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October 13, 2006

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, DC 20544

RE: Proposed Federal Rule of Evidence 502

Dear Peter:

This letter is sent in response to the request for public comments on Proposed Federal Rule of Evidence 502. Enclosed you will find a copy of an article that analyzes the Rule and contains the bulk of my comments . In this letter, I will avoid repetition of the points made in the article and confine myself to the Rule's problematic conflation of attorney-client privilege and work product protection discussed at pp. 3-6 of the article.

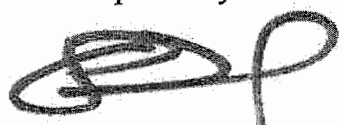
On reflection, the article may understate the vice of conflating attorney-client privilege and work product protection as done in subdivision (a). This concern can be illustrated with a further elaboration of the hypothetical contained in the article concerning an auto accident with three witnesses. Two witnesses say that the plaintiff had the green light; one says the light was red. Plaintiffs' counsel takes statements from all three. The article then asks: If counsel uses the two statements that favor the plaintiff, must counsel "in fairness" disclose the third? And it answers that this is not the law today, and should not be. But this is only the beginning of the problem.

Suppose, in connection with each of the three statements, plaintiffs' counsel writes memo to the files to remind himself or herself of factual issues bearing on the assessing the credibility of the witness giving the statement — witness A had a problematic vantage point, witness B is a friend of a friend of the plaintiff, witness C twitched a lot. If even one statement is used, counsel's work product memo assessing that witness's credibility ought "in fairness" be disclosed? Why should the use of a statement require plaintiff's counsel to become the investigator for the defense? Why shouldn't each side do its own investigation?

And, as noted in connection with the Rule 30(b)(6) hypothetical discussed in the article, who is going to rummage through counsel's files to see what else exists and what, as a result, ought "in fairness" be disclosed?

Thank you for the opportunity to comment on this important proposal.

Respectfully submitted,



Gregory P. Joseph

GPJ/589782
Enclosure

PRIVILEGE WAIVER: PROPOSED FEDERAL RULE OF EVIDENCE 502

Gregory P. Joseph*

The Advisory Committee on the Federal Rules of Evidence is considering Proposed Fed.R.Evid. 502, which would address waiver of attorney-client privilege and work product protection. The Rules Enabling Act requires affirmative Congressional approval of any rule "creating, abolishing, or modifying an evidentiary privilege." 28 U.S.C. § 2074(b). Therefore, Proposed Rule 502 will become effective only if enacted by Congress, and, in drafting it, the Advisory Committee acted at the request of the Chair of the House Judiciary Committee.

The Proposed Rule has four primary aspects:

- It articulates a test for determining the extent of subject matter waiver of privileged or work product material that is voluntarily disclosed.
- It resolves a split in the Circuits as to whether inadvertent disclosure effects a waiver.
- It tentatively proposes adopting the principle of selective waiver, under which disclosure to a federal office conducting an investigation does not effect a waiver as to third parties.
- It resolves a longstanding quandary by providing that a federal court order governing waiver through disclosure (inadvertent or otherwise) in the course of a litigation is binding on subsequent courts and third parties.

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Extent of Waiver. Subdivision (a) of Proposed Rule 502 addresses the scope of waiver through voluntary disclosure:

> **(a) Scope of waiver.** — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

This provision is straightforward as applied to attorney-client privilege but is problematic as applied to work product protection. The "ought in fairness" language is borrowed from Fed.R.Evid. 106, which states the rule of completeness: "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." This phrase has not proved problematic in Rule 106, and there is no reason to believe it will prove problematic as applied to matter covered by the attorney-client privilege.

This is not to minimize the differences in the implications of the phrase as used in Rules 106 and 502(a). Under Rule 106, the court has before it a specific document or recording, and the contours of the fairness determination are cabined by four corners of that item. Under Proposed Rule 502(a), the scope of the waiver extends to all communications, written or oral, on the subject. Subject matter waiver, however, is existing law. The "ought in fairness" language provides, if anything, a potential limitation on the extent of the waiver — confining it to something less than the entire universe of the subject matter. This effectively captures what most judges have historically done in exercising their discretion.

Extrajudicial Waivers Limited. The "ought in fairness" language also has the virtue of codifying a line of decisions holding that the waiver effected by an extrajudicial disclosure of privileged information is limited to the disclosure itself, and extends no further, provided that

this does not work unfairness on the adversary. *See, e.g., In re Grand Jury Proceedings*, 350 F.3d 299 (2d Cir. 2003) (counsel for target of grand jury investigation sent letter to prosecutor asserting that target acted in good faith based on counsel's prior conversations with regulators; prosecutor's subpoena seeking counsel's notes of conversations with regulators quashed: "The crucial issue is not merely some connection to a judicial process but rather the type of unfairness to the adversary that results in litigation circumstances when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion. No such unfairness was present here."); *XYZ Corp. v. United States*, 348 F.3d 16 (1st Cir. 2003) ("the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter"). This line of decisions is also pertinent to the discussion of the selective waiver in proposed subdivision (c).

Work Product Issues. The conflation of attorney-client privilege and work product protection in subdivision (a) is unfortunate and potentially misleading. Attorney-client privilege is designed to preserve confidentiality because of the societal benefits that flow from free and open communications between attorneys and clients. Work product protection is not designed to preserve confidentiality — other than from an adversary. Disclosures that do not substantially increase the adversary's opportunity to obtain the work product do not effect a waiver. 8 Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE § 2024 (Supp. 2005). For example, if you are defending a company accused of fraud in the sale of a business and, in preparing your defense, you consult with the company's investment banker who brokered the sale, the

consultation is protected as work product. So, too, are materials you prepare based on that consultation.

Therefore, the structure of the sentence comprising subdivision (a) — "the waiver by disclosure of ... work product protection *extends* to an undisclosed communication or information" —can be quite misleading because its use of the word "extends" assumes that there is a waiver in the first place. In this example, there is not. The Advisory Committee Note cites a D.C. District Court case, *In re UMWA Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994), for the proposition that "waiver of work product [is] limited to materials actually disclosed," but this is unpersuasive for two reasons.

First, it is at best a very weak use of the word "waiver" — it means only that a person aligned in interest saw the materials — and this usage is, if not idiosyncratic, certainly not the universal approach. Many cases, including decisions of the D.C. Circuit, hold that a disclosure of work product to someone aligned in interest (like the investment banker in the example) does not effect a waiver at all. *See, e.g., In re Sealed Case*, 676 F.2d 793, 817 (D.C. Cir. 1982); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993).

Second, the Note's reliance on the *UMWA* decision highlights a problem with the proposed definition of "work product protection" in Proposed Rule 502(f) — namely, that it is limited to "*materials* prepared in anticipation of litigation or for trial." This language, largely drawn from Fed. R. Civ. P. 26(b)(3), covers only a subset of the universe of work product protection — work product embodied in "materials" — but work product protection includes oral and other intangible work product, as well. *See, e.g., In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* [*v. Taylor*, 329 U.S. 495, 512-13 (1947)] that work product protection extends to both tangible and intangible work product"); 8 Wright,

Miller & Marcus, FEDERAL PRACTICE & PROCEDURE at § 2024 ("Rule 26(b)(3) itself provides protection only for documents and tangible things and ... does not bar discovery of facts a party may have learned from documents that are not themselves discoverable. Nonetheless, *Hickman v. Taylor* continues to furnish protection for work product within its definition that is not embodied in tangible form").

Thus, in the hypothetical consultation with the company's investment banker, if you disclose your tentative theories of the case or the gist of statements you have taken or facts you have gathered, that conversation is itself protected as work product, but it is outside the definition of the rule. Further, you have "disclosed" work product to the company's banker, and it is implicit in proposed subdivision (a) that you have thereby effected a waiver that may "extend" further. You have not.

The "Ought in Fairness" Test as Applied to Work Product. The implications of the "ought in fairness" test for waiver of work product protection are also troublesome. Assume an auto accident with three witnesses. Two witnesses say your client had the green light; one says the light was red. You take statements from all three. If you use the two statements that favor you, must you "in fairness" disclose the third? That is not the law today, nor should it be. You may have taken the third solely for purposes of impeachment; you may highly distrust the accuracy of the third's rendition; and your client did not retain you to prepare your adversary's case. There is a strong argument that Rules 26(a)(1)(b), 26(a)(3) (first paragraph) and 26(b)(3) (second paragraph) contemplate that such statements are not subject to disclosure unless and until used for impeachment. A Congressionally-enacted Rule 502 may be deemed to supersede these provisions.

Or assume a Rule 30(b)(6) deposition. You represent the organization that is to be deposed. Assume that you practice in a jurisdiction that requires that you educate the deponents so that they can testify fully as to matters known or reasonably available to the organization about the noticed topics (*see* 7 MOORE'S FEDERAL PRACTICE § 30.25[3] (2005)). You prepare a thick binder of materials for the deponents to consult during the depositions. You know that the binder will be marked as an exhibit, and that nothing in it is protected. But what about everything else you know and have generated on the topics addressed in the binder? Is everything you have thought about these topics — including every email or assessment you have made of the strengths and weaknesses of your opponent's case — to be disclosed, too, "in fairness?" Is it to be reviewed in camera by a judge to determine what the boundaries of "fairness" are? This could develop into a nightmare for purposes of judicial administration as well the adversary process. These are issues that the Advisory Committee should clarify.

Note that Proposed Rule 502(a) governs only waiver through voluntary disclosure. The Advisory Committee Note stresses that it is not intended to displace or modify federal common law concerning waiver of privilege or work product in other circumstances — *e.g.*, reliance on advice of counsel, "at issue" waiver, or refreshing recollection while testifying (Fed.R.Evid. 612).

Waiver by Inadvertent Disclosure. Subdivision (b) settles the Circuit split concerning the effect of inadvertent disclosure, providing

> **(b) Inadvertent disclosure.** A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection 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, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

This is a salutary provision that adopts the majority rule. Among its most important aspects:

First, it sets for a two-part test that must be satisfied — the holder must have taken reasonable precautions to prevent disclosure and must take reasonably prompt measure to rectify the error upon discovering the inadvertent production.

Second, it is limited to inadvertence. This provision does not sanction intentional disclosure, such as the "quick peek" approach to electronic discovery under which data are turned over to the requesting party without review by the producing party; the requesting party then identifies the documents it is interested in; and the producing party will then conduct a privilege review. *See* ABA Civil Discovery Standard 32(b) and (d)(ii). This approach is, however, covered by proposed subdivision (d), discussed below.

Third, if the inadvertent disclosure occurs "in connection with federal litigation or federal administrative proceedings," and if the two-part test is satisfied, then subdivision (b)'s non-waiver rule applies in state as well as federal court.

Fourth, only inadvertent disclosure "in connection with federal litigation or federal administrative proceedings" is addressed. What is a federal administrative "proceeding?" The SEC, for example, makes numerous, sometimes very substantial, requests for documents at the informal inquiry stage — that is, before a formal order of investigation is entered (and no order may ever be entered). Is that a "proceeding?" Presumably not. Compare subdivision (c), the selective waiver provision, which, if enacted would apply to disclosures "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." As different language is used, a "proceeding" is presumably something more formal than that.

If subdivision (c) is enacted, then the use of "proceedings" in subdivision (b) is probably irrelevant because the disclosure will be captured in subdivision (c) (under which inadvertence is also irrelevant). If subdivision (c) is not enacted, however, it would make more sense to expand subdivision (b) to any disclosures "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." Given the policy underlying subdivision (b), there is no apparent reason why waiver should turn on the commencement of a formal agency proceeding. If anything, that would tend to discourage informal cooperation.

Selective Waiver. Subdivision (c) adopts the doctrine of selective waiver, permitting a person who has disclosed privileged communications to the government to continue asserting the privilege against others:

> [**(c) Selective waiver.** In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

This is highly controversial and politically charged — and the brackets signify the Advisory Committee's tentativeness in advancing this proposal. Before addressing the merits of selective waiver, there are several important aspects of this subdivision warranting attention.

First, if the criteria for selective waiver are satisfied, the absence of waiver set forth in this subdivision applies in both federal and state court.

Second, those criteria are circumscribed. This subdivision applies only when a disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or

enforcement authority." It does not apply to disclosures made to state or local governments, or to any non-governmental entities.

Third, the effect of a disclosure to a state or local government office "is governed by applicable state law." This is very peculiar and should be changed. It means that, in a federal question case — *e.g.*, a nationwide securities or antitrust class action — state law will determine waiver questions, even though the question whether a privilege exists is decided under federal law, which may actually conflict in that respect with the privilege law of the state determining waiver (*e.g.*, federal law recognizes privilege in circumstances not recognized by a control-group state). If, as is commonly the case, the same documents are sent to regulators in multiple states, the law of the most pro-waiver state will control. It is difficult to see what the purpose of wholesale incorporation of state waiver law in a federal question proceeding might be. This provision should be limited in impact to state court proceedings.

Fourth, as reflected by the last sentence, there are no limits imposed on the governmental recipient of the privileged information. Will the use of the selectively-disclosed material at trial by a regulator waive the privilege? Does it matter if the regulator has forwarded the privileged material to another regulator or prosecutor, who introduces it at trial? Presumably there is no effect on the privilege as to third parties in either scenario, since these uses of selectively disclosed materials are reasonably within the contemplation of this rule. A selective waiver provision that evaporates on the foreseeable use of the disclosed material would be a trap, not a protection.[1]

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[1] It should also be observed that privileged material that has been submitted to a regulator in connection with settlement negotiations — material that may or may not be privileged or protected — may be offered into evidence by the prosecution in a criminal case, even though it may otherwise be excludable as settlement materials, under the amendment to Fed.R.Evid. 408(a)(2) effective December 1, 2006.

On the substantive merits: The selective waiver doctrine currently exists, in the federal system, primarily in the Eighth Circuit. *See Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). For years, corporate counsel have unsuccessfully urged other courts to adopt it, so that they could continue to protect from disclosure to civil plaintiffs materials produced by businesses to regulators or prosecutors in the course of investigations. Now on the verge of statutory success, many corporate counsel have reversed course and oppose it.

Critics voice a legitimate concern that subdivision (c) may encourage and exacerbate an existing trend by regulators and prosecutors to demand that persons being investigated waive privilege and work product. Some critics also express concern that this provision will require *Miranda*-like warnings to clients about the risk that they may as a practical matter be forced to waive, putting their communications with counsel at risk. Plaintiffs' counsel also object that their clients should continue to have access to materials disclosed to regulators and prosecutors because it is unfair to permit defendants to selectively waive privilege when it suits their purposes but conceal damning information when it does not.

While these concerns are legitimate, on balance subdivision (c) is desirable. To the extent that prosecutors are able, fairly or unfairly, to compel waiver of attorney-client privilege, it is in the best interests of those being investigated that the scope of the waiver be contained. To the extent that selective waiver facilitates exoneration as well as inculpation, permitting persons under investigation to disclose privileged material gives them a freer choice. To the extent that governmental investigations are expedited, the public interest is served. Nor is it unfair to require civil plaintiffs to conduct their own discovery, without the benefit of materials supplied to facilitate governmental investigations or effectively compelled by the government at risk of loss of liberty, in accordance with the Federal Rules of Civil Procedure.

Further, as discussed in connection with subdivision (a), there is already a line of decisions effectively permitting selective, extrajudicial disclosure. This provision helps to unify and clarify an existing doctrine of selective waiver that exists in Circuits that otherwise consider that that do not recognize the doctrine.

Court-Ordered Non-Waiver. Proposed Rule 502(d) provides that a court order concerning privilege waiver — *e.g.*, the typical agreed order that inadvertent production of privileged materials does not effect a waiver — binds not only the parties to the litigation but also third parties in subsequent litigations. It is not, however, limited to inadvertent production:

> **(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 order incorporates the agreement of the parties before the court.

This is a very constructive provision that resolves a vexing, pre-existing problem — namely, that the court-ordered return and protection of inadvertently produced material in Case 1 did not afford any protection from the discovery demands of litigants in Case 2. As to the latter, the privilege may have been waived, subject to the protections afforded by subdivision (b).

Note the breadth of this provision. *First*, this provision is not limited to inadvertently-produced material. The "quick peek" approach to electronic discovery (or, for that matter, massive paper discovery), discussed above, can easily be accommodated.

Second, if its criteria are satisfied, this subdivision applies to all state as well other federal proceedings.

Third, the phrase "state or federal proceedings" is not limited to judicial, as opposed to administrative or legislative, proceedings.

At the same time, note the limitations of subdivision (d):

- It is limited to federal court orders. An earlier iteration of the rule would have extended to state court orders addressing non-waiver as well.
- It is limited to orders governing disclosures made in connection with litigation pending before the court. This will prevent parties from approaching the court for the purpose of obtaining an order (although it would not prevent the commencement of a friendly declaratory judgment action to obtain an order).
- The order must incorporate an "agreement of the parties before the court." The purpose of this limitation is not immediately clear, although it does reflect the genesis of such orders in ordinary course.

Mere Party Agreements. Under Proposed Rule 502(e), the parties' agreement concerning privilege waiver must be "so ordered" by the court or it has no binding effect outside of the litigation in which it is entered:

> **(e) Controlling effect of party agreements.** An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

This provision is a wake-up call to counsel to ensure that party agreements are incorporated in court orders. Or it is an invitation to the alert to lay a trap for the unwary.

Definitions. The definitional subdivision, Proposed Rule 502(f), provides:

> **(f) Included privilege and protection.** — As used in this rule:
> 1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and
> 2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

This provision is noteworthy in two respects. *First,* the definitions of both "attorney-client privilege" and "work product protection" embrace "applicable" law and are not limited to

"federal or state law" (as it was in an earlier iteration). This sensibly encompasses foreign law. Assume a multinational corporation headquartered in London with two operating subsidiaries, one in Toronto and one in New York. An internal investigation is undertaken. A Toronto law firm conducts the interviews and prepares a report for the board of the parent concerning the Canadian operation. A New York law firm does the same with respect to the New York subsidiary. Both reports are presented to the SEC, together with underlying witness statements. A securities class action is commenced in New York and the plaintiffs seek both reports and all statements. All are treated equally, which is the right result, and which avoids a series of complex questions concerning which law would otherwise govern the court's determination of waiver of privilege and protection with respect to the foreign-generated materials.

Second, the definition of "work product protection" is limited to "*materials* prepared in anticipation of litigation or for trial." As noted in connection with the discussion of the subdivision (a), this is too confining. The language of this proposal is drawn from Fed.R.Civ.P. 26(b)(3), simply substituting "materials" for "documents and tangible things." But, as discussed above, a great deal of work product is oral or otherwise intangible, and it is protected. *See, e.g.*, 8 Wright, Miller & Marcus, FEDERAL PRACTICE & PROCEDURE at § 2024. Unless this definition is changed, the proposed rule will not determine waiver of all work product. Does a common law of waiver survive for oral or intangible work product? What is the point of the distinction? Sometimes the quest for brevity and conciseness backfires. The earlier definition of work product protection — embracing "federal common- law and state-enacted provisions or common-law rules" — should be reincorporated.

Conclusion. Proposed Rule 502 has many virtues. With some modification, this valuable proposal merits enactment.