06 - EV - 013
Testify

Judy Krivit/DCA/AO/USCOURTS
12/19/2006 06:57 AM

To James Ishida/DCA/AO/USCOURTS@USCOURTS, John Rabiej/DCA/AO/USCOURTS@USCOURTS
cc Gale Mitchell/DCA/AO/USCOURTS@USCOURTS
bcc
Subject Fw: Evidence Hearing - 1/29 NYC

FYI
----- Forwarded by Judy Krivit/DCA/AO/USCOURTS on 12/19/2006 06:56 AM -----

"Dugan, Nancy" <Nancy.Dugan@cclfirm.com>

12/18/2006 09:38 PM

To <Rules_Support@ao.uscourts.gov>, <James_Ishida@ao.uscourts.gov>, <Judy_Krivit@ao.uscourts.gov>
cc
Subject Evidence Hearing - 1/29 NYC

Dear Mr. Ishida and Ms. Krivit:

Today our office received confirmation that time has been reserved on the agenda for John Vail to testify on behalf of AAJ at the January 12 Evidence Hearing. Mr. Vail is not available to attend that hearing and requested to testify at the January 29 hearing in New York City. I apologize for the confusion my original email caused and hope that the agendas may be changed to reflect Mr. Vail's participation in New York on the 29th. Please let me know if there is anything further I can do to effect this request. Thank you.

Nancy Dugan
Legal Administrator
Center for Constitutional Litigation, P.C.
1050 31st Street NW
Washington, DC 20007-4499
Tel: (202) 944-2809
Fax: (202) 965-0920
Email: nancy.dugan@cclfirm.com

From: Dugan, Nancy
Sent: Friday, December 08, 2006 11:11 AM
To: Judy_Krivit@ao.uscourts.gov
Subject: RE: Evidence Hearing - January 12, 2007 in New York

I'm sorry for the confusion. I was obviously looking at both at the same time. Mr. Vailwould like to testify on January 29 in New York City. Please confirm that space is available. Thank you.

From: James_Ishida@ao.uscourts.gov on behalf of Judy_Krivit@ao.uscourts.gov
Sent: Fri 12/8/2006 8:29 AM
To: Dugan, Nancy
Subject: Re: Evidence Hearing - January 12, 2007 in New York

Dear Ms. Dugan:

Thank you for the request, on behalf of John Vail, to testify at the upcoming public hearing on proposed Evidence Rule 502. We have two public hearings scheduled on the proposed new Evidence Rule -- January 12, 2007, in Phoenix, Arizona, and January 29, 2007, in New York City. To clarify Mr. Vail's request, is he requesting to testify on the 12th in Phoenix or on the 29th in New York?

James Ishida

"Dugan, Nancy" <Nancy.Dugan@cclfirm.com>

12/07/2006 04:39 PM

To <Rules_Support@ao.uscourts.gov>
cc
Subject Evidence Hearing - January 12, 2007 in New York

Dear Sir/Madam:

I am writing to request time on the January 12 (29) , 2006 Evidence Rules Hearing agenda for John Vail of the Center for Constitutional Litigation to provide testimony. Mr. Vail's testimony will be on behalf of the American Association for Justice (formerly Association of Trial Lawyers of America (ATLA)). Mr. Vail's contact information follows. If you have any questions regarding this request, please do not hesitate to contact me or him at any time.

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Legal Administrator
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06 - EV - 013
Testify

Dear Sir/Madam:

I am writing to request time on the January 12, 2006 Evidence Rules Hearing agenda for John Vail of the Center for Constitutional Litigation to provide testimony. Mr. Vail's testimony will be on behalf of the American Association for Justice (formerly Association of Trial Lawyers of America (ATLA)). Mr. Vail's contact information follows. If you have any questions regarding this request, please do not hesitate to contact me or him at any time.

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Testimony

January 16, 2007

Via U.S. Mail and Via E-Mail to:
Rules_Comments@ao.uscourts.gov

Mr. Peter McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20504

***Re*: Proposed Rule of Evidence 502 – Testimony and Commentary on behalf of the American Association for Justice (formerly the Association of Trial Lawyers of America)**

Dear Mr. McCabe:

Thank you for the opportunity to provide testimony and commentary on proposed Federal Rule of Evidence 502. We are providing this commentary in advance of John Vail's appearance before the Committee in New York on January 29th. It is possible that we will revise or extend our commentary prior to the February 15th deadline.

We represent the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), whose 60,000 members litigate daily in state and federal courts. AAJ members are among the persons most immediately affected by this proposal and they are among the persons most experienced, from the perspective of plaintiffs, with the issues addressed. We have consulted with the membership about the proposal and that consultation informs our remarks.

Summary of Commentary

The Committee notes that it has narrowed the scope of the proposed rule so that the rule less broadly affects state court litigation, and particularly state court litigation involving non-parties. This is a partial acknowledgement of an understanding fundamental to the Republic: that the litigation of disputes is primarily a function of the

governments of the states, to be interfered with by the federal government only in the most compelling circumstances, if at all.[1]

No compelling circumstances justify the proposed rule on inadvertent disclosure, which pre-empts state privilege law. The Committee posits that large amounts of resources spent on privilege reviews in federal litigation can be saved by the proposal. The proposed rule, however, comes into play only when an inadvertently disclosing party has been non-negligent. It is difficult to discern how litigants can both meet the threshold standard of care and conserve significant resources. The primary effect of the rule would be not to save resources, but to insulate federal litigants from subsequent liability, a privilege they would not enjoy if they were litigating the same case in state court.

The rule could give rise to significant and difficult satellite litigation regarding whether the procedures used by an inadvertently disclosing litigant were sufficient to meet the terms of the rule – satellite litigation in which there is a significant claim to right to trial by jury.

The proposal making sneak peek and clawback agreements broadly enforceable addresses concerns voiced by both the plaintiffs' and defendants' bars during hearings on rules relating to electronic discovery. It has the potential to yield benefits to civil litigants and their counsel who choose to waive certain rights in return for quicker, easier access to information. This proposal likely is not plagued by the prospect of satellite litigation in the federal courts.

The bracketed proposal regarding selective disclosure is a bad idea whose time has not come. The wrong solution to a problem of prosecutorial overreaching, the proposal has been roundly and persuasively criticized by the organized bar. We join in that condemnation.

The Reporter for the Committee has posited that the proposed rule "would almost certainly survive an attack on its constitutionality." (Memo of Kenneth Broun, March 22, 2006, hereafter "Broun," at 19.) We are not so sanguine. The Reporter posits two powers supporting the proposed rule: the power to make rules necessary and proper to the administration of the federal courts and the commerce power. Our firm was counsel for the successful plaintiff in the most recent Supreme Court case dealing with

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[1] *See, e.g., Palmore v. United States*, 411 U.S. 389, 401 (1973) (noting the extraordinarily limited role of federal courts in the first century of the nation's existence). Even today, federal courts decide only about 3% of all cases heard by American courts. Brian J. Ostrom & Neal B. Kauder, Examining the Work of State Courts, 1997, 1998 NATIONAL CENTER FOR STATE COURTS 8 (indicating that in 1996 there were over 87.5 million cases filed in state courts and 1.9 million in federal courts).

Congressional power to create federal rules that displace state rules, *Jinks v. Richland County*, 538 U.S. 456 (2003), and we feel some special familiarity with these issues.

The proposed rules on inadvertent disclosure and selective waiver address, primarily, not problems of administration of the courts, but problems of litigants with substantive law. These stand in contrast to the enactment involved in *Jinks*. These proposals are not necessary and proper to the functioning of the federal courts and cannot be justified under Congress's power to make rules for the federal courts. The proposal regarding sneak peek and clawback agreements more directly relates to problems of administration. These agreements can greatly speed litigation. This proposal is more likely to be found permissible.

Nothing in the proposed rule, in the first instance, regulates commerce. The rule regulates litigation and courts. Neither a court nor the litigation that occurs there is commerce. Activities that occur in court are permissibly regulated as affecting commerce only if – and perhaps not even then – they are necessary to a broader scheme of regulating commerce. No such broader scheme exists here and the proposed rule is not within the commerce power.

Analysis

Inadvertent Waiver

We address it first the proposal regarding inadvertent disclosure because we find it to be both constitutionally harmful and practically without benefit.

Proposed Rule 502(b) protects inadvertent disclosures if the litigant "took reasonable precautions to prevent disclosure" and, once disclosure was known, took "reasonably prompt measures" to retrieve the privileged information. The standard is a narrow one, designed to protect only those who have at least attempted to protect themselves[2], incorporating, essentially, a negligence standard.

The Committee has noted that "an enormous amount of expense is put into document production in order to prevent inadvertent disclosure." May 15, 2006 (Revised June 30, 2006) Memo of the Hon. Jerry E. Smith to the Hon. David F. Levi at 2, reprinted in Preliminary Draft of Proposed Amendments at 394, 395. The requirement that "reasonable precautions" be taken wisely will leave litigants with the burden of doing all that is reasonable to preclude disclosure. Any lawyer who does

[2] The standard "instill[s] in attorneys the need for effective precautions against... disclosure." *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 450 (D. Mass. 1988).

not now assure that reasonable procedures were taken to avoid disclosure by definition courts malpractice liability, and the proposed standard does not differ in a significant way from the standard already observed. Whether existing expenses are enormous or not, the proposed rule will do little to change them.

The proposed rule purports to have one significant effect: insulating the inadvertent discloser from having the inadvertently disclosed document used in the existing or any subsequent proceeding. This benefit to the discloser is not related in any way to the administration of the federal courts. The behavior of the discloser would be the same before or after the rule. Only the consequence of the disclosure would change, and it would do so in a way that damaged the principle that decisional rules should not affect the choice between a federal and a state forum. *Hanna v. Plumer*, 380 U.S. 460, 469 (1965). This is especially difficult for AAJ members, who find themselves in federal court primarily because the defendant has chosen that forum by invoking diversity jurisdiction to remove tort claims from state courts.

The constitutionality of the proposed rule hinges on its utility to the administration of the courts. That utility is absent, and the rule is not within the power of Congress. We discuss constitutional issues separately, below.

The proposed rule has the potential to create satellite litigation. Let us assume the following, which we take to be a fairly predictable scenario:

> P and D are litigating in federal court. D inadvertently discloses a smoking gun document. P stipulates that the document was inadvertently disclosed and the court incorporates that finding into an order that there was, under the proposed rule, no waiver of privilege.
>
> Subsequently, P2 sues D in state court and asks for the document. D asserts privilege[3]. P2 asserts that the privilege has been breached. D responds with the order from the federal proceeding.

P2 would assert: I was not a party to the federal case. I was not in privity with P, nor was I in active concert with P. The federal order does not bind me.[4]

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[3] Note here that D must act affirmatively, and can legitimately claim privilege only because of the existence of the federal rule.

[4] A court generally cannot issue an order binding a nonparty who lacked notice of the proceeding. *See, e.g., Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 34 F.Supp.2d 28, 43 (D.D.C. 1998) (stating that a court can enforce a judgment against nonparties if, for example, both the parties and the nonparties are "in active concert or participation" and have "receive[d] actual notice of the order").

Assume that the state court agrees with P2. D appears to have no viable immediate federal remedy. A motion in the federal court under Rule 71 or an action under the All Writs Act would face numerous jurisdictional and doctrinal problems.[5] D, procedurally, is limited to vertical appeal through the state courts and discretionary review by the Supreme Court.

Assume that the court agrees that P2 is not bound by the existing order, but finds that D is entitled to assert the federal standard in the state proceeding. There remains a question of whether D meets the criteria for the standard to apply. The court must entertain evidence and argument regarding that question.[6] It gets harder to see how resources are being saved.

P2 also could assert that the substantive standard incorporated into proposed 502(b)[7] was not within the power of Congress to enact.

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[5] A primary problem here is the express desire of the Committee to create a rule that would bind state courts. *See generally* Broun memo. Orders generally bind parties, not courts. Even if the rule is viewed as substantive federal law which a state court is bound to follow, a state court is not required to give collateral effect to a federal court order applying the rule when the party against whom the order is to be enforced in the state court was not a party to the federal action. A rule otherwise would deny due process. *See, e.g., Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 323-24 (5th Cir. 2006) ("A turnover order that issues against a non-party for property not subject to the control of the judgment debtor completely bypasses our system of affording due process.") (citation omitted); *Steans v. Combined Ins. Co. of Am.*, 148 F.3d 1266, 1271 (11th Cir. 1998) ("We are confident that a district court cannot enter a judgment purporting to bind nonparties over whom it does not have jurisdiction . . . .").

[6] Under state constitutional doctrine regarding the right to jury trial, P2 plausibly could assert that, given that the federal standard directly affects available remedies and is based on a substantive standard of what is reasonable, P2 is entitled to have a jury determine whether D's conduct conforms with the standard. *See, e.g., Craven v. Fulton Sanitation Service, Inc.*, 361 Ark 390, 206 S.W.3d 842 (2005). Under analogous federal doctrine, P in the original litigation could assert the same entitlement to jury trial. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998). Jury trials on collateral issues in otherwise summary proceedings are known to the federal courts. Because of sensitivity to the constitutional right to jury trial, they are available, for example, on the issue of contract formation in proceedings under the Federal Arbitration Act to enforce asserted valid arbitration agreements. 9 U.S.C. §4.

[7] Proposed Rule 502(b) provides a shield "in a state or federal proceeding." We note here a tension in drafting. In the hypothetical situation above, we posited agreement of the parties incorporated into a court order. This is covered by proposed Rule 502(d). Such an order by its terms is enforceable only in federal proceedings, but ostensibly it would incorporate the substantive standard of 502(b). If no order were made pursuant to 502(b), the substantive standard would appear to be available to a disclosing party in collateral proceedings; we don't believe the intent of 502(d) is to limit this availability. Whatever the intent of the drafters, greater clarity seems desirable.

Finally, and importantly, the provision, which in our estimation yields no benefit to judicial administration, provides a disincentive from entering into sneak peak and clawback provisions which could speed litigation, as we discuss below.

Selective Waiver

We hope that this horse is dead. Prosecutorial overreaching, not attorney-client privilege, is the problem.[8] Rather than commenting anew on the wisdom of this idea, we concur with and adopt the testimony of AAJ member Elisabeth Cabraser given before an ABA Commission examining the issue. For convenience, a copy is attached. It is also available at: http://www.abanet.org/buslaw/attorneyclient/publichearing20050421/testimony/cabraser.pdf.

Not only do we believe the provision unwise, we believe it not to be within the power of Congress. Again, our constitutional analysis is below.

Sneak Peek and Clawback

Under existing doctrine, AAJ members have entered into sneak peek and clawback agreements and have found that they can significantly shorten time necessary for discovery. We are intrigued by the incentive the proposed rule would create for parties to enter into these agreements more freely.

The prospects for satellite litigation regarding this proposal are lesser than those for the proposal on inadvertent disclosure, but they still exist. Let's return to the hypothetical situation posited above. An order incorporating an agreement between P and D does not find that any disclosure occurred. Thus, in a collateral case in which P2 sues D, there is no question of the collateral enforceability of a federal court's factual finding. Similarly, there is no collateral dispute about whether anyone behaved reasonably. Assuming a disclosure had been made in federal court, D can rely on the presumptive validity of the federal standard to assert, in the state court, that materials remain privileged. P2 would need to assert, factually, that the privilege had been breached and that the federal substantive standard was unconstitutional. There seems little real factual

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[8] See Testimony of Thomas J. Donohue, President & CEO, U.S. Chamber of Commerce, before the Senate Judiciary Committee Hearing on The Thompson Memorandum's Effect On The Right To Counsel In Corporate Investigations, September 12, 2006, http://judiciary.senate.gov/testimony.cfm?id=2054&wit_id=4378 ("The attorney client-privilege is a cornerstone of America's justice system – this privilege even predates the Constitution and the Bill of Rights. The Thompson memo violates this right by requiring companies to waive their privilege in order to be seen as fully cooperating with federal investigators.")

dispute, and resolution of the constitutional question would develop in the law just as any other legal issue develops, and eventually would be settled.

We are wary of any proposal that pre-empts state privilege regimes. If a record demonstrates that such agreements do, in fact, significantly reduce the time needed to adjudicate claims, their benefit to the administration of justice could distinguish, for purposes of constitutional analysis, this proposal from the proposal regarding inadvertent disclosure. Again, our constitutional analysis is below.

Constitutional Questions

The Reporter suggests that the proposed rule is justified under both the power of Congress to make rules for federal courts and the commerce power. We believe that the regime related to enforceability of sneak peek and clawback agreements, created by subsections (d) and (e) of the proposed rule, could be justified as necessary and proper to the functioning of the federal courts despite its intrusions on state adjudication. We do not believe that Congress has the power to enact the provisions on inadvertent disclosure or selective enforcement.

The Committee, we expect, is aware that the role of privilege in the evidence rules has been controversial since the inception of the rules. Documenting some of that controversy will set context for our discussion.

The Federal Rules of Evidence took effect on July 1, 1975. They were drafted by the Supreme Court but enacted by Congress,[9] which had reserved authority to pass them[10] because of its concern that the rules as drafted, especially those that defined and created certain privileges and refused to recognize others, improperly intruded upon substantive state law. S. Rep. 93-1277, 93d Cong. 2d Sess. (1974), 1974 U.S.C.C.A.N. 7053. *See also Boggs v. Blue Diamond Coal Co.*, 497 F. Supp. 1105, 1124 n. 103 (D. Ky. 1980) (noting that Congress was concerned with "the proposed rules of privilege and in particular the relation between the rules of privilege and the substance-procedure dichotomy.") "[T]here was dissatisfaction with the policy of the Court's rule not to require application of State privilege in civil actions where the underlying issues were governed by substantive State law, a result which many legal scholars deemed mandated

[9] "In 1965 Chief Justice Warren appointed an advisory committee to draw up a set of federal rules of evidence. After two preliminary drafts were circulated, 46 F.R.D. 161 (1969) and 51 F.R.D. 315 (1971), the Supreme Court reported to Congress a set of rules to take effect in 1973, 56 F.R.D. 183 (1973)." *Boggs v. Blue Diamond Coal Co.*, 497 F. Supp. 1105, 1124 n.103 (D. Ky. 1980) (citing Saltzburg & Redden, Federal Rules of Evidence Manual 5 (2d ed. 1977); Wright, Federal Courts § 93 (3d ed. 1976)). *See also* S. Rep. 93-1277, at ___ (1974), *as reprinted in* 1974 U.S.C.A.N.N. 7051, 7052.

[10] Act of March 30, 1973, Pub.L. 93-12, 87 Stat. 9

by *Erie R.R. Co. v. Tompkins* [304 U.S. 64 (1938)]." S.Rep. 93-1277, 93d Cong. 2d Sess. (1974), 1974 U.S.C.C.A.N. 7053. *See Central Vermont R.R. Co. v. White*, 238 U.S. 507, 511 (1915) ("There can, of course, be no doubt of the general principle that matters respecting the remedy-such as the form of the action, sufficiency of the pleadings, *rules of evidence*, and the statute of limitations-depend upon the law of the place where the suit is brought.") (emphasis supplied).

Ultimately, Congress eliminated the specific privilege rules proposed by the Court and substituted a single rule (Rule 501). 1974 U.S.C.C.A.N. at 7053. Rule 501 left the law of privilege as it was: to be developed by the courts of the United States utilizing the principles of the common law.[11] "In addition, a proviso was approved requiring Federal courts to recognize and apply state privilege law in civil cases governed by *Erie R.R. Co. v. Tompkins* . . . ." *Id.*

> The rationale underlying the proviso as passed by the House is that Federal law should *not* supersede that of the States in substantive areas such as privilege absent a compelling reason. This reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy.

Id. (emphasis added).

Congress explicitly rejected the Supreme Court's attempt to "federalize" the law of privilege. As a result, federal courts sitting in diversity jurisdiction apply state law governing privilege, and when an issue of waiver of the privilege arises, the court employs state law regarding waiver.[12]

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[11] Rule 501 provides that in cases where state law supplies the rule of the decision, such as in a diversity-jurisdiction matter, "the privilege of a witness, person, government, State, or political sub-division thereof shall be determined in accordance with State law." Fed. R. Evid. 501.

[12] *See, e.g., In re Avantel, S.A.*, 345 F.3d 311, 323 (5th Cir. 2003) (citing *Hyde Const. Co. v. Koehring Co.*, 455 F.2d 337, 340-42 (5th Cir.1972) (considering, in a diversity case, whether Mississippi law-not federal law-would determine whether the attorney-client privilege had been waived); *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 731 (8th Cir. 2002) ("Nebraska law controls the issue of waiver of attorney-client privilege in this [diversity] case."); *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699 (10th Cir. 1998) (making a similar determination as *Pamida*); *F.D.I.C. v. Fid. & Deposit Co. of Md.*, 196 F.R.D. 375, 380 (S.D. Cal. 2000) (holding that state attorney-client privilege law applied to resolve whether the inadvertent disclosure of documents during discovery operated as a waiver because state law governed the substantive issues of the case); *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 237 n.27 (D. Md. 2005). The court in *Hopson* noted that because state privilege law governs issues of waiver in diversity cases "[c]ounsel must be cautious to make sure which standard governs in their cases . .

To date Congress has refused to enact rules of procedure that encroach on state privilege law, even when issues of such law arise in the federal courts. This is evidence of Congressional sensitivity to constitutional limits on Congressional power and is a clear expression of prudential deference to the values of federalism.[13] Congress has never perceived a "compelling reason" to upset the balance between federal and state laws governing privilege, despite awkward situations that can arise in litigation as a result of the federalist structure we have erected to protect our freedoms.[14] Congress's historical tendencies do not dispose of the question of whether Congress has the power to act, but they tell us clearly that Congress is reluctant, absent a compelling reason, even to explore the question.

We are aware that privilege reviews can be expensive and torpid. The proposal regarding inadvertent disclosure does little to change this. In contrast, we believe that sneak peek and clawback agreements could save significant time and money. This significant difference in effect could serve to distinguish it, for purposes of constitutional analysis, from the inadvertent disclosure provision.

Congress's Article III & Article I, § 8, cl. 18 Powers

The Reporter suggests that "[a] rule that governed the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality." (Broun, 19.) The Reporter reasons that Congress's authority to legislate concerning privilege arises, in part, from its

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. ." *Hopson*, 232 F.R.D. at 237 n 27. It counseled attorneys to beware that "in cases asserting both federal and state claims, both federal and state privilege standards could be applicable, which could result in the paradoxical situation in which a producing party's conduct could constitute waiver of the attorney-client privilege for the federal claims, but not for the state claims." *Id.*

[13] Preserving the federal structure is a key the protection of individual rights:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

New York v. United States, 505 U.S. 144, 181 (1992) (quotation omitted)

[14] See, e.g., Hopson, supra n. 12.

authority under Article III, § 1 and Article I, § 8, cl. 9, to establish lower federal courts, and from the necessary and proper clause, Article I, § 8, cl. 18.[15]

In *Jinks v. Richland County, S.C.*, 538 U.S. 456 (2003), the Court considered, in a constitutional challenge to 28 U.S.C. § 1367(d), the scope of Congressional power under these provisions. The statute in question aids supplemental jurisdiction by tolling state statutes of limitations on state law claims while a federal court considers whether those claims are appropriate for adjudication there. The Court upheld the statute, finding that it resolved a real problem "that federal judges faced when they decided whether to retain jurisdiction over supplemental state-law claims that might be time barred in state court," and that it "eliminate[d] a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive' from common facts." *Id.* at 462-63. The Court found § 1367(d) "necessary" because it "is 'conducive to the due administration of justice' in *federal* court, and is 'plainly adapted' to that end."[16] The Court found that § 1367(d) is "proper" because, assuming for argument that the substance-procedure distinction is valid, the rule is not a "'procedure' immune from federal regulation." *Id.* at 465.

Both the inadvertent and selective waiver provisions are entirely distinct from the enactment upheld in *Jinks*. The rule on selective waiver does not address a problem created by judicial branch action or, as in *Jinks*, a problem making a federal forum less attractive than a state one. It addresses a problem of executive branch overreaching. The selective waiver rule is neither necessary nor proper to assure that federal courts can function.[17]

The same is true of the inadvertent disclosure provision. Both § 1367(d) and the inadvertent disclosure provision insulate a party from the effects of state privilege law, but the existence of state privilege law is not a barrier to access to a federal forum; the

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[15] The Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const., Art. I, § 8, cl. 18. Congress has the authority to promulgate rules governing procedural matters in the federal courts, and that so long as the enactments are "'rationally capable of classification' as procedural rules [they] are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (citing *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); *see also McInnis v. A.M.F., Inc.*, 765 F.2d 240, 244 (1st Cir. 1985).

[16] Id. at 462 (emphasis supplied). Note that the Court addressed both the end the statute serves and means used to reach the end.

[17] We do not underplay the problem of prosecutorial overreaching. We condemn it. But this proposal is not an appropriate solution, and Congress has other powers at its disposal to resolve the problem. See generally Senate hearings cited supra, n. 8.

same substantive law applies in federal or state court. Indeed, the federal rule would create an immunity in federal court that a litigant would not enjoy in state court, in violation of fundamental federalism doctrine.[18]

The statute in *Jinks* did not alter a state law to be applied in a case; it merely assured that law could, at some point, be applied, by either a federal or a state court, whichever proved appropriate. The proposed rules do alter state law to be applied to a case in a way that violates a central tenet of *Erie* – that "Congress has no power to declare a substantive rule of common law applicable in a State." *Erie*, 304 U.S. at 78.

These proposed rules are not, in the constitutional sense, "necessary," as they are not "conducive to the due administration of justice' in *federal* court." *Jinks* at 462 (emphasis supplied).[19] The due administration of justice is first concerned with discharging one of the "first duties of government" – providing remedies to injured persons. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In our federal system, that duty always has been, and still is, first discharged by the constituent states. See note 11, *supra*. Recognition of that fact again counsels utmost caution in displacing the doctrines the states have put into place to serve that end.

These proposed rules also are not, in the constitutional sense, "proper." In *Printz v. United States*, 521 U.S. 898 (1997), and *Alden v. Maine*, 521 U.S. 898 (1997), "the Supreme Court advanced an interpretation of 'proper' that calls into question the constitutionality of federal statutes that trespass upon the domain of state and local legislative power." *U.S. v. Sabri*, 326 F.3d 937, 954 (8th Cir. 2003) (Bye, J., dissenting). For example, in *Printz*, "[r]elying solely on its understanding of what constitutes a 'proper' law, the Court held the Necessary and Proper Clause forbids Congress from enacting legislation that intrudes on state sovereignty." *U.S. v. Sabri*, 326 F.3d at 954-55 (citing *Printz*, 521 U.S. at 923-24). As in *Printz*, the Court in *Alden v. Maine*, 521 U.S. 898 (1997), "recognized the word 'proper' restricts the scope of legislative power." *Sabri*, 326 F.3d at 955 (citing *Alden*, 528 U.S. at 732) ("rejecting the argument that the

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[18] *Hanna*, 380 U.S. at 471 ("We are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law."); *Flaminio v. Honda Motot Co*, 733 F.2d 463, 471 (7th Cir. 1984) (Posner, J.) ("Congress intended the Federal Rules of Evidence to apply in diversity cases," but was cognizant that under *Erie*, "federal courts [are] *constitutionally* obligated to decide diversity cases in accordance with the rules of decision prescribed by *state* law . . .") (emphases supplied)

[19] *See Boggs v. Blue Diamond Coal Co.*, 497 F.Supp. 1105, 1112 (D. Ky. 1980) ("[I]t is not necessary and proper for the operation of a national court system to establish rules for deciding cases, whether such rules are 'general' or 'local' in nature, if those rules are unrelated to the operation of that national court system.") (describing holding of *Erie*).

Necessary and Proper Clause conferred authority on Congress to subject unconsenting states to suit in state court 'as a means of achieving objectives otherwise within the scope of the enumerated powers'").

We see the proposed rule regarding sneak peek and clawback agreements as potentially distinguishable for purposes of constitutional analysis. Unlike the other provisions, they operate only when, free from federal coercion, the parties agree. Displacement of state law occurs only when both parties, neither wielding the club of prosecutorial power, concur that displacement will aid the administration of justice. A record demonstrating that these agreements significantly advance the pace of litigation, serving the needs of the courts themselves and of the litigants, could render this proposal within Congressional power.

Commerce Power

Despite *Erie*'s strong prohibition against Congressional regulation concerning "substantive rules of common law applicable in a state," *Erie*, 304 U.S. at 78,[20] the Reporter asserts that there is a "strong argument . . . for a federalized attorney client privilege enacted by Congress under its Commerce Clause powers" (Broun at 21.) Our reading of Commerce Clause jurisprudence leads us to an opposite conclusion.

The Commerce Clause confers upon Congress the power "[t]o regulate Commerce . . . among the several States . . . ." U.S. Const. Art. I § 8, cl. 3. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and *is regulated by prescribing rules for carrying on that intercourse*." Gibbons v. Ogden, 22 U.S. 1, 189-90 (1824) (emphasis supplied), quoted in *Lopez*, 514 U.S. 549 at 553. It consists of the "production, distribution, and consumption of commodities." *Gonzalez v. Raich*, 545 U.S. 1, 25-26 (2005) (citing Webster's Third New International Dictionary 720 (1966)); *see also* Black's Law Dictionary 263 (7th Ed. 1999) (defining commerce as "[t]he exchange of goods and services" or "[t]rade and other business activities."). That is a far cry, textually, from what is proposed here: an enactment that regulates not production, distribution, or consumption, nor sets rules for carrying on that intercourse, but directly and baldly supplants laws the states have structured to assure the fair administration of justice. To reach the conclusion that this proposal regulates commerce, one has to do what the court in *Lopez* forbade: "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez* at 567.

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[20] We are aware that the *Erie* doctrine applies only to cases in which state law is applied. As the proposed rule is not limited only to cases in which federal law is applied, we do not belabor the distinction in our discussion.

State laws of evidence, of privilege, and of the waiver of such privilege do not constitute are not "commercial regulations." *Richmond & Allegheny R.R.*, 169 U.S. 311, 315 (1898). Although "they control in some degree the conduct and liability of those engaged in such commerce, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." *Id.* The

Supreme Court has "*always* [] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power. . . ." *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) (emphasis in original); *accord United States v. Morrison*, 529 U.S. 598, 618-19 (2000).

We are aware that the Commerce power authorizes Congress to regulate intrastate activities that "affect interstate commerce . . . ." *United States v. Darby*, 312 U.S. 100, 118 (1941).[21] But the Court has reminded us, in *United States v. Lopez*, 514 U.S. 549, 557 (1995), and again in *United States v. Morrison*, 529 U.S. 598, 608 (2000), that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."

> [T]he scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

Morrison, 529 U.S. at 608 (citing *Lopez*, 514 U.S. at 556-57 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).[22] *Lopez* and *Morrison* instruct that the

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[21] Even under *Darby*, the Court made it clear that the means Congress used must be justified by the ends it sought to achieve: "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*, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* (emphasis supplied) We believe such proportionality to be absent from the proposed rules.

[22] The Court has retained a "distinction between what is truly national and what is truly local" in defining the outer bounds of Congress's power under the Commerce Clause – a distinction that our Constitutional "system of dual sovereignty between the States and the Federal Government" commands. *Gregory v. Ashcroft*, 501 U.S. 452, 457, 458 (1991) (affirming that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front"); see also *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (noting that we live in a nation of dual sovereigns, "each protected from incursion by the other").

regulation of intrastate activity "that is not directed at the instrumentalities, channels, or goods involved in interstate commerce" – in other words, regulation like the proposal before us – "has always been the province of the States." *Morrison*, 529 U.S. at 618 (emphasis added); see *Lopez*, 514 U.S. at 561 n.3.

The cases do admit that Congress may regulate "those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." *Morrison* at 608-09 (citations omitted).[23] The proposed rule plausibly could fall only under this category. *See* Broun at 21, relying on Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59, 157 (2002) ("The privilege legislation I propose would fall primarily within [this] category.").

The Supreme Court has never upheld, under this category, an enactment that simply supplants state law. As its most recent case dealing with this issue, *Gonzalez v. Raich*, 545 U.S. 1 (2005), makes clear, the Constitution tolerates regulation of activities "substantially affecting" commerce when that regulation is adjunct to a broader scheme of regulation of activities undoubtedly in interstate commerce. *United States v. Darby*, 312 U.S. 100 (1941), to *Wickard v. Filburn*, 317 U.S. 111 (1942), to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), to *Katzenbach v. McClung*, 379 U.S. 294 (1964). to *Gonzalez v. Raich*, 545 U.S. 1 (2005), The Court has approved regulation "substantially affecting" commerce only to the context of a broader regulatory scheme clearly connected to regulation of core.

The power to enact generally applicable tort law that is not directed at interstate commerce is also a police power that the Founders denied the Federal Government and reposed in the States. "The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States" to craft rules of decision that regulate intrastate activity. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). States traditionally have occupied the field in the administration of civil justice, whether for the recompense of personal or property injuries. *See* Federalist, No. 17 (Alexander Hamilton) (noting that the "administration of criminal and civil justice" was reserved to the States) (emphasis added); *Lopez*, 514 U.S. at 564 (noting that family law, criminal law, and education are three areas that have traditionally been regulated by the states); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (noting that the States have traditionally regulated real property). Both as a historical matter and as matter of constitutional design, "[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (Marshall, C.J.) (recognizing that "the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury," and it is "[o]ne of the first duties of government [] to afford that protection").

[23] The Reporter's argument is founded upon the conclusion that the "legal services" is an "industry." *Id.* (citing Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59, 156-71 (2002).) He reasons that because the provision of legal services constitutes "commerce" and "the attorney-client privilege protects [the] communications upon which the industry's article of commerce – provision of legal services [–] depends," Congress properly can enact a rule affecting that privilege under its Commerce power. *Id.* at 22.

Here there is no such scheme. These proposals go to the heart of an activity traditionally delegated to the states and that, indeed, involve an expression of state sovereignty. *See* Federalist, No. 17 (Alexander Hamilton) (noting that the "administration of criminal and civil justice" was reserved to the States). Both as an historical matter and as matter of constitutional design, "[i]t is the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).[24] The proposed rule does not regulate commerce and does not permissibly address matters that substantially affect commerce.

Conclusion

Much of the deliberation about the proposed rule has been about the effects of the rule on commerce. Neither federal nor state courts exist primarily for the purpose of accommodating commerce. Their primary purpose is political, resolving disputes in a way that allows diverse people to live together. *See* John Vail, *Big Money v. The Framers*, Yale L.S. (The pocket Part), Dec. 2005, http://www.thepocketpart.org/2005/vail.html . Upsetting the carefully wrought political structure that allows them to fulfill their role clearly is not something to be done lightly, and the upset wrought by the proposed rules on inadvertent waiver and selective waiver clearly is not justified.

We thank you for your willingness to entertain our thoughts. We are happy to respond to any requests for further information that the Committee might make.

Very truly yours,

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[24] *See also Lopez*, 514 U.S. at 564 (noting that family law, criminal law, and education are three areas that have traditionally been regulated by the states); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (noting that the States have traditionally regulated real property).

American Bar Association
Presidential Task Force on the Attorney-Client Privilege
April 21, 2005, Hearing in New York City

Testimony of Elizabeth J. Cabraser
Lieff, Cabraser, Heimann & Bernstein, LLP

Thank you for the opportunity to provide this testimony today. I have been representing plaintiffs in securities and investment fraud cases, mass torts, and class actions for 27 years. My firm has represented hundreds of thousands of plaintiffs and class members since our founding in 1972.

I am testifying here today because two important assumptions underlying much of the testimony may not have been examined as fully as protection of the public interest requires.

The first assumption is that companies have no choice but to have inside or outside counsel conduct compliance investigations and oversee compliance programs, effectively merging the functions of determining facts and rendering legal advice and thus jeopardizing the confidentiality of legal advice when disclosing the details of the factual investigation. That conflation of functions has led to the present dilemma.

The second assumption is that some action should be taken to protect the decision of a company to obtain an advantage by disclosure of privileged material to a public or private asserted guardian of the public interest while refusing to disclose it to those members of the same public that it has harmed by its unlawful conduct.

A. The Expansion of Counsel's Tasks Into Business Operations Has Created Part of the Perceived Problem

Upjohn Co. v. United States, 449 U.S. 383 (1981), held that in some circumstances internal investigations by companies essential to the provision of legal advice, including communications by mid-level and lower-level employees not in the "control group," are protected in Federal courts by the attorney-client privilege. The investigation involved questionable payments to or for the benefit of foreign governmental officials. The Court specifically declined to announce a broad rule, and limited its holding to the facts of the case before it.[1] The circumstances of that case differ, to a dispositive degree, from those present in many of the internal investigations this Task Force is considering:

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[1] "We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings." 449 U.S. at 386.

- Upjohn took action on a report of independent accountants performing an audit of a foreign subsidiary, without waiting for outside events.

- Upjohn's internal investigation was for the purpose of obtaining legal advice and bringing the company into compliance with the law, and all participants were told the matter was confidential and under the control of the General Counsel. There was no other business purpose to the investigation.

- Upjohn reported its questionable payments to the SEC and the IRS, and provided the government with a list of all employees that had provided information.

There would be little dispute today as to protection for attorneys' notes and interviews where a corporation voluntarily disclosed wrongdoing prior to any external suspicion of wrongdoing, and provided the names and contact information of all knowledgeable present and former employees.

Corporate compliance programs and internal investigations that occur only after accusations of wrongdoing by victims or by the government, that place a lawyer on top of the compliance or investigation pyramid where there is no fundamental reason for doing so, and that attempt to throw a cloak of privilege over findings on the existence, scope, and details of the wrongdoing, and over the identify of knowledgeable employees, gain no support from *Upjohn* and deserve little sympathy from his Task Force.

It is important to bear in mind that questions of compliance often depend on expertise and judgments outside any special competence of counsel. Compliance of financial reporting with regulatory and accounting standards can be overseen by accountants, compliance with environmental controls can be overseen by qualified engineers, compliance with health and safety standards can be overseen by qualified medical and other professionals, compliance with nondiscrimination and anti-harassment standards can be overseen by Human Resources personnel and outside fact investigators, and compliance with other aspects of the regulatory framework can be overseen by other types of properly qualified personnel. None of these functions needs to be carried out by an attorney, and any attorney assigned or retained to oversee such functions will have to rely on such properly qualified personnel with respect to everything but legal judgments.

The purposes of the attorney-client privilege are distorted by attempts to extend the privilege to information identified and obtained by persons with non-legal expertise just because an attorney is designated to receive their reports. An example may help make this clear. A company may require its employees to report orally on any problems with the safety of its products to a compliance program run by its outside counsel. An employee who becomes aware that a problem in the design for an oven may lead to an explosion and fire once for every hundred thousand ovens sold reports it orally to outside counsel. Outside counsel then orally informs the CEO and the Vice-President for Manufacturing, who take no action. When a family of four dies in just such an explosion, the company defends against punitive damages on the ground that it had no means of knowing of the danger, and in its responses to discovery simply states that it is not providing information subject to attorney-client privilege.

While I hope that the above "worst-case" scenario will never occur, there is little room for doubt that corporations seek to manipulate the structure of their compliance and investigative activities in order to throw broad cloaks of privilege over them. "Outside counsel may be retained to conduct an internal investigation in an effort to increase the likelihood that the investigations's [sic] results will be protected by the attorney-client privilege and the work product doctrine."[2] Similarly, Richard Gruner states that "if counsel is involved in a compliance review but acts only as a fact finder or source of business advice, there is little chance that the privilege will apply."[3] He advocates wrapping counsel's work in a framework of giving legal advice. Both commentators—and the majority of those providing testimony to this Task Force—assume that is it desirable to throw the cloak of privilege over the business function of overseeing compliance.

If Upjohn had asserted privilege as to the fact that questionable payments had been made, or as to the details of the payments, or as to the identity of knowledgeable officials, it is difficult to conclude that the Supreme Court would have made the same decision. If a corporation tries to conceal such critical facts by the expedient of having an attorney preside over the compliance effort or investigation, honoring the asserted privilege would place off-limits the key facts and witnesses on which auditors, government regulators, and private litigants necessarily depend. To the extent that corporations attempt to throw wider and wider privilege blankets over their business and compliance activities by assigning counsel to discharge what are in reality business functions, it is understandable that auditors and government regulators would demand privilege waivers and that private litigants would seek the same access as auditors and regulators. It is the corporate tactic that breeds the demands corporations now see as problematic.

Such demands do not invade the traditional scope of attorney-client privilege. The proper non-litigation role of attorneys—and the only role the attorney-client privilege is intended to protect—is that of providing legal advice and obtaining the information needed to provide sound advice. Both inside and outside counsel perform far broader business roles. The New York Court of Appeals referred to the business roles of in-house counsel in *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588, 592–93, 540 N.E.2d 703 (N.Y. 1989), but the same roles are increasingly undertaken by outside counsel today:

> For example, unlike the situation where a client individually engages a lawyer in a particular matter, staff attorneys may serve as company officers, with mixed business-legal responsibility; whether or not officers, their day-to-day involvement in their employers' affairs may blur the line between legal and nonlegal communications; and their advice may originate not in response to the client's consultation about a particular problem but with them, as part of an ongoing, permanent relationship with the organization. In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose . . . the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure . . . .

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[2] Michael J. Chepiga , *Federal Attorney-Client Privilege and Work-Product Doctrine* in CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2000 423, 482 (Practising Law Institute, 2000).

[3] Richard S. Gruner, *General Counsel in an Era of Compliance Programs*, 46 EMORY L.J. 1113, 1178 (1997).

(Citations omitted.) This expansion of the role of outside as well as in-house counsel has been widely remarked. Michael A. Knoerzer stated in *Attorney-Client Privilege and Work Product Doctrine*, 31 BRIEF 40, 41 (2002):

> More and more, corporate counsel and their outside counsel find themselves responsible for traditionally nonlegal tasks such as negotiating contracts, analyzing potential corporate transactions, and investigating potential claims. The attorney-client privilege and work product doctrine have not prospered in this new environment. Courts have responded to the evolving role of attorneys as business and legal advisors by closely scrutinizing communications, denying privileged status to all but those made strictly for the purpose of rendering legal advice.

It is the decision of corporations to "counselize" their business chores of overseeing compliance and conducting investigations, more than the demands of auditors and regulators, that jeopardizes the confidentiality of counsel's advice.

B. Where a Corporation Relies on its Internal Investigation or Compliance Program to Obtain Some Advantage, It Waives the Attorney-Client and Work Product Privileges

There are many situations in which a corporation relies on its internal investigations or compliance program to obtain business or litigation advantage. For example, a defendant's liability for a racially or sexually hostile working environment is often dependent on whether it took adequate steps to prevent harassment from occurring, and whether it took adequate steps to investigate any complaints of harassment. With co-worker harassment, or supervisory harassment without a tangible employment action, liability often does not depend on the occurrence of the hostile environment but on management's reaction to it.[4] Similarly, a corporation's exposure to punitive damages in this area of law may turn on whether it had a good-faith compliance system in place.[5]

Employers are free to have their counsel conduct the investigation and, as long as they do not rely on the investigation to provide a defense, the courts generally treat the investigation as privileged even when a governmental enforcement agency demands the records of the investigation.[6] Where they rely on the investigation or compliance program conducted by counsel to gain any benefit in litigation or business, it is black-letter law that they have waived both attorney-client and work-product privileges.[7] In discussing waiver of a juror's privilege as

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[4] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

[5] *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

[6] *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999). Because the organization's President was promptly fired, it is difficult to see how the investigation could have been attacked as inadequate.

[7] *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("There is authority for the proposition that a party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield. . . . Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." (Citations omitted.)); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, 502 U.S. 813 (1991) (same).

to statements during deliberations, the Supreme Court stated: "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused."[8]

Because confidentiality is at the core of both the attorney-client and work-product privileges, a corporation's decision to disclose to an independent person or entity[9] otherwise privileged materials—either as a volunteer or to gain some perceived benefit—destroys the reason for the privilege. In many jurisdictions, even inadvertent disclosure has such an effect.

C. Public Policy Forbids Selective Waivers of Privilege Where a Corporation Discloses Privileged Information to an Independent Entity, Outside the Context of a Joint Prosecution or Joint Defense Agreement with an Aligned Party in Actual or Anticipated Litigation

Regulators, prosecutors, and auditors discharge their functions so as to protect the public interest. Litigation on behalf of those injured by the wrongful acts or omissions of a corporation, to deter further wrongs and to provide a remedy for past wrongs, is imbued with the public interest to an even greater extent because the entire purpose of our system of civil justice is to provide remedies for those harmed by unlawful actions.

The arguments for selective waiver rest on four fallacies: *first*, that a corporation's ability to obtain a plea bargain or reduced charge without opening the door to a remedy for victims is so deserving of protection that selective waivers must be allowed; *second*, that internal investigations and compliance programs have a purpose that so transcends the avoidance of unlawful activity and provision of remedies to those harmed that selective waivers should be allowed; *third*, that the interests of the regulators, prosecutors and auditors are so aligned with the interests of the corporation that selective waivers should be allowed; and *fourth*, that selective waivers can be allowed without opening the door to abuses such as providing a selective waiver to the particular governmental official or particular plaintiffs' lawyer that will give the defendant the most favorable deal. All of these propositions are inimical to the core purposes of our civil justice system, and their acceptance would distort those purposes beyond recognition.

The SEC and states' Attorneys General have argued that selective waiver is an important tool for law enforcement, which saves the government time and money in the prosecutorial process. But selective waiver is often used as a "carrot" in deals that reward the informant with favorable treatment or immunity. The result may be nonprosecution of deep pockets, a justifiable side effect of expediting a criminal prosecution of individuals, but one that gives no monetary or symbolic satisfaction to the victims: defrauded investors. In the *McKesson* litigation, for example, my clients, defrauded pension funds that with other institutional investors lost hundreds of millions of dollars sought—and got—production of a roadmap of accounting fraud that McKesson's litigation counsel prepared to curry favor with, and obtain a nonprosecution

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[8] *Clark v. United States*, 289 U.S. 1, 15 (1933).

[9] Disclosure to an aligned party sharing the same or similar stake in an actual or anticipated investigation or litigation, under a joint prosecution or joint defense agreement designed to protect attorney-client and work-product privileges, is outside the scope of this testimony.

pact from, the SEC. McKesson argued selective waiver as a shield, and the SEC and California Attorney General chimed in as *amici*, urging, as policy arguments, the fallacies listed above.

These matters were all considered and rejected in *McKesson HBOC, Inc. v. Superior Court*, 115 Cal.App.4th 1229, 1238, 9 Cal.Rptr.3d 812 (Cal. App. 1st Dist. 2004). The court rejected selective waivers of the attorney-client and work product privileges, stating:

> We see no real alignment of interests between the government and persons or entities under investigation for securities law violations. Even if we credit McKesson's claim that it was interested in rooting out the source of the accounting improprieties, we still find the situation here is not qualitatively different than a defendant's sharing privileged material with one plaintiff, but not another. Though McKesson and amici curiae advance policy arguments for allowing sharing of privileged materials with the government . . . no one suggests that a defendant facing multiple plaintiffs should be able to disclose privileged materials to one plaintiff without waiving the attorney-client privilege as to the other plaintiffs.

The court reached the same result as to the work product privilege. "As Merrill Lynch points out, McKesson did not need to disclose the audit report and interview memoranda to prepare its case for trial, and McKesson's adversaries are not taking undue advantage of Skadden's efforts because the documents would have remained protected had not McKesson disclosed them to third parties." 115 Cal.App.4th at 1241.

Similar considerations led the Sixth Circuit to reject arguments for the creation of selective waiver:

> Secondly, any form of selective waiver, even that which stems from a confidentiality agreement, transforms the attorney-client privilege into "merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." *Steinhardt*, 9 F.3d at 235. Once "the privacy for the sake of which the privilege was created [is] gone by the [client's] own consent, ... the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice." *Green v. Crapo*, 181 Mass. 55, 62, 62 N.E. 956, 959 (1902) (Holmes, J.). "The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality as to others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." *Permian*, 665 F.2d at 1221.

In re Columbia/HCA Healthcare Corporation Billing Practices Litigation, 293 F.3d 289, 302–03 (6th Cir. 2002), *cert. dismissed*, 539 U.S. 977 (2003).

Twenty-seven years ago, the Eighth Circuit assumed without analysis that there was such a high value in the use of "independent outside counsel" as to justify selective waivers of privileged material by providing them to the government and to no others. The court did not consider any of the matters later courts have held to be important, and its faith in the value of

outside counsel has proven more idealistic than real. *Diversified Industries, Inc., v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978 (*en banc*). Nothing in this decision commands support today.[10]

The Task Force is well aware of the other authorities in this field, and there is no need to discuss them.

Rejection of selective waiver thus continues the prevailing, and better balanced view. It will also be no surprise to either prosecutors or counsel for clients under criminal investigation, who have long acknowledged, and advised their clients, that selective waiver cannot be relied upon, and should not be a basis for providing information to the government: such cooperation has benefits far too important to be foregone in the absence of selective waiver, including the ultimate goal of avoiding criminal indictment, and the second-best outcome: a plea agreement for a lesser charge.

Conclusion

I suggest that, whatever the Task Force recommends to government agencies or to auditors seeking the production of privileged materials, it endorse the majority view that the disclosure of privileged materials to any independent entity, whether regulator, prosecutor, auditor, or anyone else not an aligned party sharing the same or similar stake in an actual or anticipated investigation or litigation, operates to waive the privilege as to all others.

[10] Indeed, a panel of the Eighth Circuit rejected selected waiver—in a criminal-law decision not involving outside counsel—ten years after *Diversified*, citing *Permian Corp. v. United States*, 665 F.2d 1214, 1219–21 (1981), and giving *Diversified* a "*But cf.*" citation. *In re Grand Jury Proceedings Subpoena to Testify to: Wine*, 841 F.2d 230, 234 (8th Cir. 1988). The panel stated: "Voluntary disclosure is inconsistent with the confidential attorney-client relationship and waives the privilege. . . . 'A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes.'" (Citations omitted.)