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Hughes Hubbard

Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004-1482
Telephone: 212-837-6000
Fax: 212-422-4726
hugheshubbard.com

Charles W. Cohen
Direct Dial: 212-837-6856
cohen@hugheshubbard.com

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VIA E-MAIL

Peter 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

Re: New York Hearing on Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

I hereby request an opportunity to testify at the January 29, 2007 hearing in New York on the proposed Federal Rule of Evidence 502. Thank you.

Very truly yours,

Charles W. Cohen

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Testimony

Statement of Charles W. Cohen
Regarding Proposed Federal Rule of Evidence 502

Thank your for letting me speak at today's hearing. I am gratified that the Committee has identified the protection of privilege as an issue that needs to be addressed. Proposed Rule 502 will be a vital tool to deal with today's litigation realities. While I have some suggestions for modification of the current draft of the proposed rule, I firmly believe that the Rule is needed.

I. Comments on the Proposed Rule in General

There are three aspects of current litigation practice that make adopting a rule to protect privilege a necessity now. They are: (1) litigation tactics that use non-merits-based attacks to coerce settlement; (2) massive document productions in litigation, especially production of electronically stored information ("ESI"); and (3) the multi-jurisdictional nature of large-scale litigation.

Litigants today often decide to settle litigation irrespective of the merits when the cost of pursuing the litigation outweighs the benefit of seeing the litigation through to the end. There is no question that litigating privilege attacks directly increases the cost of litigation. The cost of litigation traditionally has been discussed in terms of the dollars directly expended in the litigation, but there are also collateral costs. For example, negative press about a party, which might be based on incomplete or misleading reports of documents obtained in discovery, could result in serious harm to the party's reputation. Given the virtually limitless number of sources "reporting" news today over the Internet, it is almost a certainty that descriptions of the privileged information, spun and mischaracterized in the most unfavorable way possible, will show up in the public domain. Lawyers know this, and some pursue strategies of driving up these collateral costs as a way to achieve results they could not obtain through a neutral determination of the case on its merits. When coupled with the attack on the confidentiality of documents produced in litigation, another frequent non-merits based attack strategy, the collateral costs multiply.

Adding to the urgency of the situation is that the explosion of ESI has resulted in vast increases in document production volume, and correspondingly greater potential for error in identifying documents that contain privileged information. This situation has been noted for some time by the Advisory Committee on Federal Rules of Civil Procedure ("Civil Rules Committee"), which spent years working on the issue and proposed the new e-discovery rules as a result. As the Civil Rules Committee aptly stated, "The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information." Committee Notes at 8 (quoting *Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, Sept. 2005, at 27). The difficulty in protecting against inadvertent disclosure of privileged materials means that there likely will be a privilege waiver issue in many more cases than in the past.

Much litigation today occurs in multiple jurisdictions, including both state and federal courts. No matter how strong the rules are in one forum, if the rule is not in place in all forums, the protection is illusory. For this reason, I support returning the original proposed scope of the proposed Rule, namely that it would apply in both federal and state forums. If Congress decides that the substance of the Rule would be better enacted as separate legislation, rather than legislation to change the Federal Rules of Evidence, then that should be done. The goal of promoting certainty by uniformity is not furthered by enacting rules that apply to only some, but not all, jurisdictions.

Finally, the Rule is needed if for no other reason than to finish the job the Civil Rules Committee started. The newly-adopted e-discovery amendments to the Federal Rules of Civil Procedure attempt to provide parties with methods to deal with the often crushing cost of electronic discovery. Two of those methods are "claw back" agreements and "quick peek" procedures. However, these procedures carry significant risks in the current environment. One judge has stated the issue quite starkly – "Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the [new FRCP amendments]." *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005). The Advisory Committee on Evidence Rules has wisely sought to add the protections needed to make the Civil Rules work the way they were intended to work.

II. Comments on Specific Provisions

A. Proposed Rule 502(a)

Proposed Rule 502(a) is a limitation on subject-matter waiver providing that waiver beyond the specific materials disclosed is possible only when the disclosure of the additional materials "ought in fairness" be made. While this wording is useful because it is the same as that used in current Rule 106, the Committee should strengthen the Notes to clarify that it is only the rare case where there would be any waiver beyond the specific documents, and even then the waiver would be of the narrowest scope that is fair. Because the rule of completeness exists to prevent misleading the court or jury, *see, e.g., United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982) (additional disclosure required only when "necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact"), there can be almost no situation where a disclosure in discovery alone should result in a waiver of undisclosed materials. For similar reasons, the text of the Rule should state that it is only a voluntary waiver that can result in the waiver being extended beyond the specific materials disclosed.

B. Proposed Rule 502(b)

Proposed Rule 502(b) would provide that there would be no waiver at all if a disclosure is inadvertent. This is a key provision that gives force to the Civil Rules Committee's recognition that it is inevitable that some inadvertent disclosure will happen in almost every document production in today's electronic document environment. As stated in the Committee Notes, the

proposed rule balances the competing interests of the importance of maintaining the confidentiality of privileged documents and minimizing the costs of privilege reviews. In practice, there could be significant litigation over what constitutes "reasonable precautions" and "reasonably prompt" remedial measures. The Committee Notes should reflect that a document review policy not wholly inappropriate for the scope and volume of the document production meets the "reasonable precautions" standard. Similarly, the Notes should reflect that a party is not under a duty to re-review its document productions, and therefore it could be long after the production is made when a party first learns or should have learned of an inadvertent disclosure, possibly even just before trial. No matter when the disclosure is discovered, the protection against waiver should be in force.

C. Proposed Rule 502(c)

Proposed Rule 502(c) would provide an exception to the waiver by voluntary disclosure rule where the disclosure is made to a "federal public office or agency" in certain circumstances. It does not apply to disclosures to state public offices or agencies. The Rule would prohibit parties in other litigation or investigations from claiming that the privilege had been waived by disclosures subject to the Rule. This proposal should not be adopted. It does not further the purposes served by the attorney-client privilege and it erodes the ability of parties to rely on their privilege protections.

D. Proposed Rules 502(d) and 502(e)

Proposed Rules 502(d) and 502(e) would provide that the parties can enter into confidentiality agreements to protect against waiver of privilege and that such agreements, when incorporated into a court order, bind non-parties as well as parties. This is a great start. But Rule 502(d) should be extended to situations where the party making disclosure seeks such an order but the other side refuses to agree. Especially in "asymmetrical cases," in which one side has substantially more material to produce in discovery than the other, there may be little incentive for one side to agree to a non-waiver provision. If a court grants a party's request for a non-waiver order to govern its production, the court order should have the same effect as if the parties agreed to it.

III. Conclusion

In conclusion, I want to commend the Committee for taking up the mantle that the Civil Rules Committee passed to it. Proposed Rule 502 would go a long way toward improving the discovery practice in today's real-world litigation. With the suggested modifications, it would also help strengthen our system of justice by reducing the collateral costs of litigation. Thank you for your time and attention.