06-EV-047
TESTIFY

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To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject FRE - Proposed Rule 502 - Request to Testify in NYC

Dear Mr. McCabe:

I respectfully request the opportunity to testify regarding proposed Federal Rule of Evidence 502 at the New York City hearing scheduled for Monday, January 29, 2006.

Because I will be in Phoenix for the Standing Committee meeting, I will also attend the FRE 502 hearing there, but do not plan to testify at that time.

Look forward to seeing you in Phoenix and New York.

Respectfully yours,

Al
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MEMORANDUM JANUARY 23, 2007

TO: Peter G. McCabe, Esq.
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544
(Rules_Comments@ao.uscourts.gov)

FROM: Alfred W. Cortese, Jr.

RE: COMMENTS ON PROPOSED FEDERAL RULE OF EVIDENCE 502

I would like to express my gratitude to the Standing Committee and the Advisory Committee on Evidence Rules for developing and publishing proposed Federal Rule of Evidence 502 and for the opportunity to present these brief comments. The Committee is to be commended for recommending a rule that on the whole should help save significant amounts of time and effort spent in litigation to avoid waiver of the attorney-client privilege, and that will help make the discovery process more efficient and less costly.

My comments will be limited to what I perceive are the two most significant policy issues with which the Committee must deal: 1) whether or not there should be a single, uniform rule on waiver of privilege in all federal and state proceedings; and 2) whether selective waiver advances the purposes of attorney-client privilege or work product protection or poses a threat to those protections. Because this is not a typical rulemaking, in the final analysis, Congress will be making the choices and establishing the policy based on the Committee's recommendations of what is best for the judicial system.

Clear and uniform waiver rules should be applicable in state and federal courts.

Several comments have advanced many cogent reasons why one clear and uniform waiver rule should apply in all federal and state proceedings as originally proposed by the Committee:

- Congress can under its Commerce Clause and Article Three powers enact a law establishing a uniform waiver rule binding in both state and federal courts.

- Such a rule would best protect privilege and work product and thereby increase the efficiency of and lower the enormous and growing costs and burdens of privilege review in modern litigation.

- Predictability as to the consequences of inadvertent disclosure of privileged information will incline counsel to enter into agreements that expedite document review and discovery.

- Professors Capra and Broun's excellent March 22, 2006 memorandum captures at pages 1 and 2 the policy reasoning in two "fundamental principles": 1) "Uniform rules on waiver are required so that parties are able to predict in advance the consequences of litigation conduct"; and 2) "The waiver rules must be uniform at both the federal and state levels. If, for example, conduct does not constitute a waiver in federal practice, but does so in a state court, parties would have no assurance that information protected by privilege or work product will remain protected."

Subsequently, of course, as a matter of comity with the state courts, the Evidence Committee decided to "scale back" the published proposal to those situations in which the initial disclosure occurred during litigation in federal court or federal administrative proceedings. Obviously, the federal rulemaking committees must give due deference to fundamental principles of federalism and comity with the state courts. However, in this instance, where Congress is to make the ultimate policy determination, I respectfully suggest that the Committee craft a rule or recommend legislation that would best protect privilege and work product and best serve the interests of predictability, uniformity, and efficiency and leave the implications of federalism to Congress and the Executive.

For example, The Committee might suggest, as Professors Capra and Broun have pointed out at page 37 of their March 22 memorandum, that Rule 502 be made applicable by Act of Congress in all federal proceedings and that a separate provision be passed by Congress and enacted into law that would apply an identical waiver rule to the state courts.

Selective waiver will diminish privilege and work product protections.

Selective waiver appears to be more controversial than expected when originally proposed and codification of the concept against the weight of the law now is opposed by many diverse interests on both sides of the "v". The Committee's motivation in proposing Rule 502 (c) is understandable and laudable, but the opposition to the Rule is compelling.

"We believe strongly that 502 (c) … would seriously weaken citizens' ability to consult with their attorneys in a confidential – and therefore meaningful – manner. As a matter of principle, the privilege must be applied consistently and without favor in order to give sufficient weight to a defendant's constitutional right to counsel in the criminal context, and in order to preserve the adversarial system's search for truth in all contexts." *Testimony of Lawrence S. Goldman on behalf of National Association of Criminal Defense Lawyers*, 06-EV 043 at 1.

The Association of Corporate Counsel summarizes its opposition to selective waiver as follows: "…[F]irst, because 502(c) is designed to 'protect' companies facing a

government investigation or proceeding, and so it does not adequately address the disclosure of material that is routinely demanded outside the prosecutorial or courtroom context; second, because it assumes that the remedy to the problem of inappropriate coercion of corporate disclosures of attorney-client protected confidences is to protect further disclosures to third parties, rather than censuring and prohibiting the original government demand that is inappropriately made; and, third, because we fear that any 'codification' of selective waiver will perversely increase the number of waiver demands made of companies (since prosecutors and enforcement officials can suggest to companies that their waived disclosures will be protected against future third party discovery requests)." *Testimony of Susan Hackett on behalf of ACC,* 06-EV-045 at 2.

Lawyers for Civil Justice concludes that, "On balance, however, under current circumstances, LCJ believes that selective waiver does not advance the purposes underlying either the attorney-client privilege or work product protection and that selective waiver poses a serious threat to the ability of corporate clients and their constituents to rely on these protections." *Lawyers for Civil Justice Comments to the Advisory Committee on Evidence Rules Regarding Proposed Fe. R. Evid. 502,* 06-EV-046 at 3. Among the reasons supporting their conclusion, LCJ points out that corporate officers and employees will be loath to bring sensitive issues to counsel's attention if those communications are likely to be disclosed to the very people that might prosecute them and that as a result companies will lose opportunities for early intervention and self-policing. *Ibid.* at 4. Moreover, the rule will encourage prosecutorial reliance on waiver and could be viewed as ratification by the Committee of government policies coming under increasing attack. *Ibid.* at 16-20.

In the final analysis, the issue is a matter of principle. As LCJ and other commentators have pointed out, the Committee's and judiciary's priority should be strengthening and protecting privilege and work product, not elevating the interest in efficient government investigations and prosecutions over the rights of individuals and companies to confidential communications with their attorneys.

Again, the policy choices here are for Congress to make. Hopefully, however, the Committee will report to Congress that public comment has demonstrated that selective waiver is not a viable or workable concept and should be withdrawn from consideration.

Respectfully submitted,

Alfred W. Cortese, Jr.