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VIA E-MAIL AND U.S. MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Rule 502 of the Federal Rules of Evidence

Dear Mr. McCabe:

We are writing to comment on proposed Rule 502 of the Federal Rules of Evidence. These comments are provided on behalf of myself and a few of my partners at the law firm of Irell & Manella LLP who frequently litigate in federal court.

We commend the Advisory Committee's efforts to make litigation more efficient and less costly. In furtherance of those goals, and based on our experience in dealing with disputes regarding document production and privilege issues, we believe that proposed Rule 502 could be improved in certain ways as discussed below.

Clarifying "reasonableness." Among other things, the proposed Rule is intended to ease the burdens on producing parties who currently must be "extremely careful" to make sure that privileged documents are not inadvertently produced. According to the Report of the Advisory Committee on Evidence Rules, "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." The proposed Rule aims to correct this problem by providing that an inadvertent disclosure shall not operate as a waiver if certain conditions are met. Unfortunately, those conditions are vague (i.e., whether the precautions against disclosure were "reasonable" and whether the holder took "reasonably prompt measures once the holder knew or should have known of the disclosure"). If adopted, the proposed Rule likely would spawn significant litigation, and we predict that the proposed Rule would not change how discovery is actually conducted. To give the proposed Rule greater clarity, and to give producing parties greater comfort, we suggest that the Advisory Committee provide examples (e.g., in a Commentary section) of precautions that are considered "reasonable." For instance, with respect to electronic discovery, it would be helpful to specify that searching for key words -- such as attorney names and "privilege" --

is a reasonable precaution against disclosure. Similarly, for production of large volumes of hard-copy documents, it would be helpful to specify that it is reasonable to review only the subsets of documents that are likely to contain privileged documents (and not to review for privilege categories of documents, such as invoices and technical documents, that are unlikely to contain privileged information). As for determining whether corrective measures are "reasonably prompt," we suggest providing a Comment to indicate that action within a 14-day window generally would be considered prompt, and further providing a Comment that the "should have known" standard generally should be construed narrowly so that the 14-day clock ordinarily would not start running until a party is on actual notice of the problem.

Restricting the "ought in fairness" standard. In addition to limiting the circumstances in which waiver is found, the proposed Rule also goes a step further and would change the scope of any waiver. In place of the "subject matter" waiver standard, the proposed Rule would provide an "ought in fairness" standard for determining the scope of the waiver. The "ought in fairness" standard is somewhat fuzzier than the "subject matter" standard, and we expect that implementation would require increased judicial involvement and *in camera* review. We recommend that the proposed Rule be limited to inadvertent disclosures, and that the current jurisprudence for determining the scope of the waiver for intentional disclosures not be disturbed.

Eliminating unnecessary definitions. Sub-section (f) provide definitions for "attorney-client privilege" and "work product protection." It seems to us that these definitions are unnecessary and may become an unintentional source of confusion (e.g., does the definition of "work product" in this sub-section supersede the definition in Rule 26?). We recommend deleting sub-section (f).

In addition to the foregoing suggestions for modifying proposed Rule 502, we also have two related suggestions for future consideration by the Advisory Committee:

Privilege logs. We recommend the adoption of a rule fixing manageable time limits for preparing privilege logs as well as standards for what information must be included in the logs. Establishing default time limits (e.g., 14 days after the service of the written response to the document requests) would eliminate any risk of waiver by failing to produce the log at the same time as the written response to the document requests, while preventing parties from unduly dragging out the preparation of privilege logs. Establishing standards for what must be included in the logs would ensure that the parties provide adequate information to determine whether privilege is being properly asserted. These changes would reduce (or at least simplify) costly and unnecessary motion practice regarding the need to prepare a log, as well as the timeliness and adequacy of the log. Such unresolved issues and motion practice can make completing depositions and other discovery in a timely fashion difficult.

Protective Orders. Discovery of information that is confidential or purportedly confidential typically results in expensive and repetitive negotiations and motion practice as to the terms pursuant to which such discovery will take place. We recommend the adoption of a model Protective Order or default Protective Order regarding confidential information that a court may enter in any civil case that requires the production of confidential information. Such Protective Orders are entered in virtually all cases in which confidential documents need to be produced, but only after the parties have spent significant time and expense negotiating over the terms of a proposed Protective Order. In addition to the time and expense, wrangling over Protective Orders often leads to delays in the production of confidential documents. A model Protective Order or default Protective Order would minimize this time and expense. Moreover, in crafting the terms of the Protective Order, the Committee could strike an appropriate balance between protecting confidential information from disclosure and protecting the public's interest in access to information. Courts would remain free to modify the terms of the Protective Order in the event it was appropriate on the particular facts of a case, but a model or default Order would substantially speed discovery and reduce disputes that are unrelated to the merits of a case and that often introduce inefficiency and delay.

We hope that these comments are useful to the Committee. Please do not hesitate to contact us if you have any questions.

Very truly yours,

Perry Goldberg

Perry Goldberg

cc: Morgan Chu, Esq.
Christine Byrd, Esq.
Laura Brill, Esq.