MEMORANDUM 06 - EV - 055

TO: Advisory Committee on Evidence Rules DATE: February 12, 2007

FROM: Jinjian Huang CC:

SUBJECT: **Comments and Observations Regarding Proposed Rule of Evidence 502 --- Non-Waiver Agreements (Proposed Rules 502(d) and (e))**

The proposed Evidence Rule 502 largely endorses the use of non-waiver agreements and clarifies their controlling effect. The recognition on non-waiver agreements by the proposed rule, however, goes too far and raises many concerns, including (1) contravening to the traditional attorney-client privilege concept; (2) contravening to the justifications of attorney-client waiver; and (3) contravening to the legislative intent. Further modifications to the proposed rule are needed.

I. THE SWEEPING EFFECT OF NON-WAIVER AGREEMENTS UNDER PROPOSED RULE 502

Proposed Rules 502(d) and (e) have a potential sweeping effect: they essentially allow parties to "enact" their own law governing the waiver of privilege by disclosure. The proposed rule does not put any limits on the agreements reached by the parties. And there is no guidance on how a court is to decide whether to enter an order requested by the parties. It appears that as long as the parties agree to the terms, they can totally eliminate the effect of waiver by disclosure, no matter whether it is inadvertent disclosure or intentional disclosure, so long as the judge goes along. This might make other parts of the proposed rule relatively unimportant, because most of the time in commercial litigation, parties can just enter into an agreement and specify that, under no circumstance, will there be a waiver of privileged information by disclosure.

By doing so, parties can avoid a finding of waiver in the two situations in which waiver cannot be avoided under current law. First, in the case of inadvertent disclosure, parties can totally avoid the reasonable precaution requirement of proposed Rule 502(b). This, indeed, is supported by the Committee Note, which specifies "the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party."[1] Second, parties may even intentionally disclose the privileged information without being subject to a finding of waiver, since nothing indicates otherwise in proposed Rule 502.

II. THE PROBLEMS OF NON-WAIVER AGREEMENTS UNDER PROPOSED RULE 502

The sweeping effect of non-waiver agreement allowed under proposed Rules 502(d) and (e) raises many potential concerns, including contravening to the traditional privilege concept, waiver justifications, and the legislative intent.

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[1] Committee Note on Subdivision (d).

A. Contravening to the Traditional Attorney-Client Privilege Concept

The purpose of attorney-client privilege is to encourage full and frank communication between attorneys and their clients. This purpose, however, can hardly be served if the parties can contract away the privilege waiver effect and simply disclose all the privileged information. Given the staggering volume of information involved in E-discovery and the risks of waiver associated with the uncertain guidance on privilege waiver rules, attorneys may be easily tempted to enter such an agreement and disclose all or most of privileged information to avoid significant amount of time and effort required by privilege screening. Even though the client is the privilege holder and should be the one who ultimately decides on whether to enter a non-waiver agreement, it is highly unlikely that he or she would resist the attorney's advice to enter such an agreement. Knowing that the opposing party would be able to at least see all the privileged information, the client might be deterred from disclosing some embarrassing information to his attorney.

Alternatively, the willingness to disclose all the privileged information to the opposing party raises a serious challenge to one of the basic justifications for the privilege's existence, which assumed that the privilege's protection is needed because without it the client would not have divulged the information to his attorney. Thus, the more aggressively one sanctions non-waiver agreements, the more one cuts the foundation out from under the privilege.

In addition, as the "attorney-client privilege is a matter of common law and the oldest of the privileges for confidential communication known to the common law,"[2] allowing parties to enter non-waiver agreements to enact their own privilege waiver law would substantially contradict with this traditional concept. After all, the attorney-client privilege "is not a creature of contract, arranged between parties to suit the whim of the moment."[3] By entering a non-waiver agreement, parties would be able to totally eliminate the effect of waiver by disclosure, an important component of the attorney-client privilege, and thus change the law.

B. Contravening to Justifications of Waiver

Unlike other exclusionary evidentiary rules that are designed to assist in finding the truth by excluding evidence which is unreliable or likely to be unfairly prejudicial or misleading, the attorney-client privilege obstructs the truth-finding process by limiting the information available to both adversaries and fact-finders and thus needs constraints. One primary and valuable method to restrict it is waiver. Due to the severe consequence of waiver, the privilege holder would be much less likely to abuse the privilege. Waiver is mostly justified on fairness principle, which would mandate a waiver if unfairness results from the privilege holder's affirmative act to misuse it. This justification would be seriously frustrated if parties can contract away all the effect of waiver by disclosure. Lifting the waiver limit on privilege through entering a non-waiver agreement, parties could do the exact things that the waiver is aimed to avoid. Namely, the privilege holder can easily garble the truth by selectively or partially disclosing the privilege without facing any risk of waiver of the privilege.

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[2] *In re* Columbia/HCA Healthcare, 293 F.3d 289, 302 (6th Cir. 2002) (internal citation omitted).
[3] *Id.* at 303 (internal citations omitted).

The producing party can literally look at all the privileged information, and decide what to disclose and what not to, or intentionally disclose all privileged items and later claim privilege over part of all of them. Besides the potential possibility of garbling truth, the continual uncertainty on whether privilege would be asserted as to information produced in discovery could disrupt trial preparation. More significantly, the nearly absolute privilege under a non-waiver agreement may create a risk of undermining the appearance of justice. A full disclosure without a waiver would allow the opposing party to see all the evidence, including the contradictory evidence. And yet, because of the privilege claim, the opposing party is unable to offer it in evidence and loses its case. Under this circumstance, the privilege not only suppresses the truth but threatens to make justice a mockery, since the opponent is subjected to a judicial result known to be wrong.

C. Contravening to the Legislative Intent

Another concern raised by proposed Rule 502 is that it might undermine the framers' goal. The Committee found that it is "the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between and among them,"[4] and "[c]onfidentiality orders are becoming increasingly important in limiting the costs of privilege review."[5] Based on these findings, the Committee concluded that it is necessary to codify non-waiver agreements. The proposed rule thus endorses the use of non-waiver agreements and gives them significant controlling effect.

However, the Committee failed to notice that while courts increasingly recognize non-waiver agreements, they almost universally put some limits on the agreements. Even the most lenient existing decision – which allowed such an agreement to shield parties from waiver to the extent that goes beyond the protection under the balancing approach – would find the agreement unenforceable if parties' disclosure was "completely reckless."[6] No court would go as far as allowing parties to intentionally disclose privileged information without waiving the privilege based on a non-waiver agreement. Yet, it appears that parties can easily do so under proposed Rules 502(e) and (d). The proposed rules do not provide any guidance on how a court is to determine whether to enter an order requested by the parties. It is unclear to what extent a court can exercise its discretion not to issue such an order. According to the Committee Note, parties at least may totally contract away any care on disclosing the privileged material.[7] Thus, in meeting the practical needs of using non-waiver agreements, the proposed rule goes too far and ignores the common limits put on non-waiver agreements by courts.

Moreover, while the proposed rule seeks to provide a uniform set of standards to determine the consequences of a disclosure of privileged information, it "makes no attempt to alter federal or state law on whether a communication or information is protected as attorney privilege or work product as an initial matter."[8] In another words, the proposed rule only deals with existing privilege. This is somewhat circular. The non-waiver agreements allowed under

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[4] Advisory Committee Report, Committee Note, at 9.
[5] *Id.*
[6] *See Cardiac*, 2001 WL 699850 at *2-3 (citing *Prescient Partners* to note that unless parties' inadvertent disclosure is completely reckless, parties' non-waiver agreement should be enforceable).
[7] Advisory Committee Report, Committee Note, subdivision (d).
[8] Advisory Committee Report, at 2.

the proposed rule would substantially alter the otherwise applicable federal or state law on waiver. As "no waiver" is an important component of privilege, it would be hard to find an existing privilege without altering federal or state law where disclosure is an element to find whether privilege exists as an initial matter. Particularly for communication between the client and his attorney that occurs after parties enter into a non-waiver agreement, it is unclear whether one should take into account any disclosure following the communication when deciding whether the communication is privileged.

For example, if the privilege asserting party recklessly or intentionally disclosed the communication before parties entered a non-waiver agreement, the privilege would be waived and there is no privilege as an initial matter. And it is clear that privilege exists if the communication that occurred before entering the non-waiver agreement was disclosed after such an agreement was entered. However, what if both the communication and the disclosure occurred after the non-waiver agreement, should the court apply the federal or state privilege law only (where the disclosure would constitute a waiver) or take into account the non-waiver agreement when considering the existence of privilege as an initial matter? The privilege asserting party certainly would argue that under the non-waiver agreement, the disclosure did not constitute a waiver and privilege thus exists. If that is the case, the non-waiver agreement will hardly not alter federal or state law to find privilege as an initial matter.

Therefore, the sweeping effect of a non-waiver agreement under proposed Rule 502 contravenes not only to the traditional attorney-client privilege concept and waiver justifications, but also to the legislative intent in enacting this rule. Further modifications on non-waiver agreements codified in the proposed rule are needed.

III. CONCLUSION AND RECOMMENDATIONS

The biggest concern on allowing parties to limit the effect of waiver through non-waiver agreements is not about the voluntariness of disclosure, but the purpose of disclosure. If the disclosure is purported for something other than reducing litigation cost or improving efficiency of discovery or other legitimate grounds, waiver should occur regardless of the existence of a non-waiver agreement.

To implement this idea, one way is to specify the factors that a court could consider when deciding whether to enter an order requested by the parties. For instance, the court could consider whether the order would lead to a blanket rule; whether there is a potential abuse of the order by either party. But since the order was entered before disclosure, it would be hard for a court to evaluate or foresee the potential danger. A better way would be to incorporate the fairness principle into the proposed rule on the controlling effect of court orders, because a court then could evaluate whether unfairness resulted from the disclosure during the course of discovery.

Accordingly, proposed Rule 502(d) can be modified as following: "A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court ***should in fairness*** govern all persons or entities in all state or federal proceedings. . . . " Similarly, proposed Rule 502(e) can be modified as following: "An agreement on the effect of disclosure of a communication or

information covered by the attorney-client privilege or work product protection ***ought in fairness*** be binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order."