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February 15, 2007

VIA E-MAIL

06 - EV -069

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

Re: Federal Rule of Evidence 502

Dear Mr. McCabe:

I am the Chair of the Commercial and Federal Litigation Section of the New York State Bar Association. On February 13, 2007, the Section unanimously approved the enclosed report entitled "Report on Proposed Federal Rule of Evidence 502." On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Evidence Rules in connection with its consideration of proposed Rule 502.

If you would like further information, we would be pleased to hear from you.

Sincerely yours,

Lesley F. Rosenthal /sm

Lesley F. Rosenthal

LFR:GKA:sm
Enclosure

cc: Mark H. Alcott, Esq. (via e-mail w/encl.)
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INTRODUCTION

On May 15, 2006, the Advisory Committee on Evidence Rules ("Advisory Committee") published proposed Federal Rule of Evidence 502 for public comment. The following report contains the comments of the New York State Bar Association's Commercial and Federal Litigation Section in response to proposed Rule 502. The proposed rule addresses certain issues associated with waivers of attorney client privilege and work product protection in the contexts of both voluntary and inadvertent disclosure.

Movement towards a federal rule of evidence that would address the issues targeted by proposed Rule 502 generally can be traced to two relatively recent developments: a) the increased volume of information that must be reviewed for purposes of legal proceedings as a result of electronic discovery, and the concomitant increased likelihood of inadvertent disclosure of privileged information, and b) the reportedly increased tendency of government prosecutors and regulators to request privilege waivers from parties from whom the government seeks documents. In the Section's view, the rule is well crafted to achieve its stated goals in some respects, but in other respects is problematic.

SUMMARY

The Section's position on each subsection of the proposed rule is as follows:

502(a): The Section does not support the adoption of this subsection, which would limit the scope of waiver resulting from a disclosure of otherwise attorney-client privileged or work product protected information to undisclosed documents regarding the same subject matter, based on a "fairness" test.

502(b): The Section supports the adoption of this subsection, which provides that inadvertent disclosure does not waive the attorney-client privilege or work product protection, if certain conditions are met.

502(c): The Section does not support the adoption of this subsection, which would codify a "selective waiver" rule under certain circumstances where otherwise privileged or protected information is disclosed to government agencies acting in certain capacities and third parties subsequently seek disclosure of the same information.

502(d) and (e): The Section supports the adoption of subsections (d) and (e), which build on the provisions of proposed Rule 502(b) to prevent inadvertent disclosures from being considered a waiver of attorney-client privilege or work product protection. These subsections provide that party agreements to the same effect will be binding in the litigation in which they are involved (Rule 502(e)) and, when encompassed in a court order, will be binding on third parties (Rule 502(d)).

COMMENTS ON PROPOSED RULE 502 BY SUBSECTION

The Section Does Not Support the Adoption of Proposed Rule 502(a)

Proposed Rule 502(a) provides:

> **Rule 502. Attorney-Client Privilege and Work Product: Limitations on Waiver**
>
> **(a) Scope of waiver.** In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends 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.

Although not stated expressly, proposed Rule 502(a) is directed at the non-inadvertent (that is, voluntary) disclosure of communications or information protected by the attorney-client

privilege or the work product doctrine.[1] Proposed Rule 502(a) would also apply to the effect in federal litigation of both judicial and extrajudicial disclosures, without differentiating between the two.

The justification for proposed Rule 502(a) is two-fold. First, the Advisory Committee claims that it will reduce the time and effort expended during discovery in reviewing documents to preserve the attorney-client privilege or work product protection, and thus reduce the costs of discovery. *Report of the Advisory Committee on Evidence Rules*, dated May 15, 2006, at 2, 8 ("*Advisory Committee Report*"). The Advisory Committee suggests that "the discovery process would be more efficient and less costly if documents could be produced without risking a subject matter waiver of the attorney-client privilege or work product protection." *Advisory Committee Report* at 2. Second, the proposed Rule "seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection." *Advisory Committee Report* at 9. As discussed below, neither justification holds up

We are aware of no empirical evidence, and the Advisory Committee has not provided any, that establishes that limiting the scope of waiver in the case of voluntary discovery disclosures will significantly reduce the time, effort and expense of reviewing and producing documents, the principal justification for the proposed Rule. To the contrary, it is likely that limiting the scope of voluntary disclosure waiver will not achieve this goal. It can reasonably be expected that parties will still conduct careful "privilege" reviews before producing documents, for at least two reasons. First, such reviews are performed to avoid disclosing to adversaries harmful documents that are protected from disclosure. Second, such reviews are performed to

[1] Inadvertent disclosure is covered by proposed Rule 502(b), which is discussed elsewhere in this report.

preserve the ability to argue that if a document protected by the attorney-client privilege or the work product doctrine is produced, the production was inadvertent. If proposed Rule 502(b) is enacted, inadvertent production will not waive attorney-client privilege or work product protection, but only if reasonable steps have been taken to prevent disclosure.[2] Clearly, that form of the Rule would still require reasonably careful screening of documents before they are produced.

Proposed Rule 502(a) also resolves a fundamental question - - what the scope of voluntary disclosure waiver should be in the case of both attorney-client privilege and work product - - without addressing critical issues. Those issues are whether the rule should be the same in both cases, and, if so, what that rule should be, taking into account the different purposes served by the attorney-client privilege and work product protection, and considering that the attorney-client privilege has been strictly construed because it can serve as an obstacle to the search for the truth in derogation of the "public's right to every man's evidence."[3]

The Advisory Committee assumes that the rule should be the same in both cases. Yet the courts, after analyzing the purposes served by the attorney-client privilege and work product protection, for the most part, have concluded that two different waiver rules are warranted. In the

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[2] Under existing case law, there are three distinct lines of federal authority on the effect of inadvertent disclosure: (i) it will always effect a waiver; (ii) it will never effect a waiver; and (iii) application of a balancing test to determine whether a waiver is effected. *See Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (S.D.N.Y. 1993); *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 290-292 (D. Mass. 2000). In federal courts that apply a balancing test, one of the factors considered is whether reasonable steps were taken to prevent disclosure. *See U.S. v. Mallinckrodt, Inc.*, 227 F.R.D. 295, 297 (E.D. Mo. 2005) (in determining whether inadvertent production waives attorney-client privilege, court considers reasonableness of precautions taken to prevent inadvertent disclosure); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-577 (D. Kan. 1997) (same regarding attorney-client privilege and work product); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) (same); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 331-332 (N.D. Cal. 1985) (same regarding work product); *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 292 (D. Mass. 2000) (same regarding attorney-client privilege and work product).

[3] *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corat)*, 348 F.3d 16, 22 (1st Cir. 2003); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355 (4th Cir. 1984); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 632 (W.D. N.Y. 1993).

case of voluntary judicial waiver of the attorney-client privilege, the rule generally is that such voluntary disclosure of a document or information protected by the attorney-client privilege waives the privilege with respect to undisclosed documents and information relating to the same subject matter.[4] In the case of work product, there is a split in authority, but the majority rule appears to be that voluntary judicial disclosure of a document or information protected by the work product doctrine only waives protection for the document or information produced (there is no subject matter waiver).[5] Whether limited waiver or subject matter waiver is preferable and whether the rule should be the same with respect to waiver of the attorney-client privilege and waiver of work product protection needs to be addressed on the merits, which the Advisory Committee has not attempted to do. "The attorney-client privilege and the work product doctrine are based on different public policies, protect different though frequently complementary interests, and are subject to different analyses when considering the propriety of finding a

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[4] *See, e.g., Bowne of New York City, Inc. v. AmBase Corat*, 150 F.R.D. 465, 484-485 (S.D.N.Y. 1993) (subject matter waiver); *Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100, 103 (S.D.N.Y. 2000) (same); *Painewebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 992 (8th Cir. 1999) (same), cert. denied, 529 U.S. 1020 (2000); *Bowles v. National Ass'n of Home Builders*, 224 F.R.D. 246, 257 (D.D.C. 2004) (same); *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310 (D.D.C. 1994) (same); *In re Consolidated Litig. Concerning Int'l Harvester's Disposition of Wisconsin Steel*, 666 F. Supat 1148, 1153 (N.D. Ill. 1987) ("general rule is that voluntary disclosure of privileged attorney-client communication constitutes waiver of the privilege as to all other such communications on the same subject"); *In re Hechinger Inv. Co. of Del.*, 303 B.R. 18, 26 (D.Del. 2003) ("When considering the scope of [voluntary] waiver of the attorney-client privilege, other courts have adhered to the following standard: 'The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications' ").

[5] *See* discussion regarding split in authority in *Bank of America, N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 174-75 (S.D.N.Y. 2002); *compare In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (limited waiver); *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corat*, 2002 WL 31729693, at **12-14 (S.D.N.Y. Dec. 5, 2002) (limited waiver); *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (limited waiver); St. *Paul Reinsurance Co., Ltd v. Commercial Fin. Corat*, 197 F.R.D. 620, 639 (N.D. Iowa 2000) (limited waiver); *In re Chrysler Motors Corat Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) (limited waiver) *with Bowne v. AmBase Corat*, 150 F.R.D. 465, 485-86 (S.D.N.Y. 1993) (subject matter waiver); *Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100, 104 (S.D.N.Y. 2000) (disclosure of work product on the subject of certain claims waived work product protection with respect to other documents relating to those claims); *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc..*, 1997 WL 801454, at *3 (S.D.N.Y. Dec. 31, 1997) (subject matter waiver); *see also Bowles v. National Ass'n of Home Builders*, 224 F.R.D. 246, 258-259 (D.D.C. 2004) (subject matter waiver of work product protection under circumstances akin to deliberate disclosure to gain a tactical advantage); *In re Martin Marietta Corat*, 856 F.2d 619, 625 (4th Cir. 1988) (disclosure of non-opinion work product to government in attempt to settle criminal investigation was considered a "testimonial use" and thus effected subject matter waiver), *cert. denied sub nom Martin Marietta Corat v. Pollard,* 490 U.S. 1011 (1989).

waiver." *Chimie v. PPG Indus., Inc.*, 218 F.R.D. 416, 421 (D. Del. 2003). "[I]t is not necessary to apply the same waiver rules to both attorney-client privilege and work product protection, since each serves a distinct purpose...." *In re Hechinger Investm. Co. of Del.*, 303 B.R. 18, 24 (D. Del. 2003).

The Advisory Committee's recommendation appears to be based solely on consideration of the supposed impact on the expense of privilege review in pre-trial discovery and the Committee's unsubstantiated conclusion that a limited waiver rule will significantly reduce discovery costs. While the effect, if any, on the time, effort and expense of responding to discovery can certainly be taken into account in the course of that debate, it should not be the only factor considered or even the decisive factor, as the Advisory Committee has made it here.

The proposed Rule further provides that waiver will extend to an undisclosed communication or information concerning the same subject matter if, as a matter of "fairness," the undisclosed communication or information ought to be considered. This portion of the proposed Rule will undoubtedly spawn innumerable discovery disputes and a proliferation of motion practice that will add substantially to the burden of the courts, as parties try to use claims of voluntary disclosure and "fairness" as a means to obtain other protected documents. It is, moreover, largely an unworkable concept in the situation where parties will most likely be fighting over whether additional documents or information should be disclosed. (*See* discussion below.)

The Advisory Committee has indicated that the language concerning subject matter waiver and "fairness" is taken from Rule 106. However, the situation addressed here is not at all comparable to the situation addressed by Rule 106. That the "fairness" concept may work in the Rule 106 context is, therefore, no ground for concluding that it will work here. In the Rule 106

situation, the party who claims that "fairness" requires the introduction into evidence of other parts of, or documents additional to, the document that the other party seeks to introduce knows what the additional material is and can explain to the court why "fairness" requires the introduction of the additional material. It is not a matter of a guessing game or constant *in camera* reviews.

In contrast, how does the party to whom voluntary disclosure has been made of a document or information covered by the attorney-client privilege or work product protection know what else "in fairness" ought to be produced? The receiving party has not seen and does not know what else there is relating to the same subject matter and therefore whether "fairness" requires its disclosure. At most, that party has the disclosed document and a privilege log, which usually provides scant information about the contents of the documents listed.

Moreover, the receiving party, whose discovery of potentially helpful information is being blocked, may well move to require that further communications or information be disclosed just to have a neutral determine whether "fairness" requires such disclosure. Then, the producing party will have to expend additional time, effort and money in locating and providing those documents to the court. The producing party will also incur the additional time and expense of motion practice. These additional costs undercut at least to some degree the cost-saving justification for the proposed Rule.

The court may then have to conduct an *in camera* review of the documents to determine whether "fairness" requires that any of them be produced. This review is likely to impose a considerable burden on the courts because of the frequency with which such reviews may be required and the quantity of documents involved. Moreover, the non-producing party will be unable to give much, if any, meaningful input to the court since it will not have seen the

undisclosed documents. Thus, the court will receive "meaningful" guidance only from the party opposing further disclosure, hardly a level playing field. No one can predict in advance what "fairness" will or will not require.

In addition, by adding the "fairness" test, proposed Rule 502(a) does not provide a "predictable" standard under which parties can determine the consequences of a disclosure, the second justification for the proposed Rule.

Another failing of the proposed Rule is that it does not distinguish between judicial and extrajudicial disclosure (litigation vs. non-litigation disclosure). The fact that extrajudicial disclosure may result in only a limited waiver does not mean the rule should be the same for a voluntary disclosure in a judicial setting - - during discovery. *See, e.g., In re von Bulow*, 828 F.2d 94, 101-03 (2d Cir. 1997) (disclosure of privileged communications in an extrajudicial setting - - a published book - - waived privilege only with respect to particular communications or portions of communication disclosed); *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corat)*, 348 F.3d 16, 23-25 (1st Cir. 2003) (extrajudicial disclosure of attorney-client communications not thereafter used by client to gain adversarial advantage in judicial proceedings does not effect subject matter waiver; subject matter waiver involves "a disclosure made in the course of a judicial proceeding"). Again, the Advisory Committee has not addressed this issue. Certainly, no showing has been made that the reasons underlying a rule of limited waiver in the case of extrajudicial voluntary disclosure apply in the case of voluntary judicial disclosure waiver. Indeed, the courts in *von Bulow* and *In re Keeper of the Records* did not believe the same rule applied in both situations.

While the quest for a uniform rule for all federal courts is laudable, uniformity at the expense of a correct rule is self-defeating. Proposed Rule 502(a) will not achieve its professed

objectives and is a back-door attempt to resolve an issue that courts have struggled with for years - - the scope of voluntary disclosure waiver - - without addressing the merits of that issue. The Section opposes its adoption.

The Section Supports the Adoption of Proposed Rule 502(b)

Inadvertent disclosure is covered by proposed Rule 502(b), which provides that inadvertent disclosure does not waive the attorney-client privilege or work product protection, if certain conditions are met. It also is meant to be binding in state proceedings, the constitutionality of which is discussed later in this report under Federalism Issues. Proposed Rule 502(b) states:

> **(b) Inadvertent disclosure.** – A disclosure of a communication of information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings – and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

The Section endorses the position that the inadvertent production of privileged or protected information, especially when dealing with voluminous electronically stored information, should not automatically be considered a waiver of privilege. Frequently, especially in complex cases, parties spend large, and perhaps inordinate, amounts of time reviewing hard-copy discovery materials prior to production to determine whether they are privileged, which can substantially delay access for the party seeking discovery. *See Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("*Zubulake III*") (the producing party decided on a review protocol of having a senior associate at a cost of $410 per hour read every word of every document rather than having a paralegal at a cost of less than $170 per hour conduct a series of targeted key-word searches). The time and expense to review electronically

stored information can be greater than with hard-copy documents, because there is more of it, including many duplicates, and the informal nature of many e-mails makes it more difficult to determine whether the information is privileged. *See Computer Assocs. Int'l Inc. v. Quest Software, Inc.*, No. 02 C 4721, 2003 WL 21277129, at *1 (N.D. Ill. June 3, 2003) (cost to remove privileged information from eight hard drives between $28,000 to $40,000); *Medtronic Sofamor Danek, Inc. v. Michelson,* No. 01-2373-MIV, 2003 WL 21468573, at *7 (W.D. Tenn. May 13, 2003) (estimates of privilege review costs regarding backup tapes between $16.5 million and $70 million); *Cognex Corat v. Electro Scientific Indus., Inc.*, No. Civ. A 01CV10287RCL, 2002 WL 32309413, at *2 (D. Mass. July 2, 2002) (a seven-person team of lawyers and paralegals took approximately 10 weeks of work to review eight CDs of electronic files).

The Section Does Not Support the Adoption of Proposed Rule 502(c)

Introduction

The Advisory Committee takes no position on the ultimate merits of this portion of proposed Rule 502(c). *Advisory Committee Report* at 3. For the reasons discussed below, the Section does not support the adoption of the proposal based on currently available information as to its likely effects. The proposed subdivision states:

> In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. 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. 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 by law.

The proposed subsection would codify a rule of "selective" waiver designed to protect targets of federal governmental investigations from having their "cooperation" with government investigators, in the form of waiving privilege to satisfy a government request for such a waiver, used against them by private litigants claiming that such disclosure to the government requires disclosure of the same information in civil litigation to which such information is relevant (information which, absent the prior disclosure to the government, would have been protected from disclosure by privilege). This proposed rule would override a number of Court of Appeals decisions from various circuits holding that there is no right to maintain privilege as to third parties where the information in question has already been disclosed to the government. *See, e.g.*, cases cited in *Advisory Committee Report* at 12. The Advisory Committee states that particularly important to its determination as to the merits of this proposal will be any evidence of a "statistical or anecdotal" nature that shows whether such a provision would "1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions." *Advisory Committee Report* at 6.

The Section is unable to support the proposed provision at this time given the lack of evidence as to whether it will actually have the desired impact. This uncertainty is exacerbated by the fact that organizations representing the interests of corporate parties who would presumably stand to gain from the potential decrease in cost referenced by the Committee, as well as by the proposed provision's rule of non-waiver as to non-governmental persons or entities where the conditions of the provision are met, have expressed serious concerns that the proposal will be harmful to the very corporate parties it ostensibly is designed to protect. Finally, the process by which at least the Department of Justice has sought the kinds of waivers

at issue appears to be in flux in a way that may affect the policy considerations raised by the proposed rule.

The Section is Unaware of Evidence that the Proposed Rule is Likely to Accomplish the Objectives Articulated by the Committee

At this time, the Section is not aware of any significant body of reliable information supporting the notion that the proposed rule will either "promote cooperation with government regulators" or "decrease the cost of government investigations and prosecutions." In particular, we are unaware of any situation where concern over privilege waiver vis-à-vis third parties resulted in diminished cooperation with the government. Moreover, this possibility seems unlikely to occur with any significant frequency given the weight of the incentives motivating parties to cooperate with governmental investigations.

Similarly, it seems unlikely, and we are aware of no information supporting a different conclusion, that a protection from privilege waiver as described in the proposed rule would have any significant impact on the cost to the producing party involved in a governmental investigation. Regardless of whether a further waiver will be effected by production of otherwise privileged documents to the government, producing parties will still undertake careful review of the privileged documents before turning them over simply because without knowing what is in the documents it would be impossible to represent the producing party's interests effectively. Furthermore, such a careful review would be necessitated by the proposed rule's various limits on the protection afforded the producing party – including the absence of any restrictions on the government's subsequent use of the privileged documents and absence of any effect on production to state and local governments. It is precisely this careful review that gives rise to the most significant cost elements because of the many hours of attorney time required to

review the large volumes of information, typically electronically stored, commonly requested by government investigators.

The Impact of the Proposed Rule on Governmental Requests for Privilege Waiver is Uncertain

The proposed Advisory Committee note reviews the varying caselaw addressing whether disclosure of privileged information to a government agency conducting an investigation results in a waiver of privilege as to third parties, such as private plaintiffs, seeking disclosure of the same information in the context of civil litigation. As the Advisory Committee states, most courts have rejected this "selective waiver" concept. *See Advisory Committee Report* at 12. The committee notes go on to state that the "selective waiver" rule "furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations." No evidence or other basis for this conclusion is articulated. Groups representing corporate interests have expressed concern that the proposed rule may encourage an erosion of the attorney-client privilege which will usurp the important policy reasons for having the privilege at all. Such concerns are articulated in comments submitted by the Association of Corporate Counsel[6] ("ACC"), dated June 20, 2006. ACC expresses the position that "the attorney-client privilege and work product doctrine are in serious jeopardy" as a result of what it describes as inappropriate government pressure to waive privilege protection. Letter from Susan Hackett to David Levi dated June 20, 2006 ("June 20, 2006 ACC Letter") at 3. ACC refers to this asserted atmosphere as the "culture of waiver" and cites a survey conducted by a coalition of organizations with diverse interests containing attestations about the

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[6] ACC is an organization that describes itself as: "...the in-house bar association, with more than 19,000 members worldwide who practice inside the legal departments of corporations and other organizations in the private sector. ACC presents the perspective of in-house counsel who advise corporate clients on virtually every conceivable matter of law, compliance, and legal policy, including on issues of how clients should treat attorney-client privileged communications that are sheltered by the attorney-client privilege and the work product doctrine." Letter from Susan Hackett to David Levi, dated June 20, 2006 at 2.

government's practice in regard to requests for privilege waivers. *Id.* at 4. The fact that private plaintiffs are able to access the documents acquired by the government as a result of having pressured corporate parties to waive privilege, because most courts do not recognize a "selective waiver" concept, is cited by ACC as "inequitable." *Id.* Nonetheless, ACC believes that codifying the proposed selective waiver provision "would not solve – and could exacerbate – the crucially important underlying problem of government enforcement policies eroding attorney-client and work product protections." *Id.* at 5. ACC states that the proposed rule "might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances (indeed, that it is indefensible for a company to reject a waiver request), given that the government can now offer protection against third party disclosures." *Id.* The ACC is not alone in decrying a perceived erosion in the attorney client privilege as a result of government pressure. *See generally* William R. McLucas, et. al., *The Decline of the Attorney Client Privilege in the Corporate Setting*, The Journal of Criminal Law and Criminology (2006).

Much of the discontent with the current environment derided as the "culture of waiver" appears to stem from a policy document issued by then Deputy Attorney Larry Thompson on January 20, 2003, known as the Thompson Memo. This document states that prosecutors, in considering whether to bring charges against a corporation, should consider: "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection." *See id.* at 632. This statement has been interpreted as a message to prosecutors that corporations who decline to waive privilege will be deemed uncooperative. *Id.* at 634.

The possibility that the so-called "culture of waiver" represented by the Thompson Memo may be changing in certain respects is raised by another memorandum, published on December 12, 2006, in which the Deputy Attorney General, Paul McNulty, issued new guidelines for prosecutors seeking waiver of privilege. These new guidelines require, *inter alia,* that prosecutors establish legitimate need for privileged information, and obtain prior written approval before requesting it. The memo cautions that privileged communications should be sought only in rare circumstances. *See* Department of Justice document available at http://www.usdoj.gov/opa/pr/2006/December/06_odag_828.html.

Clearly, a debate is developing as to the impact of the proposed rule and the propriety of governmental requests for privilege waivers, and there is little or no reported empirical evidence on the effect the proposed rule might have on the perceived erosion of the privilege cited by some corporate interests. Moreover, the facts relevant to this debate seem to be in flux (i.e., as demonstrated by the recent publication of the McNulty Memo). Under these circumstances, the Section cannot support proposed Rule 502(c).

Other Potential Problems with Proposed Rule 502(c)

The proposed rule has other, more technical limitations as to its effectiveness in achieving the desired results of promoting cooperation and reducing expense as well. While these other limitations may not impact the weighty policy considerations involved in the "culture of waiver" debate, they are nonetheless potentially significant barriers to the utility of the proposed rule. For example, the proposed rule would not protect disclosures to local or state governments, which disclosures would still be governed by state law.[7] In addition, there would

[7] We note that on October 16, 2005, legislation was enacted that protects disclosures to banking regulators, whether federal, state or foreign, from claims of waiver by third parties. Section 607 amending Section 18 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).

be no restriction on government use of the information, or on the effect such use might have in effecting a waiver. This limitation effectively means that even with the protections currently incorporated in the proposal, a producing party would still take a significant risk of triggering a broader waiver by providing privileged documents to the federal government. Accordingly, it is unclear whether and to what extent cooperation with the government would be improved materially by the proposed rule, or whether and to what extent less money would be spent to pay lawyers conducting painstaking reviews of privileged information.

The proposal that has been offered, albeit tentatively and in brackets, to limit the effect of disclosures of privileged information to federal government investigators, does not appear to be based in any empirical evidence as to whether it will achieve its intended impact, nor does it appear to be supported by any inherent logical supremacy that would mandate its adoption. Accordingly, the Section does not support proposed Rule 502(c) unless further evidence comes to light regarding its likely effect. Given the robust debate that is developing regarding the subject matter, we are hopeful that such evidence will be developed and that the issues raised by the proposed rule can be reconsidered in an informed manner in the near future.

The Section Supports the Adoption of Proposed Rules 502(d) and 502(e)

Proposed Rules 502(d) and 502(e) build on the provisions of proposed Rule 502(b) protecting inadvertent disclosures from being considered waivers of privilege or protection by providing that non-waiver agreements will be binding in the litigation in which they are involved (Rule 502(e)[8]) and, when encompassed in a court order, will be binding on third parties (Rule

[8] Proposed Rule 502(e) provides:

(e) Controlling effect of party agreements. – An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

502(d)[9]). The Section supports these provisions as necessary adjuncts to the limitations on inadvertent disclosure contained in proposed Rule 502(b).

In proposing Rules 502(d) and (e), the Advisory Committee on Evidence Rules means to sanction the use of agreements by parties to protect against the waiver of the attorney-client and work product privileges during the discovery process. The *Advisory Committee* Report, at 13, recognized that, in the age of electronic discovery, where document productions can grow to unwieldy proportions, the cost of conducting a thorough privilege review can be exorbitant and the time needed to complete such a review incompatible with a reasonable litigation schedule. According to the Advisory Committee, proposed Rules 502(d) and (e) also are meant to "provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection." *Advisory Committee Report* at 8. Parties can be assured that their confidentiality agreements, embodied as court orders, and bolstered by a rule enacted by Congress, will be enforced.

Most importantly, proposed Rules 502(d) and (e) give a level of reassurance to parties that they could not achieve by entering into a non-waiver agreement alone, by providing that a court order incorporating the agreement of the parties is binding on non-parties in both federal and state litigation. As the Advisory Committee reasoned, "the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the

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[9] Proposed Rule 502(d) provides:

(d) Controlling effect of court orders. – 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 governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation."[10] *Advisory Committee Report* at 13.

In the absence of proposed Rules 502(d) and (e), it is not entirely clear whether a court's order incorporating the parties' non-waiver agreement is enforceable against non-parties who assert waiver by disclosure in a subsequent litigation. Parties to a litigation may enter into "claw back" or "quick peek" agreements that bind the parties themselves, and those agreements may be "so-ordered" by a court, so that any breach is not just a breach of the agreement, but a violation of the court's order.[11] However, in refusing to extend such agreements and orders to non-parties, some courts have relied on the traditional waiver doctrine, which provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice.[12] Notably, at least one court has suggested that, had the

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[10] *See also Chubb Integrated Sys. v. National Bank,* 103 F.R.D. 53, 67-78 (D.D.C. 1984) (holding that a non-waiver agreement did not apply to third-parties, that such "agreement is for the mutual convenience of the parties, saving the time and cost of pre-inspection screening," and that it is "merely a contract between two parties to refrain from raising the issue of waiver or from otherwise utilizing the information disclosed."); Advisory Committee on Evidence Rules, *Hearing on Proposal 502,* (Apr. 24, 2006) at 3-4 (Comments of Hon. John G. Koeltl), *available at* http://www.uscourts.gov/rules/advcomm-miniconference.html ("[e]ven the courts in the District of Columbia Circuit, which takes a very strict view against limiting waiver find that agreements for non-waiver are binding as matters of contract between the parties to the agreement").

[11] *See Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 239-40, 244 (D. Md. 2005) (court order incorporating non-waiver agreement between the parties is a viable method of dealing with privilege review of electronically stored information without running a risk of subject-matter waiver, but parties must still complete a reasonable pre-production privilege review or demonstrate why a review should not be done); *Zubulake III,* 216 F.R.D. at 290 ("many parties to document-intensive litigation enter into so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents"); *see also* Manual for Complex Litigation (Fourth) § 11.446 (2004) ("[J]udges often encourage counsel to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a case management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to 'take back' inadvertently produced privileged materials if discovered within a reasonable period.").

[12] *See Westinghouse Elec. Corat v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991) (so-ordered agreement between litigant and Department of Justice that documents produced in response to investigation would not waive privilege against different entity in unrelated civil proceeding); *see also Bowne v. AmBase Corat,* 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (non-waiver agreement between producing party in one case not applicable to third party in another civil case).

non-waiver agreement between the parties expressly stated that it was binding on third-parties, it might have ruled otherwise.[13]

There has also been some suggestion that a court's power to limit the use of information obtained in discovery through such devices as a protective order might suffice to bind non-parties to orders providing that privilege is not waived in subsequent state and federal proceedings. In *Transamerica Computer Co., Inc. v. IBM Corat*, 573 F.2d 646 (9th Cir. 1978), the plaintiff, TCC, moved to compel IBM to produce privileged documents that it originally produced in connection with accelerated discovery proceedings in a prior case. In that prior case, the court issued an order requiring IBM to produce 17 million pages of documents in a three month period.[14] Understandably, some privileged documents were inadvertently produced.[15] When IBM realized that privileged documents had been produced, the court issued an order preserving claims of privilege so long as IBM employed reasonable screening techniques.[16] TCC argued that "being a stranger" to the prior case, the court's order did not apply to it.[17] IBM argued that because discovery was extremely accelerated, IBM's production of some privileged documents was effectively compelled and therefore, the basic legal principle that a party does not waive the attorney-client privilege for documents which it is compelled to produce should apply.[18]

The Ninth Circuit concluded that the order preserving IBM's claims of privilege was binding on TCC, holding that "it would be disingenuous...to say that IBM was not, in a very

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13 *Bowne*, 150 F.R.D. at 478-79.

14 573 F.2d 646, 648.

15 *Id.* at 649-50.

16 *Id.* at 650.

17 *Id.*

18 *Id.* at 651.

practical way, 'compelled' to produce privileged documents which it certainly would have withheld and would not have produced had the discovery program proceeded under a less demanding schedule."[19] The court also found the order explicitly protecting and preserving all claims of privilege important, pointing out that Federal Rule of Civil Procedure 26(c)(2) empowers a district court judge to dictate "the specified terms and conditions" of discovery.[20]

While the *Transamerica* case may provide some support for the enforceability of non-waiver agreements against non-parties, the Ninth Circuit did insist that IBM maintain reasonable procedures in screening for privilege.[21] Proposed Rule 502 imposes no such requirement. Rather, "the proposed rule...is an independent basis for the court order authorizing inadvertent production. It can be viewed simply as part of the definition of what is covered by the attorney-client and work product protections."[22]

Under proposed Rule 502(d), it is unclear whether a court order on non-waiver of privilege that does not incorporate an agreement between the parties is binding on non-parties. The language of the proposed rule does not expressly provide protection for such a court order. Under the proposed rules as drafted, parties must be careful to have every agreement on waiver of privilege so-ordered by the court to ensure that it is binding on non-parties. For example, if the parties agree at a deposition that certain testimony will not constitute a waiver of privilege, parties should get court approval for that agreement.

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19 *Id.* at 652-53.

20 *Id.*

21 573 F.2d 646, 650.

22 Advisory Committee on Evidence Rules, *Hearing on Proposal 502* (Apr. 24, 2006) at 6 (Comments of Hon. John G. Koeltl), available at http://www.uscourts.gov/rules/advcom-miniconference.html.

FEDERALISM ISSUES

Federalism Issues Should Not Impede The Passage of Rule 502 by Congress

The Section has concluded that, if enacted by Congress under its Commerce Clause powers, the proposed Rule will quite likely withstand constitutional scrutiny. That the Rule may be constitutional, however, does not make it good policy. As detailed below, federalism concerns remain, even if the proposed Rule is constitutional.

Authority to Enact the Rule

The framers of proposed Rule 502 were well aware of federalism and constitutional issues associated with the proposed Rule. Indeed, Professor Daniel Capra (of Fordham University Law School), one of the principal drafters of the Rule, and Ken Broun, a consultant, have suggested (based on their discussions with the Advisory Committee):

> The waiver rules must be uniform at both the federal and state level. 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.

See Daniel J. Capra and Ken Broun, *Memorandum Re: Consideration of Rule Concerning Waiver of Attorney Client Privilege,* SLO81 ALI-ABA 245, 247 (2006) [hereinafter, Capra & Broun].

Capra and Broun note:

> If a statute or rule governing inadvertent waiver, scope of waiver and selective waiver of an evidentiary privilege is to be effective in eliminating the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, the provision would have to be binding in all courts, state or federal.

Capra & Broun at 263. As a result, they conclude:

> [T]he Rule would have to be enacted by Congress using both its powers to legislate in aid of the federal courts under Article III of the Constitution and its commerce clause powers under Article I.

The form of enactment (through direct congressional action, rather than through the normal rules amendment process) is dictated by the Rules Enabling Act, which provides (among other things) that any "rule creating, abolishing or modifying an evidentiary privilege" must be approved by Act of Congress.[23] *See* 28 U.S.C. § 2074(b); Capra & Broun at 265 (issue of enactment procedure is "moot" if Rule is enacted by Congress). This approach, however, also recognizes that modifications to privilege law essentially involve substantive rights, rather than the procedural issues that federal rules of evidence and procedure normally address.[24]

Even if a federal court has the power to issue an order to avoid privilege waiver that is binding on parties in subsequent proceedings – in essence compelling accelerated discovery on condition of non-waiver – a rule enacted by Congress can certainly aid in confirming that power. Congress' authority to enact such a rule stems from its broad powers to legislate in aid of the federal courts and its power under the Commerce Clause.[25] The provision of legal services increasingly crosses state borders and can be characterized as interstate activity. Even if the provision of legal services is largely an intrastate activity, the sheer volume of legal activity, often involving clients that operate on a national scale, affects the national economy generally. Therefore, privileged communications, which underpin and are fundamental to the attorney-

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[23] This restriction follows the refusal of Congress, under the Rules Enabling Act process, to approve Federal privilege rules in the early 1970s. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 740 (1974) [hereinafter, Ely].

[24] Professor Glynn, one of the progenitors of the modern movement toward federal privilege law, candidly notes that "privilege doctrine is substantive because it serves interests extrinsic to the particular litigation in which the privilege is asserted." Glynn at 149. This view reinforces, in part, the argument that changes in privilege law "affect commerce," and thus are appropriate for regulation under the congressional commerce power.

[25] Advisory Committee on Evidence Rules, *Hearing on Proposal 502* (Apr. 24, 2006) pat 69-71 (Comments of Timothy Glynn); Broun & Capra, 58 S.C.L. Rev. 211, 243; *Advisory Committee Report* at 8.

client relationship, are arguably properly regulated by Congress pursuant to the Commerce Clause.[26] As one commentator has argued,

> Nationwide legal practices and national litigation continue to grow....Moreover, in our modern regulatory regime of varied and complex legal rules, businesses and individuals engaged in interstate commercial activity must resort constantly to attorneys for their continuous and sound advice. And in addition to that, they must resort to attorneys to comply with broad federal regulatory regimes which would themselves govern interstate commerce....It is precisely because of this nexus between what attorneys do and interstate activity, or the interstate activity of their clients, that a uniform national treatment of waiver doctrine is needed.[27]

In addition, where federal substantive law preempts state law, federal rights cannot be defeated by the application of state procedural rules.[28]

Capra and Broun conclude, moreover, that to gain "constitutional comfort" for federal privilege waiver rules that bind state courts, "Congress' Commerce powers would have to come into play." Capra & Broun at 267. They assert what they describe as a "strong argument" for federalized attorney-client privilege, enacted under the Commerce Clause powers of the Constitution (Article I, Section 8, Clause 3). *See* Capra & Broun at 267-68 (citing Timothy P. Glynn, *Federalizing Privilege*, 52 Am. U. L. Rev. 59 (2002)) [hereinafter, Glynn].

Capra and Broun discount U.S. Supreme Court decisions, such as *United States v. Levy*, 514 U.S. 549 (1995) (invalidating act making possession of a gun near school premises a federal crime); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating act providing federal remedy for victims of gender-motivated violence), which suggest limits on the reach of

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[26] Advisory Committee on Evidence Rules, *Hearing on Proposal 502* (Apr. 24, 2006) at 70-74 (Comments of Timothy Glynn).

[27] *Id.* pat 71-72 (Comments of Timothy Glynn).

[28] Broun & Capra, 58 S.C.L. Rev. 211, 243 n. 241 (citing *Felder v. Casey*, 487 U.S. 131, 153 (1988) (finding that federal civil rights law prevented the state from applying its notice-of-claim rule in a federal civil rights action filed in state court); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949) (finding that the federal pleading test should have been applied in a Federal Employers Liability Act action filed in state court).

congressional Commerce Clause powers. Similarly, they dismiss Tenth Amendment concerns, suggested by such cases as *New York v. United States*, 505 U.S. 144 (1992) (invalidating Radioactive Waste Act because it effectively required states to implement legislation) and *Printz v. United States*, 521 U.S. 898 (1997) (invalidating Brady Handgun Act, which would have required state law enforcement officials to administer federal policy). In their view, the proposed Rule 502 is "self-executing," and "simply needs to be enforced by the courts of the state." Capra & Broun at 268 (citing *Reno v. Gordon*, 528 U.S. 141 (2000) (upholding Federal Driver's Privacy Protection Act, which would protect confidentiality of state drivers' license information)). They suggest that, although a wholesale "supplanting" of state attorney-client privilege might go "too far," the "more modest legislation dealing with the existence and scope of waiver seems likely to be upheld." Capra & Broun at 268. Nevertheless, they recognize the potential for "situations in which waiver questions might not affect interstate commerce," and in those situations, they say, "we decided as an initial matter not to extend the rule." Capra & Broun at 269.

Proponents of the Rule, moreover, analogize it to the Federal Arbitration Act ("FAA"), which essentially compels uniform recognition (in both federal and state courts) of the validity of contracts of arbitration, based on congressional Interstate Commerce power. *See* Glynn at 167. Supreme Court jurisprudence over the past 20 years has, indeed, recognized the correctness of that view.[29] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (state franchisee law, restricting enforcement of arbitration clauses preempted by FAA); *Southland Corp v. Keating*,

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[29] Yet, the FAA contains its own set of federalism issues. Section 2 of the FAA, for example, recognizes the enforceability of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, the FAA has not eliminated variations in treatment of arbitration contracts. Rather, it has simply ensured that arbitration contracts are treated the same as any other contracts, *according to state law*. *See Volt Info. Science, Inc. v. Bd. Of Trustees Of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (choice of California law in arbitration contract, included choice of California arbitration procedure).

465 U.S. 1 (1984) (recognizing "authority of Congress to enact substantive rules under the commerce clause"); *see also Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003) (debt restructuring agreement entered in Alabama between Alabama residents nevertheless subject to FAA); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA intended to regulate to "outer limits" of Commerce Clause); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (recognizing "broad" meaning of term "in commerce," as used in FAA).

We believe, on the basis of this precedent upholding application of the Federal Arbitration Act in state courts, that the proposed Rule can be constitutionally enacted. Further revision of interstate commerce doctrine by the Supreme Court, however, might, at some point, place the validity of the Rule at risk. And the fact that the Rule would rely on interstate commerce as the basis for application means that in some cases challenges to application of the Rule could be mounted, due to lack of an obvious interstate commerce connection. Of perhaps larger concern are the principles of federalism (outlined below) that are implicated even if the proposed Rule is constitutional.

Remaining Federalism Concerns

It is no small thing that Congress, in the 1970s, refused to adopt federal rules of privilege. Indeed, Professor Glynn, a modern proponent of such an approach (and an authority on whom the framers of Rule 502 rely) recognizes that such an approach may be called a "radical solution." Glynn at 63.

It is also significant that the Conference of Chief Justices of the State Courts ("CCJ"), in their August 2, 2006 board of directors resolution, noted that the Rule, as proposed, "may conflict with principles of federalism." *See* ccj.ncsc.dni.us/FederalismResolutions. The CCJ also suggested that, due to principles of "comity and federalism," changes in rules regarding privilege should be determined through the actions of state legislatures, "which are best situated"

to determine policy and reform "within their own communities."[30] The CCJ suggests a "dialogue" with the Advisory Committee regarding proposed Rule 502.

The "basic premise" of proponents of uniform federal privilege rules is that "privilege must be predictable in order to serve its purposes." Glynn at 75. Yet, Rule 502 cannot entirely ensure predictability.

- Even within the federal common law system, as it now exists, the boundaries of privilege and waiver vary somewhat from court to court. The addition of uniform rules will inevitably be subject to some interpretation, and variation.
- Built into the proposed Rule are concepts such as the taking of "reasonable precautions" to prevent disclosure, and taking "reasonably prompt measures" to protect privilege once the holder "knew or should have known" of disclosure. Thus, even if the interpretation of the Rule is uniform, there will be variations based on the facts of the individual case.
- The proposed Rule depends upon the application of interstate commerce authority. There may be cases where such authority is thin, resulting (at very least) in motion practice to determine whether the federal rule can be applied (and conceivably in rejection of application of the federal rule).
- The Rule leaves state law regarding disclosure to state and local government agencies intact. Where simultaneous investigations by federal and state authorities are ongoing, a party may face potent conflicts in the effects of disclosure to authorities that may be operating in parallel.

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[30] Professor Glynn notes that "the states have a long tradition of regulating the practice of law," but asserts that "their disparate approaches to the privilege may inhibit and burden the attorney-client relationship[.]" Glynn at 157.

Additionally, there is the question of how best to achieve uniformity. The value of federalism includes: (1) limiting the central government, to avoid concentration (and abuse) of power; and (2) encouraging local experimentation. Proponents of the Rule suggest that neither is advanced significantly by the present system. *See* Glynn at 170. But, one may ask whether such policies could be advanced, if the movement toward uniform privilege rules were pursued separately at the state and federal levels. That is, if Rule 502 were adopted and applied only at the federal level (with no binding effect in state courts), then state policy-makers (based on whatever positive experiences might be documented at the federal level) would be free to determine that similar rules should be adopted at the state level (perhaps through nation-wide adoption of an appropriate Uniform Act).

The impact on federalism should give the Advisory Committee pause before proposing changes in the parameters for waiver of the attorney-client privilege and attorney work-product protection that apply to the states.

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This report was prepared by the Committee on Electronic Discovery, chaired by Adam I. Cohen and Constance M. Boland, and the Committee on Federal Procedure, chaired by Gregory K. Arenson, of the New York State Bar Association Commercial and Federal Litigation Section. The principal authors are Adam I. Cohen, Constance M. Boland, Steven C. Bennett, Gregory K. Arenson and James F. Parver. The report was adopted as the position of the Section by a unanimous vote of its executive committee at a meeting on February 13, 2007.