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"Ainsworth, Kevin"
<KAinsworth@mintz.com>
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To <Rules_Comments@ao.uscourts.gov>
cc <MZauderer@fzwz.com>, <hayes@hugheshubbard.com>, <patricia.mcgovern@ey.com>, <lbarbour@fzwz.com>
bcc
Subject Comments on Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Enclosed is a letter submitted by the Federal Bar Council concerning proposed FRE 502.

Very truly yours,
Kevin

Kevin N. Ainsworth
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue| New York, NY 10017
Phone: 212.692.6745| Fax: 212.983.3115
E-mail: kainsworth@mintz.com
Web: www.mintz.com

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February 14, 2007

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Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Comments on Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

I am the President of the Federal Bar Council (the "Council"), a non-profit organization of over 2,000 federal court practitioners and judges in the Second Circuit. On behalf of the Council, I submit the following comments to the proposed Federal Rule of Evidence 502.[1]

As a general matter, the Council supports the policy decisions made by the Advisory Committee on Evidence Rules (the "Committee") to ease the burden of discovery and to make uniform the law concerning the waiver of privilege. Our comments and recommendations are summarized as follows:

- Rule 502 should be amended, by adding a new subsection, to clarify that it governs state courts and to overcome the potential ambiguities arising from the scope provisions of Rules 101 and 1101.

- The scope of Rule 502(a) should be broadened to create a federal one-rule analysis to use when determining the scope of privilege waivers; we believe this can be accomplished without offending principles of comity. We also make recommendations to clarify ambiguities in Rule 502(a).

[1] This letter does not necessarily represent the views of our judicial members or our other members who are employees of the government.

123 Main Street - Suite L100, White Plains, NY 10601-3104
(914) 682-8800 • Fax (914) 682-4400 • federalbar@federalbarcouncil.com
www.federalbarcouncil.org

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- The "knew or should have known" test of Rule 502(b) should be replaced with a totality of the circumstances approach. And the test for inadvertent productions should apply to investigations by federal agencies. We also propose revisions aimed at clarifying ambiguities.

- We recommend deleting Rule 502(c), as it is very controversial and might bog down enactment of the remainder of the Rule. A "selective waiver" provision should be subjected to further study, and we offer comments on issues raised by that provision.

- We recommend adopting Rule 502(d) as proposed.

- We recommend adopting Rule 502(e) as proposed.

- We have no comment regarding subsection (f).

I. The Intended Scope of Rule 502 Must Be Clarified in Light of Rules 101 and 1101

A. Recommendation

The intended scope of Rule 502 should be clarified by adding a subsection that states, in effect, "Notwithstanding Rules 101 and 1101, and unless provided otherwise in this Rule, this Rule shall be binding in state court proceedings."[2]

B. Discussion

Rule 502 or Rules 101 and 1101 should be amended to clarify that Rule 502 is intended to extend to state court proceedings. The Committee intends that Rule 502 would limit state courts' ability to find a waiver resulting from disclosures made in federal proceedings.[3] Unless that intent is

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[2] For example, our suggested Rule 502(a)(2), set forth *infra* at page 3, would apply only in federal proceedings.

[3] *See* Kenneth S. Broun & Daniel Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 269 (2006). That article discusses the potential ambiguity arising from Rule 1101 and adds: "The Committee intends to make it clear to Congress that whatever path it takes regarding this legislation, it is critical that states must be bound by the federal rule governing disclosures made at the federal level."

expressly stated, Rules 101 and 1101, which limit the scope of the Federal Rules of Evidence to federal proceedings, would create an ambiguity.

Rules 101 and 1101 provide as follows:

> **Rule 101. Scope**
> These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.
>
> **Rule 1101. Applicability of Rules**
> ...
> (b) Proceedings generally. - These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.
>
> (c) Rule of privilege. - The rule [(*i.e.*, Rule 501)] with respect to privileges applies at all stages of all actions, cases, and proceedings.

A state court interpreting Rule 502 might view it as limited by Rules 101 and 1101 and, therefore, may not interpret the rule as intended.

II. Proposed Rule 502(a)

A. Recommendation

Rule 502(a) should be amended as follows (additions underscored; deletions lined out):

> 502(a)(1) If a disclosure made in a federal proceeding of an attorney-client privileged communication or work product protected information has waived such privilege or protection, such waiver shall extend, in any federal or state proceeding, to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness

to be considered with the disclosed communication or information.

502(a)(2) If a disclosure made other than in a federal proceeding of an attorney-client privileged communication or work product protected information has waived such privilege or protection, such waiver shall extend, for purposes of federal proceedings, to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

B. Discussion

Proposed Rule 502(a) was not intended to alter the law(s) concerning when a disclosure waives the privilege as to the disclosed information, but was meant to provide greater certainty to litigants in federal proceedings concerning the effect of a waiver. We endorse and welcome the policy behind proposed Rule 502(a). We offer the following comments concerning the proposal.

1. Predictability and Efficiency Would Be Enhanced if the Rule Were To Govern the Impact in Federal Court of All Disclosures

If Congress is going to address the scope of waiver resulting from disclosures and intends to provide predictability and greater efficiency in federal court proceedings, Congress could, and should, enact a rule requiring federal courts to apply only one test, regardless of the context in which disclosure was made. Rule 502(a) and Rule 501, however, would require a federal court to look to one of at least three different bodies of law, depending upon (a) the context of the disclosure; and (b) if the disclosure was made in state court or a non-litigation context, whether the case is a federal question or diversity case. Only disclosures made in federal proceedings would be subject to Rule 502(a).[4]

The outcome in federal court of a disclosure made outside of federal proceedings would be no more predictable under Rule 502(a) than in its absence. When dealing with disclosures made outside a federal proceeding

[4] *See* Broun & Capra, 58 S.C. L. REV. at 263 ("Ultimately, the Advisory Committee determined that it would be overreaching to try to control disclosures made at the state level, and that it should focus on the consequences of disclosures initially made in federal proceedings.")

(such as disclosures made to the Securities and Exchange Commission in connection with an investigation; disclosures made to the public in a book, newspaper article, or interview; or disclosures made in state court proceedings), a federal court would look to federal common law if the case were based on federal question jurisdiction and would look to the applicable state law (which may require an analysis of which state's law should govern) if the case were based on diversity jurisdiction.

Members of the Committee have expressed a hope that federal common law would align with Rule 502(a).[5] Congress, however, need not wait for federal common law to gradually adopt the wisdom underlying the proposed Rule 502(a).

Members of the Committee also have expressed an appreciation for the certainty of a one-rule approach, but they had concerns that a Rule allowing an outcome contrary to state law would offend comity principles. Specifically, esteemed Professors Broun and Capra wrote the following:

> The Proposed Rule could be changed to provide that if disclosure is made at the state level, its effect in a subsequent federal proceeding is governed by Rule 502. For example, if a disclosure is made in a state proceeding in a state in which inadvertent disclosures are always waivers, the use of the disclosed information in a subsequent federal proceeding would not be automatic and would depend on whether the standards of Rule 502 have or have not been met (whether the party reasonably guarded against disclosure and diligently sought return of the protected information). *This option would provide the greatest certainty for parties* because they would know they could rely on Rule 502 whether the disclosure of protected information was made at the federal or state level. *This option, however, is the most offensive to comity principles because it overrides state law on privileges* even where disclosures are made at the state level.[6]

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[5] Broun & Capra, 58 S.C. L. REV. at 265 ("If it is a federal question case, the effect of the disclosure will be governed by federal common law, which is not uniform. But again, it can be hoped that the federal common law ... will eventually come into line with Proposed Rule 502's standard for federal disclosure.").

[6] *Id.* at 267 (emphasis added).

We note that the above-quoted language addresses comity only as it relates to inadvertent waiver, but not as to the matters covered by Rule 502(a)—the scope of waiver for undisclosed materials. This is a material distinction. In the inadvertent-waiver context described by Professors Broun and Capra, comity would be offended because such a Rule would allow a federal court to decide the waiver issue contrary to state law.

When dealing with the scope of waiver for undisclosed materials, however, a federal Rule could allow courts to do what they often do in the interest of judicial efficiency—to decide what is necessary to the case before the court (*i.e.*, fairness to the parties) without addressing issues that need not be resolved. A court could decide the scope of waiver based on fairness to the parties—for the limited purpose of the federal proceeding—without overriding state law and without deciding that the privilege has or has not been waived as to other undisclosed materials. Accordingly, a federal court could hold that, in fairness to the parties, the privilege has been waived as to certain documents, and as to the remainder of the undisclosed documents, the court makes no finding. Our suggested Rule 502(a)(2) would permit such a result and, we submit, would not offend comity principles.

By implementing a "one rule" approach, the analysis of privilege waiver in federal proceedings would be simplified, would lead to greater consistency and predictability, and would focus on fairness.

2. The Phrase "in federal proceedings" Is Ambiguous

Rule 502(a)'s introductory phrase "in federal proceedings" is ambiguous: it can mean the "situs" of the disclosure, the court deciding the effect of the disclosure, or both. Since proposed Rule 502(c) uses "in a federal or state proceeding" to refer, not to the location of the disclosure, but the place where the effect of the disclosure is being determined, the preamble to Rule 502(a) might be interpreted as limiting the rule to federal proceedings or requiring federal courts to apply the rule to all disclosures, regardless of where they are made.

3. The Absence of Mention of State Courts Is Ambiguous

Nothing in the rule expressly indicates that it governs or limits state courts that are faced with the question of the scope of waiver resulting from a disclosure made in a federal proceeding. We understand that the Committee intended proposed Rule 502(a) to bind state courts and to prevent them from finding that a subject-matter waiver of privilege had arisen from a disclosure made in a federal proceeding, but did not intend to limit state courts with regard to other disclosures. We endorse that concept.

Our suggested revision to the Rule reflects the intent to govern decisions by state courts concerning disclosures made in federal proceedings. Our suggested Rule 502(a)(2) would not, however, displace state law or impair a state court's power to find that a full subject-matter waiver has resulted from disclosures made outside of federal proceedings.

4. Comment Regarding Fairness Analysis

We endorse the Committee's proposal to codify common law decisions holding that a waiver of privilege for disclosed material will waive privilege for undisclosed materials if those materials ought in fairness to be considered with the disclosed communication.

We also agree with the Committee's approach to the fairness analysis, which does not limit the fairness test to the issues in the federal proceeding. The rule, as drafted, would permit a state court to find a different scope of waiver than might be found in the federal proceeding in which disclosure was made. As with any fairness approach, the issue must be decided by looking at fairness to the parties before the court—even if it is a state court proceeding involving a different party or parties. For example, if party A disclosed privileged documents to B, a federal court may find that A has not waived privilege as to any undisclosed materials since, in fairness to B, the undisclosed materials need not be considered. But in a related state case between A and C, the undisclosed materials, in fairness to C, may need to be considered; a state court applying a fairness test could find that the privilege has been waived for A's undisclosed documents.

Any amendment to Rule 502(a) should keep this same approach regarding the fairness analysis.

III. Proposed Rule 502(b)

A. Recommendation

We recommend amending Rule 502(b) as follows (additions underscored; deletions lined out):

> **(b) Inadvertent disclosure.** — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if (1) the disclosure is inadvertent and is made in connection with a federal proceeding, or an investigation conducted by a federal agency in the exercise of its regulatory, investigative, or enforcement

authority and (2) the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures under the circumstances to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

We believe that the rule, as amended above, would provide predictability and streamline discovery, particularly in the electronic discovery context by providing assurance that mistakes during a reasonably diligent production will not have Draconian consequences.

B. Discussion

We offer the following comments concerning the proposal

1. The Rule Ambiguously Refers to Different Types of Proceedings and Uses the Plural "Proceedings" When the Singular Is Appropriate

The use of "state or federal proceeding" and then "federal litigation or federal administrative proceedings" causes ambiguity. Rule 502(a) refers only to proceedings. We believe the intent was to have the same scope apply to the term "proceedings" in both 502(a) and 502(b), and that any other nouns or modifiers would lead to unnecessary litigation over the intended scope of the rule. Moreover, the use in 502(b) of the plural "proceedings" could lead to litigation; the intent of the Rule is more clearly expressed by the singular "proceeding."

2. The Rule Should Address Inadvertent Productions in Federal Investigations

The Rule should address the impact of inadvertent disclosures made in connection with federal investigations. Quite often, disclosures made to federal agencies in connection with their investigations are as onerous—if not more so—than discovery in litigation. The Rule, as amended, would insulate investigated parties from the sometimes harsh effects of inadvertent productions by applying to investigations the same waiver standard used in proceedings. By focusing the rule on federal interests, concerns of comity are diminished.

3. The Phrase "knew or should have known" Should Be Omitted

The phrase "knew or should have known" should be omitted, and the courts instead should focus on all surrounding circumstances to determine

whether a party has acted reasonably to retrieve inadvertently produced documents. The "should have known" standard would invite argument that parties should make a post-production review to determine whether any privileged information was inadvertently produced. We also do not support an "actual knowledge" test. We believe that in the absence of the "knew or should have known" language, courts will make a fact-based decision that takes into account the efforts made to safeguard against disclosure of privileged materials and the reasons why, in instances of lengthy delays between disclosure and efforts to retrieve disclosed documents, the delay was so long.

This approach was taken by the court in *SEC v. Cassano.*[7] In that case, defense attorneys reviewed a document production in an SEC office and discovered a privileged memorandum in the production. Defense counsel asked an SEC paralegal to make a copy of the document that day instead of waiting for the rest of the selected documents to be copied. The paralegal telephoned an SEC attorney and received authorization to copy the document for defense counsel. Twelve days later, the SEC asserted privilege and sought to recover the document. The Court examined the circumstances and found that the disclosure was careless, stating: "the SEC attorney authorized production of this document, sight unseen. Any other precautions that were taken, and there certainly were some, fade into insignificance in the face of such carelessness." The Court held that the privilege had been waived.

Had the Court in *Cassano* been faced with Rule 502(b), with our suggested amendments, the Court likely would have found that the SEC did not take "reasonable precautions to prevent disclosure" and, under the circumstances of the case, did not take "reasonably prompt measures" to rectify the error. There is no need to add complexity to the analysis by adding the "knew or should have known" language.

IV. Proposed Rule 502(c)

A. Recommendation

Section 502(c) should be removed from Rule 502 as proposed and should be subject to further study with the potential for separate enactment at a later time if warranted.

B. Discussion

Subsection (c) of Proposed Rule 502 provides that disclosure, when made to a federal public office or agency exercising its regulatory, investigative or enforcement authority, would not operate as a waiver in favor

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[7] *SEC v. Cassano,* 189 F.R.D. 83 (S.D.N.Y. 1999).

of non-governmental persons or entities in a federal or state proceeding. It would extend to a disclosure or communication of all information covered by the attorney-client privilege or work product protection. The provision expressly provides that it would not extend to disclosures made in state or local proceedings: "the effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities is governed by applicable state law."

The proposed Committee Note to subdivision (c) recognizes that the courts are in conflict over whether disclosure of protected information during a government investigation constitutes a waiver of privilege or protected information for all purposes and to all parties, particularly if there was no non-waiver agreement between the government agency and the producing party. Rule 502(c) proposes to rectify the conflict by providing greater protection to the disclosing party with respect to non-governmental persons, whether or not there was a non-waiver agreement. The Rule seeks to be neutral in its impact on disclosure among government agencies: "Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law." The Rule is grounded on the policy that such protection "furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."

Both 502(c) and the related Note appear in brackets in the Proposed Rule. We understand that the brackets are intended to highlight the fact that the provision was released for comment only.

In our view, Rule 502(c) stands on a different footing than the rest of proposed Rule 502—as the Committee appears to have recognized in releasing it for comment only. Proposed Rule 502 in other respects seeks to clarify waiver issues by incorporating in rule form majority common law principles [Rule 502(a) and (b)] or to expand and clarify the scope of protection that may be afforded by practices that have become commonplace in large-scale litigation [Rule 502(d) and (e)]. Rule 502(c), by contrast, does not follow the common law but instead stakes out new ground. It does so in furtherance of policy arguments based on the importance of privilege waiver to the effectiveness and efficiency of public investigations. That public policy ground, however, currently is subject to considerable discussion and debate.[8]

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[8] See, for example, the March 3, 2006 letter from Robert D. Evans to the Honorable Howard Cable, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, expressing views on behalf of the American Bar Association in strong support for preserving the attorney-client privilege and work product doctrine and stating concern that certain federal governmental policies and practices have begun to erode these rights. See also recent guidelines on when and how prosecutors may request waiver of an attorney-client or work product protections within new guidelines issued on December 12, 2006 by United States Deputy Attorney General Paul McNulty on when the Department of Justice will charge business organizations criminally;

In addition, a number of questions arise about whether the Rule as drafted would achieve its intended purpose.

We believe that, for these reasons, the inclusion of Section 502(c) at this time could draw controversy to the proposed Rule changes that would overshadow other salutary provisions of Proposed Rule 502 and might detract from their enactment. Without intending substantive comment on the appropriateness of waiver in government investigations or on the merits of the purposes sought to be achieved by the Rule, the Council therefore recommends that Section 502(c) be removed from Rule 502 as proposed and that it be subject to further study with the potential for separate enactment at a later time if warranted.[9]

The Council further responds to the Committee's request for comment with the following specific comments and questions for the Committee's consideration with respect to the scope and language of Rule 502(c) as released for comment:

- The Rule as proposed would apply to disclosures made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority. We believe that the breadth of that application should be carefully examined. There may be important differences between both the public policy served by requests for waiver and the appropriateness of finding only selective waiver, depending on whether the disclosure takes place in the context of day-to-day regulatory oversight or in the context of investigative or enforcement matters.

- The Rule draws a bright line between governmental and non-governmental persons, appearing to provide that privileges will be waived as to all government agencies (state, federal and local, whether or not participating in the investigation), but not as to any non-governmental persons or entities. This distinction raises conceptual and practical concerns. The rationale for the Rule is grounded in the potential importance of waiver to governmental investigations. Yet the rule would extend waiver to governmental persons well beyond those

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New York Law Journal December 8, 2006 "Specter Prods Justice to Stop Encouraging Privilege Waivers" and sources collected in the June 20, 2006 comment letter on Proposed Rule 502 of the Association of Corporate Counsel.

[9] The Committee notes that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C. § 2074(b). "It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause."

Other selective waiver provisions have recently been separately proposed, for example, in Section 607 of the Federal Deposit Insurance Act (12 U.S.C. 1828) and Section 205 of the Federal Credit Union Act (12 U.S.C. 1785). These strike us as arguments in favor of separating 502(c) from the remainder of the proposed Rule.

involved in the investigation. At the same time, the Rule does not provided for waiver as to non-governmental persons (for example the PCAOB or the NASD) who might be involved in a joint or parallel investigation. Arguably, when the subject of an investigation and an investigating agency cooperate in an investigation, they share a common interest (despite their potentially adversarial stance) that supports a finding of non-waiver as to third parties, on reasoning similar to that which supports a finding of non-waiver in other joint undertakings, such as joint defense agreements. But that rationale does not support drawing a line that would permit one governmental agency to disclose otherwise privileged materials to persons not involved in the investigation merely because they are "governmental" persons. Questions also arise concerning how the proposed distinction would operate on a practical level. For example, what if information is provided by a federal agency to a state agency—which presumably would constitute a "governmental" person? At that point, state law would govern under the Rule and a waiver likely would be found. But this result seems contrary to the Rule's intended purpose.

- The interplay of the Rule and other government disclosure obligations, for example, under the Freedom of Information Act ("FOIA"), is not clear. For instance, would disclosure under FOIA come within the clause stating that "Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law"? A rule that provided for non-waiver as to non-governmental persons and yet contemplated disclosure in response to FOIA requests would seem to fall short of its intended purpose.

- The Rule's express provision that it does not govern the "effect of disclosure to a state or local government agency" would likely override federal common law that might otherwise apply in federal question cases. Elsewhere, where the rule excludes state proceedings, it does so by omission, leaving the applicability of federal common law in federal question cases intact. It is not clear that the Committee intended these different results for different subsections of the proposed Rule. In addition, given the prospect that when federal investigations occur there often will be parallel, joint, or follow-on state investigative efforts, this exception has the potential to substantially narrow the effectiveness of the Rule.

V. Proposed Rule 502(d)

A. Recommendation

Rule 502(d) should be adopted as proposed.

VI. Proposed Rule 502(e)

A. Recommendation

Rule 502(d) should be adopted as proposed.

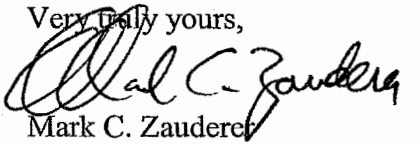
VII. Proposed Rule 502(f)

The Council has no comments or recommendations concerning the definitions contained in Rule 502(f).

* * *

We appreciate the opportunity to comment on these important issues. If the Federal Bar Council can be of any further assistance to the Committee, please do not hesitate to contact me.

Very truly yours,



Mark C. Zauderer

cc: Vilia B. Hayes, Esq.