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IADC

International Association of Defense Counsel

06 - EV- 025

Testify

December 6, 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
Washington, DC 20544

Dear Mr. McCabe:

I am writing in my capacity as President of the International Association of Defense Counsel to request an opportunity to testify before the Rules Advisory Committee at its scheduled hearing on January 29th in New York City with regard to the proposed changes to Federal Rule of Evidence 502. Please advise if the schedule will permit me to appear before the Committee on January 29th. I can be reached at my office address: Venable LLP, 2 Hopkins Plaza, Suite 1800, Baltimore, Maryland 21201. My e-mail address is: brparker@venable.com.

Very truly yours,

Bruce R. Parker

BRP:ac
BA2DOCS/#307132

cc: Gino Marchetti, Jr., Esquire
Greg Lederer, Esquire
G. Edward Pickle, Jr., Esquire
Barry Bauman, Esquire

Testimony

"Mary Beth Kurzak"
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01/19/2007 03:34 PM

To <Rules_Comments@ao.uscourts.gov>
cc "Parker, Bruce R." <BRParker@Venable.com>
bcc
Subject Comments on Proposed Evidence Rule 502

Please accept the attached comments from the International Association of Defense Counsel regarding Rule 502.

If you have any difficulty with the attachment or require that we send a hard copy as well, please contact me.

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The IADC dedicates itself to enhancing the development of skills, professionalism, and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

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International Association of Defense Counsel

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

Re: Proposed Revisions to Rule 502

January 18, 2007

The International Association of Defense Counsel (IADC) has been serving a distinguished membership of corporate and insurance defense attorneys since 1920.

Its activities benefit the more than 2,500 invitation-only, peer-reviewed members and their clients as well as the civil justice system and the legal profession. Moreover, the IADC takes a leadership role in many areas of legal reform and professional development.

The International Association of Defense Counsel ("IADC") respectfully submits these comments regarding proposed Federal Rule of Evidence 502. The IADC commends the efforts of the Advisory Committee on Evidence Rules and generally supports proposed Rule 502, however, we oppose Rule 502(c). We also recommend some textual revisions to proposed Rule 502(a) and 502(b) that will significantly improve the Rule.

The attorney-client privilege and attorney work product doctrine play important roles in the day-to-day business operations of successful, law-abiding companies and individuals. We applaud the Committee's efforts to craft a Federal Rule of Evidence that seeks to protect these principles from the pressures of increasingly complex litigation and technological advances that have amplified the intricacy and expense of discovery practice over the past several years.

The attorney-client privilege promotes open, honest interaction and encourages corporate executives, employees, and other individuals to seek advice from counsel so that they can act responsibly and within the law.[1] The United States Supreme Court articulated these principles in Upjohn Co. v. United States, stating that the purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client."[2] Indeed, in both the

[1] XYZ Corp. v. United States (In re Keeper of the Records), 348 F.3d 16, 22 (1st Cir. 2003) ("By safeguarding communications between client and lawyer, the privilege encourages full and free discussion, better enabling the client to conform his conduct to the dictates of the law and to present legitimate claims and defenses if litigation ensues."); In re Horowitz, 482 F.2d 72, 81-82 (2d Cir. 1973) (citing United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)) ("The privilege finds its justification in the need to allow a client to place in his lawyer the 'unrestricted and unbounded confidence', that is viewed as essential to the protection of his legal rights.").

[2] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). See Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys . . . [I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.").

criminal and civil contexts, the attorney-client privilege is closely connected to the constitutional right to effective assistance of counsel.[3]

Likewise, the attorney-work product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[4] The Supreme Court recognized the importance of protecting attorneys' ability to prepare their client's case in Hickman v. Taylor, stating that disclosure of such information would have detrimental effects:

> [M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[5]

The IADC believes that the effect of proposed Rule 502 on limiting subject matter waiver, resolving the split in the Circuit courts regarding inadvertent disclosure, and providing litigants and courts the ability to better control and manage waiver issues through the use of agreements and court orders appropriately addresses some of the problems that have resulted from the complexity of electronic discovery. It further believes, however, that proposed Rule 502(c) relating to selective governmental waiver goes too far, and would create more problems that it would solve through its extraordinarily broad potential. As a result, proposed section (c) undermines the privilege the Rule seeks to protect.

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[3] Martin v. Lauer, 686 F.2d 24, 32-33 (D.C. Cir. 1982) (observing that litigants' "interest in speaking freely with their attorneys is interwoven with their right to effective assistance of counsel"); Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118 (5th Cir. 1980) (finding that in both civil and criminal cases "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement" and that the need for attorney-client communication is essential in any case); Odone v. Croda Int'l PLC, 170 F.R.D. 66, 69-70 (D.D.C. 1997).

[4] United States v. Nobles, 422 U.S. 225, 238 (1975).

[5] Hickman v. Taylor, 495 U.S. 495, 511 (1947).

Scope of Waiver

The IADC generally agrees with proposed Rule 502(a)'s limitation on subject matter waiver to those "unusual situations" where a party selectively and misleadingly uses privileged or protected information. The Committee Note indicates that "[t]he rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; . . ." The text of the proposed section (a), however, does not state that it applies only to voluntary disclosures. We believe that section (a) should be revised to state: "In federal proceedings, the waiver by voluntary disclosure of an attorney-client privilege or work product protection . . ." The present omission of the word "voluntary" from this phrase threatens to undermine the Committee's goal of responding to litigants' concerns that inadvertent disclosure will operate as a subject matter waiver.[6] The current text of the proposed section (a), leaves open the possibility that a court could order subject matter waiver where a party inadvertently disclosed privileged information by failing to take "reasonable precautions to prevent disclosure."[7] A careless, involuntary disclosure should be protected from subject matter waiver because it does not rise to the level of the "unusual situations" where subject matter waiver is appropriate.[8] Accordingly, adding the word "voluntary" to the text of Rule 502(a) will clarify and bolster the Rule's objective of protecting the attorney-client privilege and attorney work product doctrine.

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[6] Omission of the word "voluntary" from the text also undermines the Committee's stated intent to "reject the result in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver."

[7] Proposed Fed. R. Evid. 502(b).

[8] In re Hechinger Inc. Co of Del., 303 B.R.18 (D. Del. 2003) (subject matter waiver not appropriate in case of inadvertent disclosure); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., 132 F.R.D. 204 (N.D. Ill 1990) (same); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449. (D. Mass. 1988) (no subject matter waiver despite application of "strict liability" waiver rule); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 116 F.R.D. 46, 52 (M.D.N.C. 1987) ("In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue."); Duplan Corp. v. Deering Milliken, Inc.,

Inadvertent Waiver

The provisions set forth in proposed Rule 502(b) generally address the problems of a litigants' inadvertent disclosure of privileged or protected information. The sheer volume of unorganized electronic information that must be collected, reviewed and produced in modern document productions has increased the risk that privileged or protected communications will be inadvertently disclosed. As the Committee recognized, due to the variance of law across the country, litigants have been forced to spend tremendous energy and exorbitant sums to protect against the possibility of an inadvertent disclosure causing subject matter waiver of all privileged information. The IADC supports the Committee's goal of creating a uniform standard which adopts the majority position that waiver occurs only if the disclosure occurred due to carelessness and the party failed to make a timely request for the return of the privileged or protected material.

The IADC is concerned, however, about embodiment of the concept of carelessness in the phrase "reasonable precautions" which is vague and subjective. Indeed, some courts have observed that "[i]t is difficult for a party to show that it took reasonable precautions to prevent production of privileged documents where those precautions obviously failed."[9] Because waiver must typically be an intentional or knowing act, the more appropriate standard for assessing waiver by inadvertent disclosure is gross negligence or such extreme disregard for protection that

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540 F.2d 1215 (4th Cir. 1976) (work product); United States v. Pollard, 856 F.2d 619, 625-26 (4th Cir. 1988) (work product).

[9] Draus v. Healthtrust, Inc., 172 F.R.D. 384, 388 (D. Ind. 1997); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449 (D. Mass. 1988); but see Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 443 (S.D.N.Y. 1995) ("But 'reasonable' precautions are not necessarily foolproof. Just as a tort defendant who acts in a reasonably prudent manner avoids liability despite the occurrence of an accident, so an attorney who takes reasonable precautions in discovery may avoid waiver even though he inadvertently discloses a privileged document.").

the disclosure should be deemed to be intentional.[10] Accordingly, the IADC suggests that the text of section (b) should be clarified and changed from "reasonable precautions" to "reasonable steps considering the circumstances of the document production."[11]

In addition, to provide further guidance and clarification of the language in the text, the Committee Note should discuss specific factors that may bear on a determination as to whether a party acted reasonably under the circumstances of a particular review. The most obvious circumstance is the volume of documents or electronically stored information involved in the review.[12] Another significant circumstance is the amount of time that the party has to conduct the review. For instance, it is not reasonable (and often impractical) for a party to conduct a second or third review of millions of documents or computer files in a relatively short time frame.[13]

The proposed section (b) and Committee Note are also unclear as to whether the proposed section requires consideration of all the factors commonly employed under the majority rule in assessing waiver by inadvertent disclosure: (a) the reasonableness of the precautions to prevent inadvertent disclosure; (b) the time taken to rectify the error; (c) the scope of discovery;

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[10] F.D.I.C. v. Marine Midland Realty Corp., 138 F.R.D. 479, 483 (D. Va. 1991); In Re Grand Jury Proceedings, 727 F.2d 1352, 1356 (quoting In re Horowitz, 482 F.2d 72, 82 (2d Cir. 1973); Desai v. American Int'l Underwriters, 1992 U.S. Dist. LEXIS 6894 (S.D.N.Y. 1992) ("inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the asserted privilege").

[11] Alldread v. Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) (stating that the "circumstances surrounding a disclosure" should be examined to determine if waiver has occurred); Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989) (refusing to "conceive of further precautions that might have prevented an inadvertent disclosure" and analyzing only the particular circumstances involved in the review).

[12] Transamerica Computer v. Int'l Bus. Mach., 573 F.2d 646 (9th Cir. 1978) (17 million pages screened in three months); F.D.I.C. v. Marine Midland Realty Corp., 138 F.R.D. 479, 483 (D. Va. 1991); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985) (16,000 pages screened); Kansas-Nebraska Nat. Gas. Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983) (75,000 documents produced).

[13] F.H. Chase, Inc. v. Clark/Gilford, 341 F. Supp. 2d 562, 563-65 (D. Md. 2004) (finding that time constraints of review weighed against finding waiver despite party producing 569 pages of privileged information out of 7,155 documents produced); Kansas City Power & Light Co., 133 F.R.D. at 174 (finding no waiver where procedures employed, including screening, were adequate to prevent inadvertent disclosures given the scope of discovery).

(d) the extent of the disclosure; and (e) the overreaching issue of fairness.[14] Although the proposed section (b) specifically adopts the first two factors, it leaves open the question as to whether courts are to consider the other three factors, and if so, the weight that courts should give to the other three factors. This omission is an invitation to uncertainty and inconsistent rulings. The IADC suggests that the Committee should state with specificity that all five factors are to be given equal consideration when a court assesses the question of waiver through inadvertent disclosure.

The IADC also believes that the proposed Rule 502(b) is too burdensome in that it imposes on litigants to take "reasonably prompt measures, once the holder knew *or should have known*" of the inadvertent disclosure. The "should have known" language threatens to absorb the Rule. Arguably, some courts may determine that if a party had taken reasonable steps under the circumstances of the particular review, the party "should have known" about the inadvertent disclosure as soon as it occurred.[15] Such a standard would put the producing party in an impossible position.[16] The proposed section (b) could also be read to require a party to re-review the produced documents immediately after production to determine whether any privileged information was inadvertently disclosed—contravening the Rule's stated purpose of conserving parties' resources. In most cases, a party will not know of an inadvertently produced document until opposing counsel attempts to use the document, or alerts the producing party to the inadvertent production.[17] Accordingly, section (b) should require a party to take reasonably

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[14] Lois Sportswear, U.S.A., Inc., 104 F.R.D. at 105.
[15] See, e.g., Draus, 172 F.R.D. at 388; Int'l Digital Sys. Corp., 120 F.R.D. at 449.
[16] F.H. Chase, Inc., 341 F. Supp. 2d at 564-65 (recognizing that "neither the attorneys nor the assistants were aware that disclosures had been made at the time of the production" thus steps taken after actual knowledge of disclosure were reasonable).
[17] Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 81574 (D. Kan. 2006) (Defendant first became aware of inadvertent disclosure at deposition); Zapata v. IBP, Inc., 175 F.R.D. 574, 577 (D. Kan. 1997) (same);

prompt measures to rectify the error only after the party has actual knowledge, or with reasonable diligence after production should have discovered, the inadvertent disclosure.

Selective Waiver

The IADC opposes Rule 502(c). It is vague and overly broad, and the effect of the provision would be to sacrifice a fundamental right of legal representation and the assurance of confidentiality in communications between attorneys and their clients which are foundations of the judicial system, all for the sake of a possible increase in the efficiency of government investigations or inquiries.[18] In our view, this is neither necessary nor desirable. In addition to the arguments presented by the Lawyers for Civil Justice and the Association of Corporate Counsel, which the IADC supports, we emphasize several factors which make the implementation of Rule 502(c) problematic.

Proposed section (c) empowers any "federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority" to seek from businesses or individuals a waiver of the attorney-client privilege and work product protection on the empty promise that such a selective waiver "does not operate as a waiver . . . in favor of non-governmental persons or entities." The Committee Note attempts to justify this erosion of the attorney-client privilege and work product protection under the guise of "maximize[ing] the effectiveness and efficiency of government investigations."[19] Thus, the plain language of the proposed Rule would allow any federal government agency conducting any type of investigation of an individual or corporation to request such a selective waiver, whether in the context of a serious criminal investigation, a regulatory compliance inspection, or a minor civil dispute, so long as the agency believes that its

[18] Fisher v. United States, 425 U.S. at 403; Upjohn Co. v. United States, 449 U.S. at 389; Martin v. Lauer, 686 F.2d at 32-33.

[19] Proposed Rule 502(c) advisory committee note (citing In re Columbia/HCA Healthcare Corp. Billing Prac. Litig., 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J. dissenting).

work would be completed more "efficiently" if the private party waived its rights. As we have already seen through the stated practices of the United States Department of Justice, if the private party refuses to voluntarily waive, such a refusal can be used against the party.[20] The net effect of this provision would be to empower representatives from any agency in any branch of government to effectively coerce individuals and corporations to sacrifice the long-held protections afforded to attorney client communications and attorney work product. Furthermore, once agency officials have been empowered to coerce an initial waiver of selective materials, it would be difficult for any individual or company to draw the line on further requests for selective waiver. In particular, if the initial material provided in a selective waiver provides avenues of interest to agency representatives, there is nothing to stop them from continually expanding the scope of their requested waiver to pursue those avenues, coerce production of further documents, and thus further erode individuals' and companies' essential rights to confidentiality. As a result of these concerns, proposed Rule 502(c) seems to the IADC to be fundamentally at odds with the Committee's laudable stated goals of protecting the attorney client privilege and work product protection.

As noted above, the promise of protection by selective waiver contained in proposed Rule 502(c) is empty. In practical effect, once privileged or protected information is turned over to the government, a private party has no assurance that the government, itself, will not disseminate or use the information in some way that would destroy the limited protection afforded by proposed Rule 502(c). Highlighting the empty promise is the third sentence of section (c): "Nothing in this rule limits or expands the authority of a government agency to disclose

[20] Despite the "McNulty Memorandum" and its recent revision to the DOJ's charging guidelines as set forth in the "Thompson Memorandum," prosecutors are still permitted to penalize a private party when making charging decisions if the private party refuses to voluntarily waive its privileged communications. Moreover, the ameliorative effect of the protections set forth in the McNulty Memorandum are greatly reduced as they only deal with Department of Justice Investigations.

communications or information to other government agencies or as otherwise authorized by law." While section (c)'s selective waiver provision is limited only to disclosure to federal agencies, the federal government's use or disclosure of the privileged or protected information would potentially render existing attorney-client and work product protections meaningless. It is an accepted fact of public life that leaks occur between government agencies; between levels of government; and from government agencies to the press or other individuals. In theory, a party in a civil action against the individual or corporation may not be able to use the actual documents that were voluntarily disclosed to the government agency, but if the information contained in the disclosed documents is leaked to the public or used at trial, the opposing party will know precisely which information to seek in discovery or could affirmatively use the information.

Finally, the IADC emphasizes that the proposed selective waiver rule improperly elevates the goal of governmental efficiency above the fundamental right of citizens to effective legal counsel,[21] the age old expectation of privacy in communications between attorneys and clients,[22] and the recognized public interest in an attorney's ability to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[23] No governmental agency can credibly argue that the need for efficiency in its investigations should abrogate the legal rights of citizens.[24] The IADC believes that, contrary to the Committee's stated goals in proposing new Rule 502, the selective waiver provision creates the risk of decreasing clarity and efficiency for all parties to litigation, and allowing the exception to absorb

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[21] Potashnick, 609 F.2d at 1118 ("the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement" and that the need for attorney-client communication is essential in any case)
[22] Upjohn, 449 U.S. at 389 ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law") (citing 8 J. Wigmore, Evidence § 2290 (McNaughton 1961)).
[23] Hickman v. Taylor, 329 U.S. at 500.
[24] The Committees focus on drafting an evidence rule that favors governmental efficiency over fairness and protection of citizens' rights is at odds with the purpose of the Federal Rules of Evidence. See, Fed. R. Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

the rule. The original and fundamental protections provided by attorney-client privilege and the work product doctrine exist not only to protect the rights of clients and legal practitioners, but also because the absence of those rights would lead to greater inefficiency in representation and obfuscation in the sharing of information by defendants.[25] The broad assertion of governmental power codified in the selective waiver provision leaves individuals, corporations and attorneys in the precarious position of being unable to predict in advance whether and to what extent their conversations, advice and work product will be protected. As the Supreme Court recognized in Upjohn, "[a]n uncertain privilege . . . is little better than no privilege at all. If Rule 502(c) is codified it will have a chilling effect on the confidential relationship between attorneys and the individuals, employees, and corporate executives they are meant to counsel.

As a result of these concerns, the IADC believes that proposed section (c) is counterproductive to the Committee's efforts to clarify for private individuals, companies and attorneys the degree of frankness with which they may with surety of confidentiality speak to one another.

With regard to proposed Rule 502(d), the IADC generally supports the provision. We would encourage the Committee to clarify, however, that section (d) operates independently of selective waivers to federal authorities as contemplated in section (c). Consistent with our comments regarding Rule 502(c), the Note to Rule 502(d) should clarify that proposed Rule 502 does not permit parties to enter into "selective waiver" agreements.

We thank the Committee for providing us with the opportunity to contribute our thoughts and opinions pertaining to the proposed Rule. We are also grateful to the Committee for its

[25] "Both for corporations and individuals, the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985) (citing Upjohn, 449 U.S. at 389; Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976)).

thoughtful efforts to clarify the issues involving these fundamental tenets of the attorney-client relationship. If the Committee feels that any further contribution on our part would benefit the process, we would be happy to offer any assistance it may require. IADC President Bruce Parker will be present and welcomes the opportunity to provide testimony and answer the Committee's questions on Friday, January 26, 2007.