.3d 574 (10th Cir. 1994) (rule of completeness embodied in Rule 106 requires additional disclosure only if it is necessary to explain admitted evidence); *See also*, G. P. Joseph, *Privilege Waiver: Proposed Federal Rule of Evidence 502*, Comment 06-EV-03 (October 18, 2006) at 5-6.

IV. RULE 502(B) SHOULD BE AMENDED TO REQUIRE "REASONABLE STEPS" TO PREVENT DISCLOSURES RATHER THAN "REASONABLE PRECAUTIONS" AND THE COMMITTEE NOTE SHOULD CLARIFY THAT A PARTY MUST ONLY ACT WITH REASONABLE PROMPTNESS UPON LEARNING OF A DISCLOSURE

Proposed Rule 502 would resolve a conflict among the Circuits regarding the effect of the inadvertent disclosures of privileged information.[34] Proposed Rule 502(b) adopts the so-called "middle ground" approach,[35] providing that the inadvertent disclosure of privileged information in federal proceedings does not operate as a waiver in a state or federal proceeding 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."

By resolving this conflict among the circuits, proposed Rule 502(b) removes significant uncertainty from the law. Currently, a party that is subject to litigation in many jurisdictions faces differing burdens for privilege review depending, for example, on whether it is in the District of Columbia as opposed to New York.[36] As set forth succinctly in the Committee Note, the proposed rule balances the competing interests of the importance of maintaining the confidentiality of privileged documents and minimizing the costs of privilege reviews. Moreover, this rule comports with the general rule that a party must knowingly or intentionally

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[34] *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228, 235-236 (D. Md. 2005) (discussing the three approaches to inadvertent disclosure).

[35] *See Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (noting that the majority of courts have adopted the "middle ground" approach to inadvertent waiver).

[36] The D.C. Circuit presently adheres to the strict liability approach to waiver - i.e., any mistaken disclosure of protected information constitutes a waiver. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989). Conversely, the federal district courts in New York have followed the "middle ground" approach that has been incorporated into proposed Rule 502(b). *See Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993).

waive a right[37] or have shown such extreme or gross negligence as to warrant a finding of "intentional" waiver.[38]

The proposed rule, however, provides little guidance as to what constitutes "reasonable precautions" to prevent disclosures or "reasonably prompt measures" to rectify disclosures. Even with the most comprehensive document review policies in place, it is inevitable that inadvertent disclosures will occur at times in complex, document-intensive litigation.[39] The mere fact that a disclosure occurs does not demonstrate that reasonable precautions were not in place.[40] For these reasons, LCJ recommends that the proposed Rule 502(b) be amended to require "reasonable steps" to prevent disclosure rather than "reasonable precautions." A requirement of "reasonable steps" is less subjective and adequately accomplishes the Committee's goal of ensuring that parties establish reasonable procedures to protect against the disclosure of privileged information.

The Note should also clarify that the reasonableness of steps taken to prevent disclosure of privileged information will vary according to the circumstances presented, such as the number of documents involved[41] and the time constraints for production.[42] Where a large number of documents must be reviewed within a relatively short period of time, a party should be permitted

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[37] *See F.D.I.C. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D. Va. 1991).

[38] *See id.*

[39] *Bank Brussels Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 443 (S.D.N.Y. 1995).

[40] *See id.* ("Just as a tort defendant who acts in a reasonably prudent manner avoids liability despite the occurrence of an accident, so an attorney who takes reasonable precautions in discovery may avoid waiver even though he inadvertently discloses a privileged document.").

[41] *Scott v. Glickman*, 199 F.R.D. 174, 178 (E.D.N.C. 2001) (reasonableness of precautions vary according to the circumstances presented).

[42] *See F.D.I.C.*, 138 F.R.D. at 483; *Scott*, 199 F.R.D. at 178.

to employ procedures that otherwise would not satisfy the producing party's burden.[43] Conversely, where a party is not burdened by time constraints, more comprehensive measures might be required to reduce the possibility of inadvertent disclosures.[44] The Note should also make clear that a court should not accelerate discovery schedules on the assumption that Rule 502(b) or an order incorporating a non-waiver agreement under Rule 502(d) eliminates any prejudice to a disclosing party. Forcing a truncated privilege review that results in the inadvertent disclosure of privileged information does not protect or enhance the attorney-client privilege or work product protection. With the now widespread use of discovery to obtain access to electronically stored information, courts should also consider how requested information is maintained and stored when determining the reasonableness of steps taken to avoid disclosure.

Finally, the Committee Note should state that if a party takes reasonable steps to prevent inadvertent disclosures, the time period to rectify errors does not begin to run until the party discovered, or with reasonable diligence should have discovered, the inadvertent disclosure.[45] In many instances, a party will not know of an inadvertent disclosure until the opposing party attempts to use a privileged document affirmatively.[46] Consequently, the Committee Note should provide that measures taken to recover a document that has been inadvertently disclosed do not run afoul of the mandates of the rule merely because the proceeding has reached its latter stages. The rule should reflect that so long as a party acts with reasonable promptness upon

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[43] *See F.D.I.C.*, 138 F.R.D. at 483 (citing *Transamerica Computer v. Int'l Bus. Machs.*, 573 F.2d 646 (9th Cir. 1978) (finding no waiver of privilege where 17 million documents had to be screened in a three month period)).

[44] *See F.D.I.C.*, 138 F.R.D. at 483; *Scott*, 199 F.R.D. at 178.

[45] *See Zapata v. IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997).

[46] *See id.* (attorney did not learn of inadvertent disclosure until privilege documents were discussed in expert's deposition).

learning of the disclosure, the party has satisfied its obligation to take "reasonably prompt measures" to rectify any inadvertent disclosures.

V. THE COMMITTEE SHOULD WITHDRAW PROPOSED RULE 502(C) PROVIDING FOR "SELECTIVE WAIVER"

In the corporate context, the attorney-client privilege and work product doctrine are vital protections that serve society's interests and protect clients' Constitutional rights to counsel. In today's complex business environment, it is increasingly important to encourage corporate employees to engage their lawyers in open discussions to promote compliance with the law. The attorney-client privilege and work product doctrine promote candor by encouraging company employees to seek guidance and to ask difficult questions regarding the most sensitive issues. Candid communications with clients allow attorneys to gain a comprehensive understanding of the facts surrounding an issue so as to render the best legal advice.

Lawyers play a key role in helping companies understand the complex legal environment in which they operate. To fulfill this important role, lawyers must have the trust and confidence of corporate employees so that they receive all of the relevant information necessary to advise their clients on how to comply with the law. When confidentiality is predictable and assured, employees feel safer and more comfortable engaging in the "full and frank communications" necessary to avoid, uncover and address corporate wrongdoing and errors.[47] Without reliable privilege protections, executives and other employees will curtail their communications with counsel, preventing their lawyers from operating in a preventive (rather than reactive) manner. Impairment of these privileges would "not only make it difficult for corporate attorneys to

[47] *Upjohn*, 449 U.S. 383, 389-93 (1981).

formulate sound advice when their client is faced with a specific legal problem but also threaten the valuable efforts of corporate counsel to ensure their client's compliance with the law."[48]

Law enforcement and regulatory policies that allow prosecutors to request waivers and to consider a corporation's assertion of privilege in charging decisions have undermined these important public interests. The result has been a marked increase in the "compelled", "requested", "suggested" or "voluntary" waivers of the attorney-client privilege and work-product doctrine. As one former federal prosecutor stated in response to a nationwide survey, requests for privilege waivers "have become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct."[49] There has emerged a "culture of waiver" in which government agencies expect a company under investigation to waive legal privileges, and many companies do so, knowing there is no practical alternative. If a company wishes to be deemed "cooperative" and to survive a government investigation, it has no choice but to waive its constitutionally protected privileges.

A selective waiver rule will only further undermine the attorney-client privilege and work product doctrine. Proposed Rule 502(c) will exacerbate the current trends and encourage a growing and questionable presumption amongst government investigators and prosecutors that it is appropriate and "harmless" for corporations to waive the attorney-client privilege and work product protection. If adopted, the proposed rule would make it difficult for a company to assert the right not to waive the privilege in any government investigation. Further, if a selective waiver provision is included in a final rule, it might incorrectly be viewed as ratification by this Committee of government policies that are even now coming under increasing attack. Until

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[48] *Upjohn*, 449 U.S. at 392.

[49] The Decline of the Attorney Client Privilege in the Corporate Context: Survey Results (2006) at 17, available at http://www.acca.com/Surveys/attyclient2.pdf.

corporate entities have the ability to make a decision about waiver on a completely voluntary basis, the Committee should withdraw any rule authorizing selective waiver.

The current Department of Justice policy recently announced by Deputy Attorney General Paul J. McNulty at the LCJ conference in New York City, (www.usdoj.gov/dag/speech/2006/dag/_speech_061212.htm), as set forth in the "McNulty Memorandum", (www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf) (December 12, 2006), appears to provide some procedural safeguards in an effort to ameliorate the widespread impact of the "Thompson Memorandum". The McNulty Memorandum, however, still allows prosecutors to make such requests (after approval from the U.S. Attorney, or in certain instances, the Deputy Attorney General) and still allows prosecutors to consider the assertion of privilege in their charging decisions. As a result, we believe the McNulty Memorandum goes too far in expressing prosecutorial governmental policy that discourages the assertion of fundamental rights, and the Committee should not place substantial reliance on the McNulty Memorandum in formulating legal policy regarding waiver of privilege and work product protection.

Moreover, Rule 502(c), as currently drafted, provides only illusory protection against disclosure of privileged information to private plaintiffs. As written, the rule does not apply to state or local government agencies and does not restrict the right of any government agency to disclose privileged materials to other government agencies or to Congress. Thus, the rule allows state and local law enforcement and regulatory authorities to receive privileged materials produced to federal authorities. Requests from state investigators often follow federal requests as a matter of routine. Once such information is in the hands of those state and local officials, the scope of the waiver is determined by state law -- which generally rejects the concept of selective waiver. There can be no effective rule permitting selective waiver unless such a rule

applies to state and federal proceedings, covers public officials at all levels and expressly preempts any state law to the contrary.

Even if the rule is amended to apply at both the state and federal levels, major loopholes remain. For example, the rule does not limit the use of privileged materials by a government recipient. Unlike "quick peek" or "claw back" agreements and orders, which preserve the attorney-client privilege and work product doctrine by preventing a recipient from using protected information, the selective waiver provision in Rule 502(c) erodes the attorney-client privilege and work product doctrine by granting prosecutors and regulators the right to obtain and use protected information. The rule does not even prohibit a government official from turning over privileged materials to private plaintiffs. Likewise, there is no restriction against use of privileged material in tort litigation brought by state attorneys general, such as the tobacco, gun and lead paint litigations. Such use would inevitably lead to disclosure to private plaintiffs in companion litigation. A government official can also presumably waive the corporation's privilege by, for example, introducing the information at trial. Thus, the protection of the rule evaporates once the federal authority makes use of any privileged materials.

Finally, LCJ respectfully submits that the Committee's request for statistical or anecdotal evidence tending to show that limiting the scope of waiver will promote cooperation or decrease the cost of government investigations focuses on the wrong issue. The Committee's priority should be -- as it is in the other provisions of the proposed Rule -- strengthening and protecting these critically important protections against new and dangerous attacks. The Committee's emphasis on increasing the efficiency of government investigations improperly elevates that interest over the Constitutional right of individuals and companies to confidential communications with their attorneys. The strongest criticism of any evidentiary privilege,

including the attorney-client privilege, is that potentially valuable information may be suppressed and that the government must work harder to discover information. In our society, this debate was long thought to have been settled. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.[50] As the Supreme Court has stated, the privilege "promotes a public goal transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[51] The purpose of the Federal Rules of Evidence is to promote a level playing field for litigants in the adversarial process, not to favor either the government or the subjects of government investigations. Regardless of the potential impact of a selective waiver rule on the efficiency of a government investigation, in the larger context of our system of justice, such a rule increases the interference with important public interests which underlie the attorney-client privilege and work product protection.

LCJ submits that the Advisory Committee should not consider statistical or anecdotal evidence respecting the impact of selective waiver on the cost of government investigations. If it does, LCJ respectfully asks this Committee to focus equal attention on the damage that will be wrought by that increased "efficiency." That damage is increasingly well documented. In particular, LCJ would direct this Committee's attention to the results of surveys conducted by the Association of Corporate Counsel.[52]

VI. LCJ SUPPORTS PROPOSED RULES 502(D) AND 502(E)

As the Committee's Note explains, confidentiality orders are increasingly important in limiting the costs of privilege review and retention, and the utility of a confidentiality order in

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[50] *Upjohn*, 449 U.S. at 389.

[51] *Trammel v. United States*, 445 U.S. 40, 50 (1980).

[52] The Decline of the Attorney Client Privilege in the Corporate Context: Survey Results (2006) at 17, available at http://www.acca.com/Surveys/attyclient2.pdf

reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Further, a predictable set of rules is important to achieve the Committee's goal to reduce exorbitant litigation costs for review of privileged material. For these reasons, LCJ supports proposed Rule 502(d), which provides that an agreed order on disclosure of protected information governs all persons in all state or federal proceedings, and Rule 502(e), which codifies the rule that parties can enter into agreements to limit the effect of waiver. Consistent with its comments regarding proposed Rule 502(c), however, LCJ suggests that the Note to Rule 502(d) make clear that the rule does not permit parties to enter into "selective waiver" agreements.

A common provision of confidentiality orders is a "claw back" or "quick peek" agreement governing privileged materials. As previously discussed, unlike selective waiver, "claw back" and "quick peek" agreements protect the attorney-client privilege and work product doctrine by preventing the party to which the information has been disclosed from using the information. A selective waiver agreement would undermine privilege and work product protections by permitting the recipient of the information to use the information while preventing third parties from doing so. The recent amendments to the Federal Rules of Civil Procedure encourage "quick peek" and "claw back" agreements and provide procedures for retrieval of privileged material that is inadvertently produced.[53] Those amendments are procedural. They have no substantive effect and cannot address whether confidentiality orders bind non-parties.[54]

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[53] *See* Fed.R.Civ.P. 16(b)(6), 26(f)(4) and 26(b)(5)(B). For an explanation of the new federal rules on e-discovery, see George L. Paul and Bruce H. Nearon, *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure*, p. 145 (American Bar Association Publishing, 2006).

[54] *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir.1991) (agreement between litigant and DOJ that documents produced in response to investigation would not waive privilege does not preserve privilege against different entity in unrelated civil proceeding); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y.1993) (non-waiver agreement between producing party in one case not applicable to third party in another civil case).

The problem is that if provisions of a confidentiality order protecting privileged materials apply only to the parties, such protection is illusory. Today, the reality is that litigants with similar interests are organized into functioning groups which share information through electronic networks in order to operate as a more powerful unit. Privileged information can therefore be disseminated around the country in a few seconds, into jurisdictions with "death penalty" waiver policies, for use in suits there against a party who inadvertently produced the information under a Court endorsed confidentiality agreement.

For these reasons, LCJ believes that there is an urgent need for the real, substantive protection afforded by proposed Rule 502(d). It is difficult to overstate the importance of this protection to the achievement of the Committee's goals for Rule 502. Without proposed Rule 502(d), parties will be forced to conduct the type of burdensome and expensive review of disclosed documents for privilege to ensure that sensitive information does not become freely available to other litigants.

LCJ believes, however, that proposed Rule 502(d) can be improved in one respect. Consistent with its view on proposed Rule 502(c), LCJ suggests that the Note to Rule 502(d) make clear that parties cannot use the rule to enter into selective waiver agreements. Rule 502(d), if interpreted in a certain artificial way, can be read to create a "backdoor" method for allowing selective waiver agreements. The rule is limited to orders relating to the disclosure of privileged information "in connection with the litigation pending before the court." The term "litigation," however, may be given a broad construction.[55] Although a government

[55] In the work product context, for example, Restatement (Third) of Law Governing Lawyers § 90 (1998) indicates that "litigation" includes "civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing. In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues. Thus, an adversarial rulemaking is litigation for purposes of the immunity."

investigation itself may not constitute litigation,[56] Rule 502(d) could potentially encompass pre-trial criminal or regulatory investigations by governmental entities.[57] If the term "litigation" is interpreted broadly in this manner, private parties and governmental entities could use Rule 502(d) to draft agreements allowing for "selective waiver" of the attorney-client privilege, regardless of whether Rule 502(c) is included in the rule as enacted. As stated above, LCJ feels that no provision allowing selective waiver should be enacted.

Lastly, LCJ supports the enactment of Rule 502(e) relating to the controlling effect of party agreements. It is helpful to codify that party agreements to limit the effect of waiver by disclosure are enforceable and to establish a clear rule that such agreements are not enforceable against third parties. On balance, LCJ believes that proposed Rule 502(e) correctly requires parties to seek Court approval of such agreement in order to make them binding on third parties.

VII. CONCLUSION

When crafting and finalizing the terms of proposed Rule 502, the Committee's guiding principle should be to enhance and protect the attorney-client and work product protections. History and experience have proven the value of these protections — to litigants, to the civil justice system, and to the public-at-large. LCJ's comments are submitted with that same guiding principle in mind.

To preserve and enhance these critical protections, LCJ urges the Committee to:

- amend the proposed Rule to apply in federal and state court, and in diversity and federal question cases, to ensure that the Rule is effective;
- adopt limitations on subject matter waiver [502(a)];
- adopt limitations on the impact of inadvertent disclosures [502(b)]; and

[56] *See In re Grand Jury Subpoena*, 220 F.R.D. 130, 147 (D.Mass. 2004) (finding "no authority suggesting that a government investigation itself constitutes litigation").

[57] *See id.* (noting that "adversarialness" is the key inquiry to work product protection in "anticipation of litigation")

- allow courts to enter agreed orders respecting privilege and disclosure [502(d) and (e)].

The bracketed proposal on selective waiver does not enhance and protect the attorney-client privilege or work product protection. For this reason, we respectfully suggest that the Committee withdraw that provision from the proposed Rule.