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By email: Rules_Comments@ao.uscourts.gov

06 - EV-054

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comment on Proposed Rule 502 of the Federal Rules of Evidence

Committee Members:

Please consider my comments on the text of proposed Rule 502 of the Federal Rules of Evidence.

I. The Current Draft Works An Unintended Substantive Change To The Work Product Doctrine By Excluding Intangible Information From Its Scope

The Committee should not endorse a substantive rule that narrows the scope of the common law work-product privilege and the rule-based protection for litigation or trial preparation materials of Federal Rules of Civil Procedure 26(b)(3) and 26(b)(4)(B) and Federal Rules of Criminal Procedure 16(a)(2) and 16(b)(2). Unfortunately, the overly narrow phrasing of proposed Rule 502(f) of the Federal Rules of Evidence does just that. The language of proposed Evidence Rule 502(f) should be changed so that it makes clear that work-product protections encompass tangible as well as intangible information of parties—whether *pro se* or represented by counsel. For the reasons outlined below, I would suggest the following alternative language:

> **(f) Included privilege and protection. As used in this rule: . . . (2) "work product" consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by or for a party or by or for that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) for litigation then in progress or in reasonable anticipation of future litigation, including governmental regulatory, administrative or enforcement proceedings.**

Although commentators eschew as unimportant the semantics of whether the work product protection is a privilege, 8 Charles A. Wright, Arther R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2023 at 335 (2d ed. 1994), the phrasing of the rule continues to lead to questions whether "work product" protections amount to a common law privilege in the Civil Rule 26(b)(1) sense or merely a rule-based protection in the Civil Rule 26(b)(3) sense. Compare Fairbanks v. American Can Co., Inc., 110 F.R.D. 685, 687 n.1 (D. Mass. 1986) (implying work-product protection applies only to "documents or things") with 49 Peter M. Lauriat et al., Massachusetts Practice Series: Discovery § 2.8 at 90 (1st ed. 2001) (work-product protection may be asserted in response to deposition questions) and In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product"); United States v. One Tract of Real Property, 95 F.3d 422, 428 n.10 (6th Cir. 1996) (principles of Hickman v. Taylor, 329 U.S. 495, 511 (1947) apply "work product privilege" to non-tangible information since Fed. R. Civ. P. 26(b)(3) "applies only to 'documents and tangible things'").

It seems, at least in Massachusetts, work-product protections include common law privileges and rule-based protections. See In re Grand Jury Investigation, 437 Mass. 340, 343 & 355 n.25 (2002) (referring to work-product protections as both a "doctrine" and a "privilege"); In re Adoption of Sherry, 435 Mass. 331, 335, 336 (2001) (referring to "work-product privilege" and citing Mass. R. Civ. P. 26(b)(4)(B) and Hickman v. Taylor, 329 U.S. 495, 511 (1947)); General Elec. Co. v. Dep't of Envt'l Protection, 429 Mass. 798, 799 n.2, 804-06 (1999) (describing how "doctrine" as part of the "common-law work product rule" would not withstand Legislature's removal of "common law discovery protections" from statutory language); Commonwealth v. Paszko, 391 Mass. 164, 187 (1984) (creature of public policy); Ward v. Peabody, 380 Mass. 805, 817 (1980) (discussing common law origins of protection); cf. Restatement (Third) of The Law Governing Lawyers § 87, cmt. *e* (2000) (federal work-product immunity is recognized under Fed. R. Civ. P. 26(b)(3) and as common-law rule, while states recognize it as matter of common law, statute or court rule). Similarly, the Supreme Court has recognized how Hickman v. Taylor "recognized a qualified privilege." United States v. Nobles, 422 U.S. 235, 238, 239 (1975) ("The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges it may be waived."). Viewing work product as a privilege in the Rule 26(b)(1) sense, though a qualified one, permits a textual basis for protecting oral and other intangible work product.

Federal Rule of Civil Procedure 26(b)(1) extends discovery to "any matter, not privileged" relevant to the claim or defense of any party, while Rule 26(b)(3) merely protects discovery of "documents and tangible things." If "work product" protections do not qualify as a "privilege" in the Rule 26(b)(1) sense, then there would no protection for oral communications or recollections as they are neither documents nor tangible things. Even the protection afforded by Rule 26(b)(3), first paragraph, second sentence, of mental impressions, conclusions, opinions or legal theories "of an attorney or other representative of a party" only applies to "such materials," that is, documents or things. Fed. R. Civ. P. 26(b)(3).

Proposed Evidence Rule 502(f), by defining the "work product protection" to apply only to "materials," confuses whether unrecorded recollections of oral communications may qualify for work product protection. Moreover, since the proposal is to be enacted by Congress as positive law it would overrule contrary common law developments. Remember that the challenged discovery that led to the decision in Hickman v. Taylor, 329 U.S. 495 (1947), concerned an interrogatory that, in part, sought disclosure of unrecorded oral statements of interviewed witnesses: "'Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statement or reports.'" 329 U.S. at 499. This aspect of the work product doctrine should not be overlooked.

The definition of work product set forth in the Restatement (Third) of The Law Governing Lawyers § 87 (2000) would provide a better guide than current proposed Evidence Rule 502(f). As that Restatement defines only the work-product immunity as it applies to lawyers, however, its definition would need to be modified to parallel proposed Evidence Rule 502(f) with language used in Federal Rule of Civil Procedure 26(b)(3). See Restatement (Third) of The Law Governing Lawyers § 87, cmt. *a* (2000) ("Federal and state discovery rules accord work-product protection to others, including personnel who assist a lawyer, and to litigation preparation of a party and the party's representatives.").[1] I would suggest the following alternative language:

> **(f) Included privilege and protection. As used in this rule: . . . (2) "work product" consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by or for a party or by or for that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) for litigation then in progress or in reasonable anticipation of future litigation, including governmental regulatory, administrative or enforcement proceedings.**

II. Proposed Evidence Rule 502(d) Should Not Hinge On Whether Parties Can Reach An Agreement

The final phrase of proposed Evidence Rule 502(d) conditions the binding effect of a federal court's order with respect to privilege waivers on whether "the order incorporates the agreement of the parties before the court." What if the parties cannot agree, submit competing

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[1] Although courts and commentators often speak of the work product protection applying only to the work of lawyers, that is not the approach endorsed by Federal Rule of Civil Procedure 26(b)(3) or Federal Rules of Criminal Procedure 16(a)(2) and 16(b)(2), which apply protections to a party as well as his or its agents or attorneys. The true genesis of the work product doctrine is the protection of the adversarial process. Certainly a pro se party should be entitled to work product protections, especially for core work product, despite that he or she is not an attorney. Fundamental fairness if not Equal Protection should require as much. Cf. Hayden v. Acadian Gas Pipeline Sys., 173 F.R.D. 429, 430 (E.D. La. 1997) (notes and memorandum prepared by corporate employee in anticipation of litigation protected).

versions of a proposal, and the judge enters one of her own? What if a third-party defendant will not agree but every other party will? Whether the order incorporates the agreement of the "parties" or not, it binds them. And, if it binds them, should not the purpose of the rule be that it binds others, whether the issue arises again in federal or state court or administrative proceedings? At minimum, the last phrase of proposed Evidence Rule 502(d) should be omitted or the rule should be dumped entirely. If the rule is to explain what is the "[c]ontrolling effect of court orders" then it should do that, not merely explain what happens to the subset of those orders that happen to incorporate the parties' agreement on the subject. Proposed Evidence Rule 502(e) already makes clear that it should be the court's order that matters; namely, if an agreement is not blessed by the judge, too bad. The primacy of a court's order should not be undermined by making its wider applicability hinge on whether parties embroiled in litigation decide to be agreeable.

III. Proposed Evidence Rule 502(d) Should Be Rephrased To Eliminate The "Governs" Concept In Favor of Full Faith and Credit Language

Proposed Evidence Rule 502(d) seems like an attempt at a full faith and credit statute for federal court privilege rulings. As such, it probably would be better placed not in the Federal Rules of Evidence but added to the litany of full faith and credit statutes in title 28 of the United States Code and phrased using a similar approach. See 28 U.S.C. §§ 1738, 1738A, 1738B, 1738C, 1739. The current proposal speaks of how a federal court order is to "govern[]" persons or entities over whom the court has no jurisdiction. This seems to raise all sorts of jurisdictional defects of constitutional dimension. What the drafters seem to be aiming for is a rule that says if you disclose privileged material in a federal court proceeding which would not waive the privilege in that proceeding, then those acts of disclosure should not be deemed to waive the privilege should the issue arise in a state court or administrative proceeding. Consider perhaps a different phrasing to accomplish this objective that would not raise jurisdictional objections so readily, thus:

> **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 shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.**

IV. Proposed Evidence Rule 502 Contradicts Evidence Rule 501

In diversity jurisdiction proceedings state law governs privileges, Fed. R. Evid. 501, but proposed Evidence Rule 502 contradicts that approach by preempting state law rules on scope of waiver, among other topics. If proposed Evidence Rule 502 is adopted, a clarifying amendment seems to be needed for Evidence Rule 501, such as adding at the end of its second sentence "except as otherwise provided by Rule 502." The proposal also may contradict Federal Rules of Criminal Procedure 16(a)(2) and 16(b)(2) as both of these rules seem to provide protections for

certain work product that are broader than what these waiver rules would circumscribe. For example, it does not appear on its face that Federal Rule of Criminal Procedure 16(b)(2) would permit a court to order disclosure of a statement of a prospective defense witness made to a non-testifying defendant even if the court "in fairness" thought it should be considered in connection with a disclosed statement by the same witness to the defendant's investigator on the same subject. Proposed Evidence Rule 502(a) might then permit what Criminal Rule 16(b)(2) did not. I have no suggestion as to how this contradiction, if genuine, should be resolved.

V. Proposed Evidence Rule 502(b) Should Clarify Undisclosed Information Is Not Jeopardized By Inadvertent Disclosure

Proposed Evidence Rule 502(b) directs that inadvertent disclosure in federal litigation or federal administrative proceedings "does not operate as a wavier in a state . . . proceeding." Aside from the awkward phrasing, if state law governs privileges under Evidence Rule 501, including how and under what circumstances those privileges may be waived as a result of the federal proceeding, would not state courts have to honor a federal court's order as to whether a waiver occurred? See 28 U.S.C. § 1738. Cf. Stoll v. Gottlieb, 305 U.S. 165, 170 (1938) (under statute, judgments and decrees of Federal courts have same dignity in state courts as those of the state's own courts); Kopp v. Fair Political Practices Comm'n, 11 Cal. 4th 607, 681, 47 Cal. Rptr. 2d 108, 157 (1995). If federal law governs the privilege question, would not a full faith a credit law (as proposed above) bind the state courts too?

I would suggest that proposed Evidence Rule 502(b) be amended by inserting the introductory clause "**In federal litigation, including governmental regulatory, administrative or enforcement proceedings**," and then striking the phrase "in a state or federal proceeding" and inserting in its place "**as to disclosed or undisclosed communications or information**". The rule should be phrased such that it does not create confusion should proposed Evidence Rule 502(a) concerning the scope of waiver as to undisclosed communications not be enacted. Also the phrase "federal litigation or federal administrative proceedings" should be replaced in proposed Rule 502(b) with "**litigation, including governmental regulatory, administrative or enforcement proceedings**." The proposed text uses the terms "proceedings," " administrative proceedings" and "litigation" in an inconsistent and ultimately unsatisfying manner. Federal Rule of Civil Procedure 26(b)(3) focuses on the "litigation" concept so if the aim of this draft is to better define "litigation" to include administrative proceedings of a regulatory, investigative or enforcement nature then using language which makes clear these administrative proceedings are a subset of "litigation" as conceived by Civil Rule 26(b)(3) makes sense.

VI. Proposed Evidence Rule 502(a) Should Limit Waiver To Disclosed Matters Only

Proposed Evidence Rule 502(a) deals only with waiver by disclosure, not waiver by other means. Thus limited, the Committee should consider simplifying this doctrine by limiting waiver by disclosure to that information or material actually disclosed. The language could read:

> **Scope of Waiver. In federal litigation, including governmental regulatory, administrative or enforcement proceedings, and subject to Rule 502(b), the waiver by disclosure of any attorney-client privilege or work product protection extends only to the disclosed communication or information. Nothing in this rule affects waiver that is occasioned by the use of any privileged or protected information or materials.**

Although evidently this approach would depart from the prevailing trend in the cases, it would better address the Committee's aim to alleviate the widespread complaint that litigation costs for review and protection of privileged material have become prohibitive due to the concern that any disclosure will operate as a subject matter waiver of all protected information. I suggest that the expenses that drive the privilege review are expenses motivated by counsel's concern of avoiding malpractice by letting slip a document that opens the flood gates to privilege waiver for a whole class of documents or intangible information. Why as a matter of first principles such a flood-gates waiver makes sense eludes me as if the privilege is justified the justification does not disappear because of an attorney's screw up. Since this rule would be limited to disclosure, not use, which is different, cf. United States v. Nobles, supra, and further limited to disclosure in the litigation context, it really addresses a problem where clients have been unfairly punished for the oversight of counsel. The Committee should take this opportunity to rationalize the doctrine. By clarifying that the rule does not apply to "use" waivers, the Committee would avoid the danger of immunizing a party's selective or misleading use of evidence to the disadvantage of his or her adversary.

Thank you for your consideration.

Sincerely,

/s/ *Matthew J. Walko*

Matthew J. Walko