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February 13, 2007

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 Federal Rule of Evidence 502

Dear Mr. McCabe:

In connection with the Evidence Committee's consideration of public comments on its proposed Federal Rule of Evidence 502, I would like to call to your attention an editorial appearing yesterday, February 12, 2007, in the *New Jersey Lawyer* entitled "Proposed Federal Rule of Evidence 502 – an important step forward." The *New Jersey Lawyer* is a weekly legal newspaper with the largest circulation in the State of New Jersey. For your convenience, a copy is enclosed. It may also be able to be found at the newspaper's website www.njlnews.com.

Very truly yours,

JEFFREY J. GREENBAUM

Enclosure

Editorial

Proposed Federal Rule of Evidence 502 — an important step forward

Adopted with the new e-discovery rules that went into effect in the federal and state courts this fall is a new provision setting forth a procedure for litigating claims involving inadvertent waiver of privileged information. While the procedure applies to claims involving inadvertent waiver with respect to both paper documents and e-discovery, it is included in the amendments regarding e-discovery in recognition of the fact that the cost of reviewing material to protect privilege has become prohibitive and is greatly increased when electronically stored information is involved. The procedure adopted by the new rules allows a party to notify the other side that a mistake has been made, setting forth the grounds for the claim of privilege, and requires the other side to freeze and not use the document further until such time as the issue can be resolved by a court. The new rules also allow parties to reach agreements on inadvertent waiver in the form of protective orders and to have such agreements adopted by the courts in an initial scheduling order.

While they include a uniform procedure for the litigation of claims of inadvertent waiver, the new rules do not purport to set the substantive standard for waiver. Different jurisdictions, both state and federal, address the standard differently. Some jurisdictions adopt an "out-of-the-barn" approach and find that any production of privileged information constitutes a waiver regardless of whether that production is intentional or not, and also find broad subject matter waiver. Other jurisdictions going to the other extreme find no waiver unless there is an intentional relinquishment of a known right. Most adopt a middle ground containing a balancing of a number of factors.

What is a litigant to do if it practices in many jurisdictions and is subject to conflicting state and federal rules across the country? Moreover, even if an agreement is reached between litigants regarding a protocol for inadvertent waiver of privileged information in a particular jurisdiction, and adopted by the court in an order, there is still no guarantee that the production would nevertheless not be deemed a waiver in other jurisdictions in which the same parties may be subject to overlapping suits on the same subject matter.

Last summer the American Bar Association addressed the substantive issue of waiver by passing a resolution calling for uniform rules throughout the country, rejecting the extreme approaches on both sides, and recommending a balancing test considering a number of factors, including whether the party who made the error acted within a reasonable time in notifying the other side once it discovered a mistake had been made.

Spurred by the issues left open by the e-discovery procedural rules, the Federal Evidence Committee also proposed a rule change to address the substantive questions of waiver at the same time that the ABA was formulating its proposal. The new proposed Federal Rule of Evidence 502 not only addresses the substantive test for waiver, but also determines that agreements reached by parties in federal litigation as to inadvertent waiver protocols that are adopted in federal court scheduling orders would also be binding on non-parties in other actions and/or other jurisdictions. This valuable addition will directly fill the gap created by the new e-discovery rules which leave such questions open on a jurisdiction-by-jurisdiction basis.

The new proposal, subject to the additional comments below, has many positive features and is worthy of support. It provides uniform standards for litigants to address issues of inadvertent privilege waiver, which will be increasingly more difficult as issues of discovery of electronically stored information proliferate. It also addresses questions of selective waiver, which are ever-present when parties deal with government investigations and are fearful that any disclosure to the government will result in a waiver of any claims to protection when faced with parallel suits by civil litigants.

In rejecting the two extreme approaches with respect to waiver, the new proposal contains a balancing test that looks at, among other factors, whether a litigant acted reasonably from the time it "knew or should have known" that a disclosure has been made. We believe that while a balancing approach is appropriate, we prefer the standard urged by the ABA which looks to the reasonableness of the litigant's actions from the time it actually learned that a mistake had been made. In adopting a bright-line test, the ABA was concerned that issues of inadvertent privilege waiver would be mired down in litigation over whether a litigant "should have known" that an inadvertent disclosure had been made. Is a mistake made by a paralegal in producing a document a time when an attorney or party should have known an inadvertent disclosure has been made? Or, does that time run from when the partner discovered that the error had been made when preparing for deposition a year after the actual disclosure? What about the new associate who did not know that the author of the document was the former in-house counsel? These are all issues that have the potential for spawning much litigation on the issue of whether a litigant "should have known" a disclosure has been made that the ABA proposal sought to avoid.

Since the rule is an effort to provide some protection for inadvertence, a bright-line test that looks to a reasonable time from when the mistake has been discovered rather than when it "should have been discovered" will allow for more predictability and minimize litigation over these issues. We therefore urge the Advisory Committee to consider amending its proposal consistent with the ABA approach.

The proposed Rule 502 also provides that disclosures made to government agencies will not effect a waiver with respect to the same documents when requested by civil litigants. The issue of waiver in these circumstances is one that has consistently confounded practitioners who deal with investigations by the government. They have sometimes sought to protect against issues of waiver by entering into agreements with the government agency that the documents would remain confidential and disclosure to a government agency is not deemed a waiver. Such agreements, however, are not deemed effective in all jurisdictions and some courts still find that production to the government results in a waiver for all purposes. The proposed rule protects these productions against waiver even if no agreement with the government agency is reached to protect such information as confidential.

While such a provision has many positive benefits, it has unfortunately been caught up in recent time with the controversy that has exploded regarding the widely criticized practices of the government (as set forth in the Thompson and McNulty Memorandum) in requesting waiver of the attorney-client privilege by companies under investigation as a requirement of demonstrating that a company is a good corporate citizen and as a factor to consider in determining whether to indict a corporation when certain of its employees may have committed criminal conduct. These efforts by the government have been deemed a wide-scale attack on the attorney-client privilege and work product doctrine and have led to the introduction in Congress of the bill by Sen. Arlen Specter to prohibit efforts by the government to request waiver of the attorney-client privilege. The current debate over the Specter bill and criticism of the government practices leading to this proposed legislation has led others to fear that the selective waiver provisions of proposed Rule 502 may provide further encouragement to the government to request waivers in the recognition that the waiving party would not be prejudicing itself in parallel federal litigation. While this concern is legitimate, a solution would be an amendment to Rule 502 that would specifically state that nothing in this rule would authorize a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product doctrine. Such an amendment would address the concern of those that a selective waiver provision could be misused by the government and yet permit those who wish to voluntarily make such waivers to do so without the fear that it will prejudice them in parallel civil litigation.

While the proposed Rule 502 still needs some improvement, we believe that it is an important step forward that is worthy of support. We hope that the Evidence Rules Committee will duly consider the public comments received and speedily adopt an amended Rule 502 that will address these important issues.