06-EV-009
TESTIFY

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"Thomas Allman"
<tyallman@earthlink.net>

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tyallman@earthlink.net

To "Peter McCabe" <Peter_McCabe@ao.uscourts.gov>

cc "Tom Allman(Office)" <tyallman@mayerbrownrowe.com>,
"Tom Allman (home)" <tyallman@earthlink.net>

Subject Re: Advisory Committee on Evidence HEARINGS: Request to Testify

Dear Mr. McCabe;

I would appreciate it if you could sign me up to testify regarding Proposed Rule 502 at the Public Hearing on January 12, 2007 in Phoenix, Arizona or, if the hearing is postponed or cancelled, at the hearing to be held on January 29, 2007 in New York City.

I will submit my written Comments prior to the date of the Hearing. I will testify on behalf of myself.

Tom

Tom Allman
Mayer, Brown, Rowe & Maw LLP
Office (Chicago): 312-701-8627
Home (Cincinnati): 513-561-1438
Cell (Good most all times): 513-519-7865

tyallman@mayerbrownrowe.com
tyallman@earthlink.net

M E M OR A N D U M

MAYER
BROWN
ROWE
& MAW

January 8, 2007

TO: Advisory Committee on Evidence Rules

FROM: Thomas Y. Allman

RE: No: 06-EV- 009 Comments and Observations
Regarding Proposed Rule of Evidence 502(d)

Mayer, Brown, Rowe & Maw LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637

Main Tel (312) 782-0600
Main Fax (312) 701-7711
www.mayerbrownrowe.com

Thomas Y. Allman
Direct Tel (312) 701-8627
Direct Fax (312) 706-8206
tyallman@mayerbrownrowe.com

This Memorandum addresses certain of the issues raised by Proposed Rule of Evidence 502(d) ("Rule 502(d)"), which provides that:

> (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."

By Memorandum dated October 15, 2006, Reporter Dan Capra and Consultant Ken Broun raised the issue of deleting the requirement in Rule 502(d) that a party agreement be incorporated into the predicate court order.[1]

The issue is an important one. As explained below, the requirement should be retained because it complements the process contemplated by the newly effective Amendments to the Federal Rules of Civil Rules Procedure ("the 2006 Amendments") and because it helps to reduce the likelihood of unfair compulsion of hasty privilege review processes over objection. This memorandum concludes with suggestions for amendments to Subdivision (d) of the Committee Note to clarify the intent of the Committee in this regard.

[1] The Public Comment of Gregory P. Joseph, dated October 13, 2006, also characterizes the requirement of incorporation of an agreement as a "limitation" and notes that the purpose "is not immediately clear."

1. **The 2006 Amendments.** The Advisory Committee on Civil Rules has partially addressed the important issue of the expense and delay that accompany privilege review in the 2006 Amendments by providing a default process for asserting post-production claims of privilege. Thus, Rule 26(b)(5)(B) provides a method for a producing party in discovery to notify a receiving party of the claim that previously produced information included material subject to claims of privilege or work-protection. It "does not purport to alter existing rules on when a waiver has occurred, but does permit a party claiming privilege to 'freeze' the status quo pending a ruling from the court."[2]

The Advisory Committee also strongly endorsed the use of party agreements to minimize the risk of privilege waiver. A requirement was added to the "meet and confer" obligation in Rule 26(f) to discuss such agreements and Rule 16(b) and Form 35 were amended to provide for incorporation of such agreements in a case-management or other order. The form of the potential agreements was intentionally left broad and the Committee Notes to Rule 16(b) and Rule 26(f) referenced possible use of clawback or quick peek arrangements.

The Advisory Committee was quite careful to avoid expressing an opinion on the impact of such agreements on third parties.[3]

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[2] *See* Richard L. Marcus, "E-Discovery & Beyond: Toward Brave New World or 1984?," 236 F.R.D. 598, 616 (2006).

[3] The Committee Notes to Rule 16(b) and to Rule 26(f) both note that "[i]n most circumstances, a party who receives information under such an arrangement cannot assert that the production of the information waived a claim of privilege or of protection as trial-preparation material." Form 35 was modified after the Public Hearings to delete an initial reference to "privilege protection" to remove any inference that the parties could necessarily bind third parties by such an agreement. *See* Advisory Committee Report at C-37 ("As with Rule 16(b)(6), this change was made to avoid any implications as to the scope of the protection that may be afforded by court adoption of the parties' agreement.").

2. **Proposed Evidence Rules 502(d) and 502(e)**. Rule 502 is clearly intended, with Congressional approval, to complement the privilege and work-product waiver provisions of the 2006 Amendments. Proposed Rule 502(e) (**"Controlling Effect of Party Agreements**") confirms that non-waiver agreements are binding on parties to it and Rule 502(d) (**"Controlling Effect of Court Orders"**) clarifies that any non-waiver agreement included in a case management or other order applies to non-parties in any subsequent state or federal proceeding. The proposed rules will work in tandem with each other and with Civil Rules 16(b), 26(f) and 26(b)(5)(B).[4] The Comments to both Rules clearly contemplate enforcement of agreements whereby initial privilege review can be eliminated or truncated without waiver.[5] Both provisions serve important purposes by meeting the need for predictable privilege protection under the circumstances of modern day discovery.[6]

3. **Comment to Proposed Evidence Rule 502(d).** The Proposed Comment to Rule 502(d) explains that Rule 502(d) is intended to resolve an existing debate over the impact of non-waiver agreements on third parties, citing *Hopson v. Mayor and City Council of Baltimore*.[7] *Hopson* held, in relevant part, that third-party protection from non-waiver *requires* an order issued "at the compulsion of the court rather than solely by the voluntary act of the producing

[4] Where the parties provide an agreement on a procedure for claiming privilege post-production, it takes precedent over the default provision now provided by Rule 26(b)(5)(B) in the Civil Rules of Procedure.

[5] This is in contrast to Rule 502(b), which finds non-waiver in the absence of an agreement only when the party took "reasonable precautions to prevent disclosure" and also took "reasonably prompt measure" to rectify the error including, where applicable, the use of Fed. R. Civ. P. 26(b)(2)(5).

[6] *See Upjohn Company v. United States*, 449 U.S. 383, 392-394 (1981) ("an uncertain privilege . . . is little better than no privilege at all").

[7] 232 F.R.D. 228 (D. Md. 2005).

party."[8] This suggestion, which is inconsistent with the approach of the 2006 Amendments, finds its roots in the principle that a disclosure which has been compelled by a court is not a waiver; a principle which is misplaced in this context.[9] It is not needed to effectuate, with Congressional approval, the impact of Proposed Rule 502(d). However, by the reference to *Hopson* in the Proposed Comment, the Committee creates the risk that courts will misinterpret the intent of Rule 502(d) to be that parties can and should be "compelled" to surrender the right to conduct privilege reviews on realistic schedules so that a case management order can provide expedited and inexpensive review.

4. **Risks of Accelerated Privilege Review**. While "clawback" or "quick peek" agreements which eliminate or truncate privilege review are indeed plausible choices in some circumstances,[10] they must be *choices*, willingly made, not ones which are imposed on the parties. To those of us who have been responsible for protecting the attorney-client privilege and the work product doctrine within a corporation, any approach that compels a party to truncate or skip a privilege review process in the name of costs and efficiency has one obvious flaw: it ignores the ethical, moral and practical consequences of a finding of waiver by inadvertent disclosure. The conditions under which an accelerated privilege review may occur should not be

[8] 232 F.R.D. at 240.

[9] For example, a court is enabled to review privilege claims *in camera* without the privilege holder risking waiver and privileged information can be placed before a grand jury under certain circumstances. The Proposed Rules of Evidence acknowledged the principle in Proposed Rule 512, citing the unfairness, in the latter case, of forcing one to "stand his ground" and risk contempt "in order to sustain his privilege." Advisory Committee Note, Prop. R. Ev. 512, 56 F.R.D. 183, 260 (1973).

[10] A party with a large amount of only nominally protected information, none of it deemed crucial, might make a judgment to permit a "quick-peek" even though the "bell cannot be unrung" where the advantages of saving attorney review fees and other efficiencies are deemed to outweigh the risks involved.

artificially encouraged. The normal pressures of electronic and document privilege review already mean that despite reasonable precautions, "things slip through."[11]

Placing additional pressure on the parties to accelerate their review is inappropriate, even if understandable, is undesirable.[12]

5. **The Necessity of an Incorporated Party Agreement in Proposed Rule 502(d).**

As noted at the outset**,** this Committee has before it a Memorandum from Dan Capra, Reporter and Ken Broun, Consultant, dated October 16, 2006, which poses the following question:

> The provision on confidentiality orders [Rule 502(d)] applies only to orders that are based on agreements of the parties. Should the rule be extended to court orders on waiver that are not based on party agreements?

Similarly, in his incisive article on Rule 502 provided to the Committee on October 23, 2006, Greg Joseph notes that

> [t]he purpose of this limitation [in Rule 502(d)] is not immediately clear, although it does reflect the genesis of such orders in ordinary course.

The answer to both points is quite simple. The requirement of incorporation of a party agreement on non-waiver stems directly from the logic of the 2006 Amendments and is intended, in part, to address the concern that one or both of the parties will be coerced into an accelerated privilege review process without consciously accepting that risk. To block this risk, or minimize

[11] Comment by a Member, Advisory Committee, quoted in the Minutes of the April 15-16, 2004 meeting in Washington, D.C., p. 18, http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf ("Reasonable steps [to effectuate litigation holds] do not always preserve everything. Things slip through. That is the point of the safe harbor."). *Compare Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 446 (S.D. N.Y. 1995) (refusing to find waiver where privileged documents were inadvertently produced despite having taken reasonable precautions).

[12] This pressure can be subtle – Paul R. Rice has noted that that "the client's production [of privileged information], although not compelled, [can be] pressured by the court." Paul R. Rice, 2 Attorney-Client Privilege in the U.S. §9:25, "Involuntary Disclosures" (2006).

it, the parties are required by the 2006 Amendments – first in their meet and confer conference under Fed. R. Civ. P. Rule 26(f) and then in their scheduling conference with the court under Fed. R. Civ. P. Rule 16(b) – to assess and discuss possible agreements regarding inadvertent production.

Accordingly, the incorporation of non-waiver agreements should continue to be a pre-requisite under Proposed Rule 502(d) because:

Deletion would undermine the 2006 Amendments. If the Committee were to modify Rule 502(d) to delete the necessity of incorporating non-waiver terms, this would create a disincentive for the parties to meet and confer to work out the myriad of precise details that may be necessitated in the particular case. This would have the effect of undermining one of the key changes in the Federal Rules of Civil Procedure.

Deletion would risk unfair pressures to accelerate privilege review. There is a credible risk that without clarification from this Committee in the Comments to Proposed Rule 502(d), courts may be tempted by the *Hopson* logic or by a natural desire to expedite matters to pressure parties into expedited privilege review as part of an accelerated discovery schedule. *Hopson* unnaturally conflates the need for compulsion as a constitutional or procedural step with the need for accelerated privilege review.[13] The issues of privilege review and case management,

[13] The compulsion doctrine was first applied in the privilege review context by the Ninth Circuit in *Transamerica Computer Company, Inc. v. International Business Machines Corporation*, 573 F.2d 646 (9th Cir. 1978). A visibly shocked appellate panel there confronted the realities of large case privilege review ("incredible burdens on IBM," "Herculean" efforts, risks of mistakes which could "easily occur") and decided that given the accelerated discovery proceedings imposed by the trial court, IBM should be excused from the consequences of the production of privileged documents because they were "in a very practical way, *compelled* to produce privileged documents. Some courts have misread this as a tool to speed up discovery. See *Western Fuels Ass'n, Inc. v. Burlington Northern R. Co* 102 F.R.D. 201 (D. Wy. 1984) (order from a Magistrate Judge "state[d] that, in order to expedite discovery," the inadvertent production of privileged documents would not be a waiver).

however, are not the same. The degree and intensity devoted to privilege review is a matter for the litigant to decide. Setting reasonable discovery time limits is an entirely different matter.

If a busy court presiding over a Fed. R. Civ. P. Rule 16(b) scheduling conference knew that he or she was not required to incorporate agreements to provide complete protection against non-waiver, the judge could very well decide to enter such an order *sua sponte*, coupled with an accelerated discovery schedule under the theory of "no-harm, no foul." The approval of a court to the issuance of a confidential order or a scheduling order involving non-waiver provisions should not be made conditional upon the parties agreeing to an expedited schedule of production.

The Reporters hypothetical does not raise issues of fairness. The Memorandum of October 15, 2006 from Mssrs. Capra and Broun cites a potential concern under a hypothetical case. .[14] In the absence of a court ordered agreement, an *ad hoc* decision declaring non-waiver under the standards of Proposed Rule 502(b)[15] is not automatically accorded the same respect in a subsequent state proceeding as (arguably) a similar decision rendered when an agreement is incorporated into an order. However, that is a distinction which points up a difference. The point of the 2006 Amendments and Proposed Rule 502(d) is that parties who are prepared to take the time to work out in advance the terms and conditions of the impact are fairly entitled to a more predictable outcome.

6. **Conclusion: Improvements in the Comments are needed.** The Advisory Committee on Evidence Rules and the Advisory Committee on Civil Rules have done a masterful job of proposing a seamless process to encourage parties and courts to deal with the

[14] *See* Reporter's Memorandum, October 15, 2006 at p. 19.

[15] *See* ftn. 5, *supra*.

production of privileged and work product materials. By carefully requiring that the subject be discussed early and that the discovery plan be presented to and discussed in the context of the Rule 16(b) hearing, the Federal Rules set the stage for the uniform and effective impact of party agreements on waiver issues, which the Evidence Committee has provided in Rule 502(d) and Rule 502(e).

It remains only to stay the course and to protect the autonomy of individuals and corporate entities to choose how much and to what extent they can or will, within that framework, devote resources to pre-production privilege reviews. Those decisions deserve to be made, like all litigation decisions, independent of coercion. One way to emphasize these points is to amend the Draft Comments to Rule 502(d) by deleting the reference to *Hopson*, a point already made, apparently for somewhat similar reasons, by Prof. Marcus.[16]

However, the Comment should also be affirmatively amended to adding an admonition to the effect that it is not essential to the validity of the court order on non-waiver that an accelerated discovery schedule be agreed to or ordered by the court in the initial proceeding and that courts should refrain from measures designed to coerce or require accelerated privilege review absent agreement of the parties.

Both Advisory Committees – and the Standing Committee which provides the consistency of purpose necessary for the consistent evolution of both sets of rules – deserve our gratitude for tackling this difficult but important topic.

[16] Prior to March, 2006, the Comment cited *Hopson* for its argument that it was "essential" that production be "at the compulsion" of the court. Professor Marcus noted that citation to *Hopson* was "problematic" since it implied that protection can come only when a court orders production and it is therefore involuntary. *See* Memorandum to Advisory Committee, Capra and Brouon, March 22, 2006 at p. 35 (recommending deletion of the citation).

Respectfully Submitted,

Thomas Y. Allman,
Senior Counsel, Mayer Brown Rowe & Maw (2004 to date)
Senior V.P., Secretary and General Counsel, BASF Corporation (1994-2004)

January 8, 2007.