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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jerry E. Smith, Chair
Advisory Committee on Evidence Rules

DATE: May 15, 2007

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (“the Evidence Rules Committee” or “the Committee”) met on April 12th and 13th in Rancho Santa Fe, California. The Evidence Rules Committee approved one proposed amendment to the Evidence Rules — ultimately for direct enactment by Congress — with the recommendation that the Standing Committee approve it and recommend to the Judicial Conference that it be proposed to Congress. The proposed Rule 502 is discussed as an action item in this Report, along with the accompanying report to Congress and a separate report on selective waiver.

The Evidence Rules Committee also approved a report to Congress on the necessity and desirability of codifying a “harm-to-child” exception to the marital privileges. This report was prepared pursuant to the Adam Walsh Child Protection Act, which requires the Standing Committee to report to Congress on the necessity and desirability of codifying such an exception. The report is drafted as a report from the Standing Committee to Congress, and the Evidence Rules Committee recommends that the Standing Committee approve the report and send it to Congress. The report on the harm-to-child exception is discussed as a second action item in this Report.

The Evidence Rules Committee also discussed a proposal to add a time-counting rule to the Evidence Rules; it voted unanimously to take no action on the proposal, on the grounds that a time-counting rule was not necessary in the Evidence Rules and that implementation of such a rule, in the context of parallel amendments to the Civil and Criminal Rules, would lead to confusion and litigation. The Evidence Rules Committee further decided to proceed with a restyling project. Finally, the Committee has decided to consider a possible amendment to Rule 804(b)(3), the hearsay exception for declarations against penal interest. The decisions on time-counting, restyling, and Rule 804(b)(3) are discussed as separate information items in this Report.

The draft minutes of the April 2007 meeting set forth a more detailed discussion of all the matters considered by the Evidence Rules Committee. Those minutes are attached to this Report. Also attached is the proposed amendment to Rule 502 and the accompanying reports to Congress, and the proposed report to Congress on the harm-to-child exception to the marital privileges.

II. Action Items

A. Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product.

The Evidence Rules Committee has found a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. One major problem is that significant amounts of time and effort are expended during litigation to preserve the privilege, even when many of the documents are of no concern to the producing party. Parties must be extremely careful, because if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Enormous expenses are put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. After a number of public hearings and extensive public comment, the Committee has determined that the discovery process would be more efficient and less costly if waiver rules are relaxed.

Another concern expressed to the Committee involves the production of confidential or work product material by a corporation that is the subject of a government investigation. Most federal courts have held that such a disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a “selective waiver” is enforceable.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chair of the House Judiciary Committee requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. It was recognized that any

rule prepared by the Advisory Committee would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

In 2006 the Evidence Rules Committee prepared a draft rule that would address the problems of subject matter waiver, inadvertent disclosure, enforceability of confidentiality orders, and selective waiver. This draft rule was distributed to selected federal judges, state and federal regulators, members of the bar, and academics. On the first day of its April 2006 meeting, the Committee held a mini-hearing on the proposed rule 502 and Committee Note, inviting presentations from those who reviewed the rule. Based on comments received at the hearing, the Evidence Rules Committee revised the draft. Most importantly, the draft was scaled back so that it would not apply when a disclosure is made in state court and the waiver determination is made by a state court (the so-called “state to state” problem).

After discussion and review of the draft rule on waiver at its Fall 2006 meeting, the Committee unanimously agreed on the following basic principles, as embodied in the proposed Rule 502:

1. A subject matter waiver should be found only when privilege or work product has already been disclosed, and a further disclosure “ought in fairness” to be required in order to protect against a misrepresentation that might arise from the previous disclosure.

2. An inadvertent disclosure should not constitute a waiver if the holder of the privilege or work product protection acted reasonably to prevent disclosure and took reasonably prompt measures to rectify the error.

3. A provision on selective waiver should be included in any proposed rule released for public comment, but should be placed in brackets to indicate that the Committee had not yet determined whether a provision on selective waiver should be sent to Congress.

4. Parties to litigation should be able to protect against the consequences of waiver by seeking a confidentiality order from the court; and in order to give the parties reliable protection, that confidentiality order must bind non-parties in any federal or state court.

5. Parties should be able to contract around common-law waiver rules by entering into confidentiality agreements; but in the absence of a court order, these agreements cannot bind non-parties.

6. Rule 502 must apply in state court actions where the question considered by the state court is whether a disclosure previously made in federal court constitutes a waiver. If Rule 502 did not apply in such circumstances, then parties could not rely on it, for fear that any disclosure of privilege or work product in compliance with Rule 502 could nonetheless be found to be a waiver — even a subject matter waiver — in a subsequent action in state court.

After substantial discussion at the Spring 2006 meeting, the Evidence Rules Committee unanimously approved a proposed Rule 502 and the accompanying Committee Note for release for public comment. The Standing Committee released the rule for public comment. The public comment period ended in February 2007.

The Evidence Rules Committee received more than 70 public comments on proposed Rule 502, and held two public hearings at which more than 20 witnesses testified. At its April 2007 meeting, the Committee carefully considered all of the public comment, as well as other issues raised by Committee members after extensive review of the text of proposed Rule 502. The following changes were made to proposed Rule 502 as it was issued for public comment:

1. Changes were made by the Style Subcommittee of the Standing Committee, both to the text as issued for public comment, and to the changes to the rule made at the April 2007 Evidence Rules Committee meeting.

2. The text was clarified to indicate that the protections of Rule 502 apply in all cases in federal court, including cases in which state law provides the rule of decision.

3. The text was clarified to stress that Rule 502 applies in state court with respect to the consequences of disclosures previously made at the federal level — despite any indication to the contrary that might be found in the language of Rules 101 and 1101.

4. Language was added to emphasize that a subject matter waiver cannot be found unless the waiver is intentional—so that an inadvertent disclosure can never constitute a subject matter waiver.

5. The Committee relaxed the requirements necessary to obtain protection against waiver from an inadvertent disclosure. As amended, the inadvertent disclosure provision assures that parties are not required to take extraordinary efforts to prevent disclosure of privilege and work product; nor are parties required to conduct a post-production review to determine whether any protected information has been mistakenly disclosed.

6. The protections against waiver by mistaken disclosure were extended to disclosures made to federal offices or agencies, on the ground that productions in this context can involve the same costs of pre-production privilege review as in litigation.

7. The selective waiver provision — on which the Evidence Rules Committee had never voted affirmatively — was dropped from the Proposed Rule 502. The Evidence Rules Committee approved a separate report to Congress on selective waiver, setting forth the arguments both in favor and against the doctrine, and explaining the Committee's decision to take no position on the merits of selective waiver. The Evidence Rules Committee also prepared language for a statute on selective waiver to accompany that separate report to Congress; while the Committee took no position on the merits, it determined that the

language could be useful to Congress should it decide to proceed with a separate selective waiver provision.

8. The Committee deleted the language conditioning enforceability of federal court confidentiality orders on agreement of the parties. It concluded that a federal order finding that disclosure is not a waiver should be enforceable in any subsequent proceeding, regardless of party agreement.

9. The definition of work product was expanded to include intangible information, as the work product protection under federal common law extends to all materials prepared in anticipation of litigation, including intangibles.

After considering and approving these changes, the Evidence Rules Committee voted unanimously in favor of 1) Proposed Rule 502 as amended from the version issued for public comment; 2) a cover letter to Congress to accompany and explain Proposed Rule 502; and 3) a separate letter to Congress concerning selective waiver, taking no position on the merits, but including language for a selective waiver statute should Congress decide to proceed with separate legislation. Each of these documents is set forth in an appendix to this Report.

Recommendation: The Evidence Rules Committee unanimously recommends that the Standing Committee 1) approve Proposed Evidence Rule 502, the cover letter to Congress accompanying the Proposed Rule, and the separate letter to Congress on selective waiver, and 2) refer those documents to the Judicial Conference with the recommendation that they be submitted to Congress.

B. Report on the Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, directs the Evidence Rules Committee and the Standing Committee to “study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or (2) a child under the custody or control of either spouse.”

At its last two meetings, the Evidence Rules Committee researched and analyzed the necessity and desirability of amending the Evidence Rules to provide a “harm-to-child” exception

to the marital privileges. The Committee has determined that almost all courts to consider the question have already adopted an exception to the marital privileges for cases in which the defendant is charged with harm to a child in the household. One recent federal case, however, refused to adopt a harm-to-child exception to the adverse testimonial privilege; that court allowed the defendant's wife to refuse to testify even though the defendant was charged with sexually abusing a child in the household. The Committee has concluded, however, that this recent case is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances — including a previous case in the court's own circuit.

The Evidence Rules Committee determined that it would not itself propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit. Committee members also noted that an amendment to establish a harm to child exception would raise at least four other problems: 1) piecemeal codification of privilege law; 2) codification of an exception to a rule of privilege that is not itself codified; 3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and 4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The Evidence Rules Committee prepared a draft report to submit to the Standing Committee, styled as a report by the Standing Committee to Congress. The report concludes that an amendment to the Evidence Rules to codify a harm-to-child exception is neither necessary nor desirable. The Committee also decided, however, that the report should include draft language for a harm-to-child exception should Congress decide to consider codification of the exception. The following draft language was approved by the Evidence Rules Committee:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child. – The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft report of the Standing Committee to Congress is attached as an appendix to this Report.

Recommendation: The Evidence Rules Committee recommends that the Standing Committee adopt the draft report on the harm-to-child exception to the marital privileges and refer the report to Congress.

III. Information Items

A. Time-Counting Project

The Evidence Rules Committee carefully considered the time-counting template prepared by a Subcommittee of the Standing Committee. The Committee voted unanimously that it would take no action on an amendment to add a rule on time-counting to the Evidence Rules. The Committee determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because 1) there is no existing problem that would be resolved by such an amendment, and 2) adding the template to the Evidence Rules is likely to create confusion and unnecessary litigation.

There are only a handful of Evidence Rules that are subject to day-based time-counting: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield, unless good cause is shown; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial, unless good cause is shown. There are only two year-based time periods that could potentially be subject to a time-counting rule that would govern when a time period begins and ends: 1) Rule 609(b) provides a special balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 2) Rules 803(16) and 901(b)(8) work together to provide for admissibility of documents over 20 years old.

The Evidence Rules Committee concluded first that there is no need to change the number of days in any time periods in the Evidence Rules, because they are 14 days or longer and so will not be shortened or otherwise affected by the time-counting template. Nor did the Committee find a need to specify when the time periods in the Evidence Rules begin or end. The Committee was unable to find any reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules. The Committee noted that the day-based time periods in the Evidence Rules are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. As to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. Any dispute on time-counting as to the two year-based time periods in the Evidence Rules could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

The Evidence Rules Committee also noted the anomalies that could arise in trying to match a time-counting rule in the Evidence Rules with parallel time-counting provisions in the Civil and Criminal Rules. Most of the provisions in the time-counting template have no applicability to the Evidence Rules — examples include the subdivisions on counting hour-based time periods and on inaccessibility of the clerk's office. The Committee was concerned that the inclusion of provisions with no applicability to the Evidence Rules could create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based

time period or some need to determine inaccessibility that they have overlooked. The problems could perhaps be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But the Committee found that solution to raise problems of its own. If a time-counting Evidence Rule were not identical to the time-counting Civil and Criminal Rules, there is likely to be confusion and an invitation to litigation — one party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the rules, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly.

For all these reasons, the Evidence Rules Committee voted unanimously to take no action on an amendment that would add a time-counting rule to the Evidence Rules.

B. Proposed Restyling Project

The Evidence Rules Committee has decided to undertake a project to restyle the Evidence Rules. The project is intended to be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. Many of the Evidence rules are “paper-based”; they refer to evidence in written and hardcopy form. The Committee determined that a restyling project can be used in part to update the paper-based language used throughout the Evidence Rules. Members also reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

Professor Joseph Kimble, the Standing Committee’s consultant on Style, has already prepared a restyled version of three Evidence Rules — Rules 103, 404(b) and 612. The Evidence Rules Committee looks forward to working with Professor Kimble and the Style Subcommittee of the Standing Committee on this important project. The Evidence Rules Committee has set no timetable for completion of the restyling project.

C. *Crawford v. Washington* and the Federal Rules Hearsay Exceptions

The Evidence Rules Committee continues to monitor case law developments after the Supreme Court’s decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is “testimonial,” its admission against the accused violates the right to confrontation unless the

declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to “testimonial” hearsay. Recently in *Whorton v. Bockting*, the Court held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause; thus, the only guarantee of reliability of non-testimonial hearsay is in the rules of evidence.

The decision in *Bockting* raises the question of whether any amendments should be proposed to the hearsay exceptions on the ground that as applied to non-testimonial hearsay, a particular exception may not be sufficiently reliable to be used against an accused. Before *Bockting*, it could still be argued that reliability-based amendments would not be necessary in criminal cases because the Confrontation Clause still regulated the reliability of non-testimonial hearsay. But that is no longer the case after *Bockting*.

The Evidence Rules Committee tentatively noted that one possibly questionable exception is Rule 804(b)(3), which provides that a hearsay statement can be admitted against the accused upon a finding that a reasonable declarant could believe that making the statement could send to subject him to a risk of penal sanction. There is no requirement in the Rule that the government provide any further corroborating circumstances indicating that the statement is trustworthy — even though the accused must provide corroborating circumstances to admit such a statement in his favor. The Committee will consider at its next meeting whether it is necessary to amend Rule 804(b)(3) to require that the government provide corroborating circumstances guaranteeing trustworthiness before a declaration against penal interest can be admitted against an accused.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

Attachments:

- Proposed Evidence Rule 502 and Committee Note.
- Draft cover letter to Congress on Rule 502.
- Draft cover letter to Congress on selective waiver.
- Draft report to Congress on the harm-to-child exception to the marital privileges.
- Draft minutes of the April 2007 meeting of the Evidence Rules Committee.

Advisory Committee on Evidence Rules
Proposed Amendment: New Rule 502

PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE*

**Rule 502. Attorney-Client Privilege and Work Product;
Limitations on Waiver**

1 The following provisions apply, in the circumstances set
2 out, to disclosure of a communication or information covered
3 by the attorney-client privilege or work-product protection.

4 **(a) Disclosure made in a federal proceeding or to a**
5 **federal office or agency; scope of a waiver.** — When the
6 disclosure is made in a federal proceeding or to a federal
7 office or agency and waives the attorney-client privilege or
8 work-product protection, the waiver extends to an undisclosed
9 communication or information in a federal or state
10 proceeding only if:

11 (1) the waiver is intentional;

*New material is underlined.

- 12 (2) the disclosed and undisclosed
13 communications or information concern the same
14 subject matter; and
15 (3) they ought in fairness to be considered
16 together.

17 **(b) Inadvertent disclosure.** — When made in a
18 federal proceeding or to a federal office or agency, the
19 disclosure does not operate as a waiver in a federal or state
20 proceeding if:

- 21 (1) the disclosure is inadvertent;
22 (2) the holder of the privilege or protection took
23 reasonable steps to prevent disclosure; and
24 (3) the holder promptly took reasonable steps to
25 rectify the error, including (if applicable)
26 following Fed. R. Civ. P. 26(b)(5)(B).

27 **(c) Disclosure made in a state proceeding.** — When
28 the disclosure is made in a state proceeding and is not the

29 subject of a state-court order, the disclosure does not operate
30 as a waiver in a federal proceeding if the disclosure:

31 (1) would not be a waiver under this rule if it had
32 been made in a federal proceeding; or

33 (2) is not a waiver under the law of the state
34 where the disclosure occurred.

35 (d) **Controlling effect of court order.** — A federal
36 court may order that the privilege or protection is not waived
37 by disclosure connected with the litigation pending before the
38 court. The order binds all persons and entities in all federal
39 or state proceedings, whether or not they were parties to the
40 litigation.

41 (e) **Controlling effect of party agreement.** — An
42 agreement on the effect of disclosure is binding on the parties
43 to the agreement, but not on other parties unless it is
44 incorporated into a court order.

45 **(f) Controlling effect of this rule.**—Notwithstanding
46 Rules 101 and 1101, this rule applies to state proceedings in
47 the circumstances set out in the rule. And notwithstanding
48 Rule 501, this rule applies even if state law provides the rule
49 of decision.

50 **(g) Definitions.** — In this rule:

51 1) “attorney-client privilege” means the
52 protection that applicable law provides for confidential
53 attorney-client communications; and

54 2) “work-product protection” means the
55 protection that applicable law provides for tangible
56 material (or its intangible equivalent) prepared in
57 anticipation of litigation or for trial.

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Committee Note

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This new rule has two major purposes:

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1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.

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2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product would cost one defendant \$120,000 and another defendant \$247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of

87 production that bear no proportionality to what is at stake in the
88 litigation”).

89 The rule seeks to provide a predictable, uniform set of
90 standards under which parties can determine the consequences of a
91 disclosure of a communication or information covered by the
92 attorney-client privilege or work product protection. Parties to
93 litigation need to know, for example, that if they exchange privileged
94 information pursuant to a confidentiality order, the court’s order will
95 be enforceable. Moreover, if a federal court’s confidentiality order is
96 not enforceable in a state court then the burdensome costs of privilege
97 review and retention are unlikely to be reduced.

98 The Committee is well aware that a privilege rule proposed
99 through the rulemaking process cannot bind state courts, and indeed
100 that a rule of privilege cannot take effect through the ordinary
101 rulemaking process. See 28 U.S.C § 2074(b). It is therefore
102 anticipated that Congress must enact this rule directly, through its
103 authority under the Commerce Clause. Cf. Class Action Fairness Act
104 of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power
105 to regulate state class actions).

106 The rule makes no attempt to alter federal or state law on
107 whether a communication or information is protected under the
108 attorney-client privilege or work product immunity as an initial
109 matter. Moreover, while establishing some exceptions to waiver, the
110 rule does not purport to supplant applicable waiver doctrine generally.

111 The rule governs only certain waivers by disclosure. Other
112 common-law waiver doctrines may result in a finding of waiver even
113 where there is no disclosure of privileged information or work
114 product. See, e.g., *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir.
115 1999) (reliance on an advice of counsel defense waives the privilege

116 with respect to attorney-client communications pertinent to that
117 defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983)
118 (allegation of lawyer malpractice constituted a waiver of confidential
119 communications under the circumstances). The rule is not intended
120 to displace or modify federal common law concerning waiver of
121 privilege or work product where no disclosure has been made.

122 **Subdivision (a).** The rule provides that a voluntary disclosure
123 in a federal proceeding or to a federal office or agency, if a waiver,
124 generally results in a waiver only of the communication or
125 information disclosed; a subject matter waiver (of either privilege or
126 work product) is reserved for those unusual situations in which
127 fairness requires a further disclosure of related, protected information,
128 in order to prevent a selective and misleading presentation of
129 evidence to the disadvantage of the adversary. *See, e.g., In re von*
130 *Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged
131 information in a book did not result in unfairness to the adversary in
132 a litigation, therefore a subject matter waiver was not warranted); *In*
133 *re United Mine Workers of America Employee Benefit Plans Litig.*,
134 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited
135 to materials actually disclosed, because the party did not deliberately
136 disclose documents in an attempt to gain a tactical advantage). Thus,
137 subject matter waiver is limited to situations in which a party
138 intentionally puts protected information into the litigation in a
139 selective, misleading and unfair manner. It follows that an inadvertent
140 disclosure of protected information can never result in a subject
141 matter waiver. See Rule 502(b).The rule rejects the result in *In re*
142 *Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that
143 inadvertent disclosure of documents during discovery automatically
144 constituted a subject matter waiver.

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146 The language concerning subject matter waiver — “ought in
147 fairness” — is taken from Rule 106, because the animating principle

148 is the same. A party that makes a selective, misleading presentation
149 that is unfair to the adversary opens itself to a more complete and
150 accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699
151 (5th Cir. 1996) (under Rule 106, completing evidence was not
152 admissible where the party's presentation, while selective, was not
153 misleading or unfair).

154 To assure protection and predictability, the rule provides that
155 if a disclosure is made at the federal level, the federal rule on subject
156 matter waiver governs subsequent state court determinations on the
157 scope of the waiver by that disclosure.

158 **Subdivision (b).** Courts are in conflict over whether an
159 inadvertent disclosure of a communication or information protected
160 as privileged or work product constitutes a waiver. A few courts find
161 that a disclosure must be intentional to be a waiver. Most courts find
162 a waiver only if the disclosing party acted carelessly in disclosing the
163 communication or information and failed to request its return in a
164 timely manner. And a few courts hold that any inadvertent disclosure
165 of a communication or information protected under the attorney-client
166 privilege or as work product constitutes a waiver without regard to
167 the protections taken to avoid such a disclosure. *See generally*
168 *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a
169 discussion of this case law.

170 The rule opts for the middle ground: inadvertent disclosure
171 of protected communications or information in connection with a
172 federal proceeding or to a federal office or agency does not constitute
173 a waiver if the holder took reasonable steps to prevent disclosure and
174 also promptly took reasonable steps to rectify the error. This position
175 is in accord with the majority view on whether inadvertent disclosure
176 is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D.
177 Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145

178 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege);
179 *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994)
180 (attorney-client privilege). The rule establishes a compromise
181 between two competing premises. On the one hand, a communication
182 or information covered by the attorney-client privilege or work
183 product protection should not be treated lightly. On the other hand,
184 a rule imposing strict liability for an inadvertent disclosure threatens
185 to impose prohibitive costs for privilege review and retention,
186 especially in cases involving electronic discovery.

187 The rule applies to inadvertent disclosures made to a federal
188 office or agency, including but not limited to an office or agency that
189 is acting in the course of its regulatory, investigative or enforcement
190 authority. The consequences of waiver, and the concomitant costs of
191 pre-production privilege review, can be as great with respect to
192 disclosures to offices and agencies as they are in litigation.

193 Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &*
194 *Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins.*
195 *Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-
196 factor test for determining whether inadvertent disclosure is a waiver.
197 The stated factors (none of which are dispositive) are the
198 reasonableness of precautions taken, the time taken to rectify the
199 error, the scope of discovery, the extent of disclosure and the
200 overriding issue of fairness. The rule does not explicitly codify that
201 test, because it is really a set of non-determinative guidelines that vary
202 from case to case. The rule is flexible enough to accommodate any
203 of those listed factors. Other considerations bearing on the
204 reasonableness of a producing party's efforts include the number of
205 documents to be reviewed and the time constraints for production.
206 Depending on the circumstances, a party that uses advanced analytical
207 software applications and linguistic tools in screening for privilege
208 and work product may be found to have taken "reasonable steps" to

209 prevent inadvertent disclosure. The implementation of an efficient
210 system of records management before litigation may also be relevant.

211 The rule does not require the producing party to engage in a
212 post-production review to determine whether any protected
213 communication or information has been produced by mistake. But the
214 rule does require the producing party to follow up on any obvious
215 indications that a protected communication or information has been
216 produced inadvertently.

217
218 The rule is intended to apply in all federal court proceedings,
219 including court-annexed and court-ordered arbitrations.

220 The rule refers to “inadvertent” disclosure, as opposed to
221 using any other term, because the word “inadvertent” is widely used
222 by courts and commentators to cover mistaken or unintentional
223 disclosures of communications or information covered by the
224 attorney-client privilege or the work product protection. *See, e.g.,*
225 *Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial
226 Center 2004) (referring to the “consequences of inadvertent waiver”);
227 *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993)
228 (“There is no consensus, however, as to the effect of inadvertent
229 disclosure of confidential communications.”).

230 **Subdivision (c).** Difficult questions can arise when 1) a
231 disclosure of a communication or information protected by the
232 attorney-client privilege or as work product is made in a state
233 proceeding, 2) the communication or information is offered in a
234 subsequent federal proceeding on the ground that the disclosure
235 waived the privilege or protection, and 3) the state and federal laws
236 are in conflict on the question of waiver. The Committee determined
237 that the proper solution for the federal court is to apply the law that
238 is most protective of privilege and work product. If the state law is

239 more protective (such as where the state law is that an inadvertent
240 disclosure can never be a waiver), the holder of the privilege or
241 protection may well have relied on that law when making the
242 disclosure in the state proceeding. Moreover, applying a more
243 restrictive federal law of waiver could impair the state objective of
244 preserving the privilege or work-product protection for disclosures
245 made in state proceedings. On the other hand, if the federal law is
246 more protective, applying the state law of waiver to determine
247 admissibility in federal court is likely to undermine the federal
248 objective of limiting the costs of production.

249 The rule does not address the enforceability of a state court
250 confidentiality order in a federal proceeding, as that question is
251 covered both by statutory law and principles of federalism and
252 comity. *See* 28 U.S.C. § 1738 (providing that state judicial
253 proceedings “shall have the same full faith and credit in every court
254 within the United States . . . as they have by law or usage in the courts
255 of such State . . . from which they are taken.”). *See also* 6 MOORE’S
256 FEDERAL PRACTICE § 26.106[1] n.5.2 (3d ed. 2006), citing *Tucker v.*
257 *Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D.Md. 2000) (noting
258 that a federal court considering the enforceability of a state
259 confidentiality order is “constrained by principles of comity, courtesy,
260 and . . . federalism”). Thus, a state court order finding no waiver in
261 connection with a disclosure made in a state court proceeding is
262 enforceable under existing law in subsequent federal proceedings.

263 **Subdivision (d).** Confidentiality orders are becoming
264 increasingly important in limiting the costs of privilege review and
265 retention, especially in cases involving electronic discovery. *See*
266 *Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial
267 Center 2004) (noting that fear of the consequences of waiver “may
268 add cost and delay to the discovery process for all sides” and that
269 courts have responded by encouraging counsel “to stipulate at the

270 outset of discovery to a ‘nonwaiver’ agreement, which they can adopt
271 as a case-management order.”). But the utility of a confidentiality
272 order in reducing discovery costs is substantially diminished if it
273 provides no protection outside the particular litigation in which the
274 order is entered. Parties are unlikely to be able to reduce the costs of
275 pre-production review for privilege and work product if the
276 consequence of disclosure is that the communications or information
277 could be used by non-parties to the litigation.

278 There is some dispute on whether a confidentiality order
279 entered in one case can bind non-parties from asserting waiver by
280 disclosure in a separate litigation. *See generally Hopson v. City of*
281 *Baltimore*, 232 F.R.D. 228 (D.Md. 2005), for a discussion of this
282 case law. The rule provides that when a confidentiality order
283 governing the consequences of disclosure in that case is entered in a
284 federal proceeding, its terms are enforceable against non-parties in
285 any federal or state proceeding. For example, the court order may
286 provide for return of documents without waiver irrespective of the
287 care taken by the disclosing party; the rule contemplates enforcement
288 of “claw-back” and “quick peek” arrangements as a way to avoid the
289 excessive costs of pre-production review for privilege and work
290 product. As such, the rule provides a party with a predictable
291 protection — predictability that is needed to allow the party to plan
292 in advance to limit the prohibitive costs of privilege and work product
293 review and retention.

294 Under the rule, a confidentiality order is enforceable whether
295 or not it memorializes an agreement among the parties to the
296 litigation. Party agreement should not be a condition of enforceability
297 of a federal court’s order.

298 **Subdivision (e).** Subdivision (e) codifies the well-established
299 proposition that parties can enter an agreement to limit the effect of

300 waiver by disclosure between or among them. *See, e.g., Dowd v.*
301 *Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the
302 parties stipulated in advance that certain testimony at a deposition
303 “would not be deemed to constitute a waiver of the attorney-client or
304 work product privileges”); *Zubulake v. UBS Warburg LLC*, 216
305 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into
306 “so-called ‘claw-back’ agreements that allow the parties to forego
307 privilege review altogether in favor of an agreement to return
308 inadvertently produced privilege documents”). Of course such an
309 agreement can bind only the parties to the agreement. The rule makes
310 clear that if parties want protection in a separate litigation from a
311 finding of waiver by disclosure, the agreement must be made part of
312 a court order.

313 **Subdivision (f).** The protections against waiver provided by
314 Rule 502 must be applicable when protected communications or
315 information disclosed in federal proceedings are subsequently offered
316 in state proceedings. Otherwise the holders of protected
317 communications and information, and their lawyers, could not rely on
318 the protections provided by the Rule, and the goal of limiting costs in
319 discovery would be substantially undermined. Rule 502(g) is intended
320 to resolve any potential tension between the provisions of Rule 502
321 that apply to state proceedings and the possible limitations on the
322 applicability of the Federal Rules of Evidence otherwise provided by
323 Rules 101 and 1101.

324 Moreover, the costs of discovery can be equally high for state
325 and federal causes of action, and the rule seeks to limit those costs in
326 all federal proceedings, regardless of whether the claim arises under
327 state or federal law. Accordingly, the rule applies to state law causes
328 of action brought in federal court.

329 **Subdivision (g).** The rule's coverage is limited to attorney-
330 client privilege and work product. The operation of waiver by
331 disclosure, as applied to other evidentiary privileges, remains a
332 question of federal common law. Nor does the rule purport to apply
333 to the Fifth Amendment privilege against compelled self-
334 incrimination.

335 The definition of work product "materials" is intended to
336 include both tangible and intangible information. See *In re Cendant*
337 *Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from
338 *Hickman* that work product protection extends to both tangible and
339 intangible work product").

340 **CHANGES MADE AFTER PUBLICATION AND COMMENTS**

341 The following changes were made from the Proposed Rule
342 502 as issued for public comment:

343 1. Stylistic changes were provided by the Style Subcommittee
344 of the Standing Committee

345 2. The text was clarified to indicate that the protections of
346 Rule 502 apply in all cases in federal court, including cases in which
347 state law provides the rule of decision.

348 3. The text was clarified to stress that Rule 502 applies in state
349 court to determine whether a disclosure previously made at the
350 federal level constitutes a waiver — despite any indication to the
351 contrary that might be found in the language of Rules 101 and 1101.

352 4. Language was added to subdivision (a) to emphasize that
353 a subject matter waiver cannot be found unless the waiver is
354 intentional.

355 5. The Committee relaxed the requirements necessary to
356 obtain protection against waiver from an inadvertent disclosure. As
357 amended, the inadvertent disclosure provision assures that parties are
358 not required to take extraordinary efforts to prevent disclosure of
359 privilege and work product; nor are parties required to conduct a post-
360 production review to determine whether any protected information
361 has been disclosed inadvertently.

362 6. The protections against waiver by inadvertent disclosure
363 were extended to disclosures made to federal offices or agencies, on
364 the ground that productions in this context can involve the same costs
365 of privilege review as in litigation.

366 7. The selective waiver provision — on which the Evidence
367 Rules Committee had never voted affirmatively — was dropped from
368 the Proposed Rule 502.

369 8. Language conditioning enforceability of federal court
370 confidentiality orders on agreement of the parties was deleted.

371 9. The definition of work product was expanded to include
372 intangible information.

373

SUMMARY OF PUBLIC COMMENTS

374 **Matthew R. Gemello and Steven B. Stokdyk on behalf of**
375 **the Corporations Committee Business Law Section of the State**
376 **Bar of California (06-EV-001) “applaud and support the Advisory**

377 Committee's efforts to advance proposed Rule 502 and the Advisory
378 Committee's objectives of reducing the burden, expense and
379 complexity associated with privilege evaluations of documents
380 produced in response to a discovery request." They oppose, however,
381 the bracketed selective waiver provision released for public comment
382 "because, among other things, we believe that (1) it will not fully
383 protect the confidentiality of the attorney-client relationship, and (2)
384 it will not advance the Advisory Committee's objective of reducing
385 the burden and expense of litigation." Among other arguments, they
386 contend that the language of the selective waiver provision covering
387 an "investigation" is unclear because it may or may not extend to an
388 inspection of a facility; and that it is unclear whether the holder of the
389 protected information must be the target of the investigation.

390 **Susan Hackett, Esq., (06-EV-002 and 06-EV-045), on**
391 **behalf of the Association of Corporate Counsel,** opposes the
392 bracketed selective waiver provision that was issued for public
393 comment. The Association concludes that it may have a "negative
394 impact" in light of a "culture of waiver" that has been "created by
395 government enforcement officials and prosecutors who have abused
396 their discretion by routinely coercing companies to waive their
397 privileges." The Association argues that a selective waiver protection
398 "might have the impact of creating a presumption on the part of the
399 government that it is appropriate to demand waiver in all
400 circumstances . . . given that the government can now offer protection
401 against third party disclosures." It states that selective waiver
402 "addresses the collateral impact of the government's inappropriate
403 waiver practices, but does nothing to encourage the necessary
404 abstention from engaging in the underlying practice in the first place."

405 **Gregory P. Joseph, Esq., (06-EV-003)** argues that Rule
406 502(a), which limits subject matter waiver, provides a "problematic
407 conflation of attorney-client privilege and work product protection."

408 He states that under Rule 502(a), the use of a witness statement may
409 result in a waiver of a memorandum of the lawyer's evaluation of the
410 witness statement, on the ground that the memorandum "ought in
411 fairness to be considered" with the statement. Mr. Joseph agrees that
412 the "ought in fairness" language accurately captures the better law on
413 subject matter waiver of attorney-client privilege. But he concludes
414 that the "ought in fairness" language may lead to more and not less
415 subject matter waivers as applied to disclosure of work product. Mr.
416 Joseph generally supports other aspects of the Rule, including the
417 provisions on inadvertent disclosure, selective waiver, and the
418 enforceability of court orders. He argues, however, that if selective
419 waiver protection is not enacted, then the inadvertent disclosure
420 provision of Rule 502 (b) should be extended to disclosures made to
421 public offices or agencies. Finally, he argues that the definition of
422 work product in Rule 502 as released for public comment should be
423 expanded because it applies only to "materials", whereas "a great deal
424 of work product is oral or otherwise intangible, and it is protected."

425 **Robert E. Leake, Jr., Esq. (06-EV-004)** endorses proposed
426 Rule 502, concluding that "Got ya" is "a game that should be
427 discouraged."

428 **Douglas G. House, Esq. (06-EV-005)** supports proposed
429 Rule 502 and favors rules permitting "the selective/potential waiver
430 of the attorney-client privilege."

431 **Phillip R. Sellinger, Esq., (06-EV-006)** endorses proposed
432 Rule 502 but urges that its provisions be extended to govern
433 disclosures made in state proceedings even when the consequence of
434 the disclosure is to be determined by a state court. He argues that
435 complete uniformity of privilege law is necessary to assure
436 predictability and to avoid conflicting outcomes in essentially
437 identical matters.

438 **Paul R. Rice, Esq. (06-EV-007)** opposes proposed Rule 502
439 for the reasons stated in his many publications that he cites
440 throughout his critique. In his view, Rule 502 is evidence that the
441 “this Advisory Committee” has sold out to corporate interests.

442 **George L. Paul, Esq., (06-EV-008 and 06-EV-052)**
443 generally supports proposed Rule 502, because the costs of discovery
444 have “strangled” the process of commercial litigation and privilege
445 reviews impose “phenomenal” expense. He recommends, however,
446 that the Rule be extended to cover disclosures made in state
447 proceedings, because the vast majority of litigation occurs in state
448 courts. He is also concerned that the standard for avoiding waiver by
449 inadvertent disclosure—that the party took “reasonable precautions”
450 to avoid disclosure—may be difficult to apply without more
451 guidance in the Rule or Committee Note. Mr. Paul concludes that
452 “reasonable precaution does not necessarily mean eyes on review”
453 and that “search and retrieval technology might be a reasonable
454 alternative.”

455 **Thomas Y. Allman, Esq., (06-EV-009)** supports Rule 502 as
456 issued for public comment, but opposes a proposal considered by the
457 Advisory Committee that would provide for enforceability of court
458 confidentiality orders that are not based on agreement between the
459 parties. He argues that parties should not be “compelled to surrender
460 the right to conduct privilege reviews on realistic schedules so that a
461 case management order can provide expedited and inexpensive
462 review.” Mr. Allman suggests that the Committee Note contain an
463 “admonition to the effect that it is not essential to the validity of the
464 court order on non-waiver that an accelerated discovery schedule be
465 agreed to or ordered by the court in the initial proceeding and that
466 courts should refrain from measures designed to coerce or require
467 accelerated privilege review absent agreement of the parties.”

468 **Richard A. Baker, Jr., Esq. (06-EV-010)** suggests that the
469 selective waiver provision be expanded to provide protection for
470 disclosures to foreign regulators.

471 **Michael R. Nelson, Esq. (06-EV-011)** states that the
472 inadvertent disclosure provision, Rule 502(b), “effectively addresses
473 the challenges that the growth of electronic discovery has placed upon
474 the ability of litigants to perform a thorough and accurate privilege
475 review.” He contends, however, that the rule would more effectively
476 address the problem of discovery costs if it were extended to cover
477 disclosures in state proceedings. He further suggests that the language
478 in the Rule conditioning protections on having taken “reasonable
479 precautions” against disclosure is “somewhat vague.” He states that
480 the term “reasonable steps” is preferable because it “serves to better
481 express the idea that a litigant must implement procedures to limit the
482 disclosure of privileged material.” Mr. Nelson recommends that the
483 Committee Note explain that the determination of whether reasonable
484 steps have been taken “should focus on the volume of material to be
485 reviewed and the time frame in which the review must be performed.”
486 Mr. Nelson opposes the bracketed selective waiver provision, arguing
487 that it “will only serve to encourage the recent tendency of . . .
488 agencies to demand the production of privileged documents in order
489 to avoid prosecution or enhanced administrative penalties.” Finally,
490 Mr. Nelson states that the subject matter waiver provision, Rule
491 502(a), should specify that a subject matter waiver is limited to
492 “intentional efforts to mislead the opposing party by introducing
493 incomplete information.” Mr. Nelson supports the provisions
494 concerning court orders and party agreements but state that “the
495 Committee Note to Rule 502(d) should clarify that the provision does
496 not authorize selective waiver agreements.”

497 **John Vail, Esq., on behalf of the Center for Constitutional**
498 **Litigation, (06-EV-013)** states that “[n]o compelling circumstances
499 justify the proposed rule on inadvertent disclosure, which pre-empts
500 state privilege law” — though Mr. Vail did not respond to a request
501 by the Committee to provide a single example of a state law on
502 inadvertent disclosure that is in conflict with Proposed Rule 502(b).
503 The Center also complains that a rule requiring a party to take
504 reasonable precautions to prevent disclosure of privileged information
505 is unlikely to reduce the costs of discovery. The Center supports the
506 proposal on enforceability of court confidentiality orders (Rule
507 502(d)), as it “addresses concerns voiced by both the plaintiffs’ and
508 defendants’ bars” and “has the potential to yield benefits to civil
509 litigants and their counsel who choose to waive certain rights in
510 return for quicker, easier access to information.” The Center opposes
511 the bracketed selective waiver provision as the “wrong solution to the
512 problem of prosecutorial overreaching.”

513 **Carol Cure, Esq., (06-EV-014)** “strongly” supports the
514 inadvertent disclosure provision (Rule 502(b)) because the burdens
515 of protecting against inadvertent disclosure in electronic discovery
516 cases are all but insurmountable. She argues, however, that the
517 “reasonable precautions” standard that must be met to protect against
518 waiver “may well be too high for most companies.” She would
519 substitute “reasonable steps” for “reasonable precautions” and
520 contends that the change “would allow the court to consider each case
521 on its own facts and to take into account whether the organization
522 has taken appropriate steps to implement an effective compliance
523 program such as writing an effective policy, providing training to
524 employees, providing sufficient resources, and monitoring the
525 program to remediate any deficiencies.” She also suggests that the
526 inadvertent disclosure provision should be extended to disclosures
527 made to regulators and to disclosures made in arbitration proceedings.
528 Ms. Cure recommends that the provision on court orders (Rule

529 502(d)) be expanded to cover all court orders on confidentiality,
530 whether or not they incorporate an agreement of the parties. As to the
531 bracketed selective waiver provision, Ms. Cure states that if it is to be
532 adopted, it should be made clear that it applies only if the waiver to
533 the regulator is “completely voluntary and not coerced”, and it should
534 apply to disclosures made to state regulators where the information
535 is proffered in a subsequent federal proceeding.

536 **Paul J. Neale, Esq., on behalf of Doar Litigation**
537 **Consulting (06-EV-017)** supports Rule 502, stressing the importance
538 of amending the rules to address the mounting costs of pre-production
539 privilege review, especially in electronic discovery cases. He
540 recommends that the bracketed selective waiver provision include
541 “privilege protection at the state and federal levels.” He also suggests
542 that the Committee should “clarify” the term “reasonable precautions
543 to prevent disclosure” as used in the inadvertent disclosure provision
544 (Rule 502(b)). In his view, the Committee should address “the use of
545 advanced analytical software applications and related methodologies
546 to assist in the determination of privilege and to facilitate a more
547 efficient production of relevant documents. . . . Given the increasing
548 use of these applications even in their relative infancy and the
549 inevitable wide-scale use of them in the future, the Committee should
550 specifically include their use and litigants’ reliance on them as
551 reasonable precautions.”

552 **Thomas P. Burke, Esq., (06-EV-019)** makes the following
553 suggestions: 1) the “should have known” language of Rule 502(b)
554 should be deleted, because the promptness of a party’s efforts to
555 retrieve mistakenly disclosed information should be determined from
556 when the party actually knew of the disclosure; 2) the Rule should
557 clarify that if a mistaken disclosure is found to be a waiver, it can
558 never be found to be a subject matter waiver; 3) the bracketed
559 selective waiver provision should specify that only voluntary waivers

560 will receive the protection afforded against private parties; and 4) the
561 Committee should add language to the Note indicating that there is no
562 intent to encourage waiver of privilege or work-product to public
563 agencies.

564 **Michael J. O'Connor, Esq. (06-EV-020)** supports proposed
565 Rule 502 as it will help to limit the “staggering costs” of pre-
566 production privilege review. He notes that privilege review can even
567 be costly in a case with relatively small stakes, because without the
568 protection of Rule 502, counsel will have to worry that a mistaken
569 disclosure in a small litigation might later be used in major litigations.

570 **Daniel J. McAuliffe, Esq., (06-EV-021), on behalf of the**
571 **State Bar of Arizona**, “commends the Advisory Committee on
572 Evidence Rules for coming forward with a proposed solution for what
573 has become a vexing and costly problem in the conduct of civil
574 litigation in the federal courts – the efforts required to protect
575 attorney-client and work product privileges in the course of honoring
576 discovery obligations in the production of requested and relevant
577 documents.” The State Bar recommends that the relationship
578 between the scope of waiver provision (Rule 502(a)) and the
579 inadvertent disclosure provision (Rule 502(b)) be clarified, to
580 indicate that if a court finds that a mistaken disclosure is in fact a
581 waiver, it will not constitute a subject matter waiver. It also contends
582 that if a waiver for failure to take “unspecified ‘reasonable
583 precautions’ is to result in the wholesale waiver of the privilege in
584 question, then little will be accomplished by subpart (b). Corporate
585 parties will continue to expend exorbitant amounts, and engage in
586 extraordinary efforts, to avoid inadvertent disclosure of privileged
587 materials, for fear that a subsequent determination that it did not take
588 ‘reasonable precautions’ will result in a blanket privilege waiver.” On
589 selective waiver, the Arizona State Bar “would be in favor of the
590 adoption of a selective waiver provision if it could be crafted in a

591 fashion that makes clear that the decision whether or not to engage in
592 a selective waiver must remain a wholly voluntary one on the part of
593 the holder of the privilege.”

594 **Patrick A. Long, Esq. (06-EV-022)** believes that Rule 502
595 “should apply to both Federal and State proceedings as this would be
596 the most effective way to protect both attorney-client privilege and
597 work product.” He also states that a waiver of undisclosed materials
598 “should only occur in those situations where it is necessary to explain
599 privileged materials which the disclosing party seeks to introduce into
600 evidence.” Mr. Long is opposed to the bracketed selective waiver
601 provision because it does not provide “sufficient protection to allow
602 full and frank communications between client and counsel.”

603 **Steven K. Hazen, on behalf of the Executive Committee of**
604 **the Business Law Section of the State Bar of California (06-EV-**
605 **023) and (06-EV-071)**, “applaud[s] the activities of the Committee
606 in seeking to establish clarity and uniformity as to inadvertent
607 disclosure of confidential information and the impact that has on the
608 vitality of the attorney-client privilege.” The Executive Committee
609 opposes the bracketed selective waiver provision. It notes that
610 selective waiver is not recognized by most courts under Federal
611 common law; it will chill candid discussions between corporate
612 counsel and corporate agents, because the agents will be concerned
613 that their statements will be turned over to a regulator and used
614 against them individually; it will allow corporations to use the
615 privilege as a sword and not a shield; it will lead to confidentiality
616 becoming “nothing more than a commodity”; and its application to
617 subsequent state proceedings will serve to undermine federalism.

618 **Bruce R. Parker, Esq., on behalf of the International**
619 **Association of Defense Counsel (06-EV-025)**, “commends the
620 efforts of the Advisory Committee on Evidence Rules and generally

621 supports Rule 502", but opposes the bracketed selective waiver
622 provision and recommends some textual revisions to other parts of
623 the Rule. The Association suggests that the scope of waiver provision
624 (Rule 502(a)) should specify that it covers only waiver by "voluntary"
625 disclosures; it states that the text of the rule as issued for public
626 comment "leaves open the possibility that a court could order subject
627 matter waiver where a party inadvertently disclosed privileged
628 information by failing to take reasonable precautions to prevent
629 disclosure." It further suggests that the "reasonable precautions"
630 language in the inadvertent disclosure provision (Rule 502(b)) should
631 be changed to state that a party who takes "reasonable steps
632 considering the circumstances of the document production" will be
633 protected from a finding of waiver. The Association further suggests
634 that the Committee Note "should discuss specific factors that may
635 bear on a determination as to whether a party acted reasonably under
636 the circumstances of a particular review. The most obvious
637 circumstance is the volume of documents or electronically stored
638 information involved in the review. Another significant circumstance
639 is the amount of time that a party has to conduct the review." The
640 Association also asserts that the standard for protecting against
641 inadvertent disclosure in Rule 502(b) sets forth two factors
642 (reasonable precautions and reasonably prompt efforts to retrieve)
643 while the predominant Federal case law also mentions the scope of
644 discovery, the extent of disclosure, and the overriding issue of
645 fairness. The Association suggests that "the Committee should state
646 with specificity that all five factors are to be given equal
647 consideration when a court assesses the question of waiver through
648 inadvertent disclosure." Finally, the Association objects to the
649 language in the Rule assessing the disclosing party's attempt to
650 retrieve mistakenly disclosed information from the time when the
651 party "should have known" of the disclosure. It states that "some
652 courts may determine that if a party had taken reasonable steps under
653 the circumstances of the particular review, then it should have known

654 about the inadvertent disclosure as soon as it occurred.” It concludes
655 that steps taken to rectify the error should be evaluated from when the
656 party had “actual knowledge, or with reasonable diligence after
657 production should have discovered” the inadvertent disclosure.

658 **Douglas L. Christian, Esq. (06-EV-027)**, in testimony,
659 enthusiastically supported proposed Rule 502. He suggested that the
660 term “reasonable precautions” in Rule 502(b) be changed to
661 “reasonably prompt measures.” He further suggested adding
662 language to the Committee Note to state that the rule does not affect
663 the lawyer’s ethical obligations with respect to receipt of
664 inadvertently disclosed information.

665 **Linda Chatman Thompson, Esq., Director, Division of**
666 **Enforcement, U.S. Securities and Exchange Commission, (06-EV-**
667 **029)**, states that enactment of a selective waiver provision “is
668 important to the Commission’s enforcement program.” If adopted,
669 “the selective waiver provision would help the Commission gather
670 evidence in a more efficient manner by eliminating a strong
671 disincentive to parties under investigation who might otherwise be
672 inclined to produce important information voluntarily.” Ms.
673 Thompson states that any concern that adopting a selective waiver
674 provision would lead to demands for waiver “is unfounded” because
675 “the Commission does not view a company’s waiver as an end in
676 itself, but only as a means (where necessary) to provide relevant and
677 sometimes critical information to the Commission staff.” She also
678 contends that providing protected information to the Commission
679 can result in “significant resource savings for the companies by
680 limiting the number of executives and other employees whose
681 testimony has been sought by the Commission staff and reducing the
682 length of the investigation.” Ms. Thompson concludes that a
683 selective waiver provision “would be helpful to the Commission in
684 carrying out its mission because the Commission is currently not

685 receiving all of the relevant privileged and protected information that
686 parties want to provide due to their concerns about waiver. The
687 Enforcement Division's experience has been that entities and their
688 counsel consider carefully whether to produce privileged materials to
689 us and a significant consideration for them is the risk that they run in
690 waiving the privilege as to private parties if they do so." She reports
691 that corporate counsel and executives state "that they would be more
692 willing to provide privileged information to us if they could have
693 greater assurance that the information would remain privileged." Ms.
694 Thompson argues that concerns of private parties that selective
695 waiver will deprive them of information is unfounded because "a rule
696 of evidence establishing that producing privileged or protected
697 documents to the Commission does not waive privilege or protections
698 as to private parties would leave private litigants in the same position
699 that they would have been if the Commission had not obtained the
700 privileged or protected materials." Thus, selective waiver "would
701 benefit the Commission significantly without harming private
702 litigants. Also, private litigants may benefit from the Commission's
703 ability to conduct more expeditious and thorough investigations."
704 Ms. Thompson concludes a selective waiver provision "would enable
705 parties to make the decision to provide privileged or protected
706 information to the Commission without fear that, by virtue of such a
707 production alone, they will be deemed to have waived the privilege
708 or protection as to anyone else" and accordingly that selective waiver
709 "is in the public interest because it would enable the Commission to
710 conduct its investigations more expeditiously and would promote the
711 Commission's interest in protecting investors."

712 **Cyril V. Smith, Esq., (06-EV-030)**, opposes the bracketed
713 selective waiver provision, arguing that selective waiver protection
714 is not needed to encourage corporations to cooperate with
715 government investigations. He states: "Having represented targets,
716 subjects and witnesses in federal white-collar investigations, I can tell

717 you that the risk of broader subsequent waiver for non-government
718 parties has never been a factor in the ultimate decision whether or not
719 to disclose information to a prosecutor or regulator. . . . The reason is
720 simple: the threat of prosecution or regulatory action (including
721 debarment proceedings and similar actions) to a public company or
722 a company in a regulated industry, or indeed most business entities,
723 is so great that the business' first priority is always to attempt
724 resolution of the criminal investigation or regulatory proceeding. No
725 further incentive is necessary to promote cooperation with
726 government regulators; the business is already fully incentivized to
727 cooperate." Mr. Smith contends that selective waiver protection
728 "would provide a windfall to companies who are the targets of
729 regulatory proceedings. Such businesses would be permitted to
730 resolve their regulatory or criminal matters while fending off claims
731 and subsequent civil proceedings — including claims such as those
732 advance by *qui tam* plaintiffs, who provide direct benefit to the
733 government."

734 Mr. Smith supports all of the other provisions of Rule 502,
735 noting that it "performs several valuable functions in dealing with
736 truly inadvertent disclosures of privilege or protected material, and
737 brings the Federal Rules of Evidence into conformity with modern
738 electronic discovery."

739 **Patrick Oot, Esq., (06-EV-031) and Anne Kershaw, Esq.**
740 **(06-EV-049)**, made a powerpoint presentation to the Advisory
741 Committee at its public hearing on Proposed Rule 502 in New York
742 City. The presentation illustrated the expenditures that were made for
743 pre-production privilege review in one particular production. The
744 expenses included review of each email by as many as three sets of
745 attorneys; the total expenditure was more than \$5,000,000.00. They
746 estimated that if the review had been for relevance only, the
747 expenditure would have been reduced by 80%. They suggest that

748 Rule 502 could be used to permit less stringent review for privilege,
749 for example by allowing searches for domain names of law firms as
750 an initial cut, disclosing the remaining information subject to a
751 clawback agreement, and reviewing the material that went to law
752 firms on an individual basis for privilege. They state that for Rule 502
753 to be truly effective in limiting the costs of electronic discovery, it
754 must apply to disclosures in both federal and state proceedings.

755 **Henry M. Sneath, Esq., (06-EV-032)**, in testimony before
756 the Committee, recommends that the court order provision (Rule
757 502(d)) be expanded to cover confidentiality orders that are not the
758 product of party agreements. He notes that in some cases the parties
759 may disagree about certain provisions in a confidentiality order, and
760 in others one of the parties might not want any confidentiality
761 agreement — yet any resulting order protecting against waiver must
762 be enforceable against third parties in order for litigants to be able to
763 rely upon it and reduce the costs of discovery.

764 **Charles W. Cohen, Esq. (06-EV-033)**, supports Rule 502 as
765 necessary to limit the costs of pre-production privilege review —
766 costs that have skyrocketed with the advent of electronic discovery.
767 He suggests that the Rule should apply to state as well as federal
768 disclosures, because “[n]o matter how strong the rules are in one
769 forum, if the rule is not in place in all forums, then the protection is
770 illusory.” With respect to subject matter waiver (Rule 502(a)), Mr.
771 Cohen approves of the “ought in fairness” test taken from Rule 106,
772 but suggests that the Committee Note specify that “it is only the rare
773 case where there would be any waiver beyond the specific documents,
774 and even the waiver would be of the narrowest scope that is fair.” He
775 also states that “the text of the Rule should state that it is only a
776 voluntary waiver that could result in the waiver being extended
777 beyond the specific materials disclosed.” With respect to the
778 inadvertent disclosure provision (Rule 502(b)) Mr. Cohen states that

779 “the Committee Notes should reflect that a document review policy
780 not wholly inappropriate for the scope and volume of the document
781 production meets the ‘reasonable precautions’ standard. Similarly, the
782 Notes should reflect that a party is not under a duty to re-review its
783 document productions, and therefore it could be long after the
784 production is made when a party first learns or should have learned
785 of an inadvertent disclosure, possibly even just before trial. No matter
786 when the disclosure is discovered, the protection against waiver
787 should be enforced.” Mr. Cohen objects to the bracketed selective
788 waiver provision because it “does not further the purposes of the
789 attorney-client privilege and it erodes the ability of the parties to rely
790 on their privilege protections.” Finally, he suggests that the court
791 order provision (Rule 502(d)) be extended to situations in which the
792 court enters a confidentiality order even though the parties are not in
793 agreement. He notes that in “asymmetrical cases, in which side has
794 substantially more material to produce in discovery than the other,
795 there may be little incentive for one side to agree to a non-waiver
796 provision. If a court grants a party’s request for a non-waiver order to
797 govern its production, the court order should have the same effect as
798 if the parties agreed to it.”

799 **Keith L. Altman, Esq. (06-EV-034)**, argues that the Rule
800 should take account of the obligations of, and the costs to, the party
801 who receives privileged information that has been mistakenly
802 disclosed during discovery. He argues that the Rule should specify
803 that in order to obtain a finding of no waiver, the producing party
804 should bear the reasonable costs incurred by the receiving party in
805 retrieving all copies of the mistakenly produced material.

806 **Taysen Van Itallie, Jr., Esq. (06-EV-035)**, supports
807 Proposed Rule 502, with the exception of the bracketed selective
808 waiver provision, which he believes “will further erode the attorney-
809 client privilege.” He is also concerned that the concept of “reasonable

810 precaution” in the inadvertent disclosure provision (Rule 502(b)) is
811 an invitation to “satellite litigation that could swallow the benefits of
812 the rule.” He would “substitute a standard which would be less of an
813 invitation to litigation, such as providing that if the holder of the
814 privilege ‘took reasonable steps in light of the extent and schedule for
815 the review’ there would be no waiver.” He would also “eliminate the
816 ‘should have known’ component of reasonable promptness, limiting
817 the start of the clock to when the holder of the privilege ‘knew’ of the
818 inadvertent disclosure.” Mr. Van Itallie expresses his “strong support”
819 for the court order provision (Rule 502(d)), because “the utility of a
820 confidentiality order in reducing discovery costs is unquestionably
821 diminished if it provides no protection outside the particular litigation
822 in which the order is entered.”

823 **Russel Myles, Esq., (06-EV-036)**, in testimony before the
824 Committee, supported Proposed Rule 502. He suggested three
825 changes to the Rule as issued for public comment: 1) The Rule should
826 extend to disclosures made in state proceedings, because the benefits
827 of the rule, in limiting the costs of discovery, will be “substantially
828 reduced” if state disclosures are not covered; 2) Subject matter waiver
829 (Rule 502(a)) should be limited to situations in which a party
830 intentionally offers privileged material in a litigation in an attempt to
831 make a misleading presentation of the evidence; and 3) The “should
832 have known” language of Rule 502(b) should be deleted.

833 **Howard A. Merton, Esq., (06-EV-037)**, in testimony before
834 the Committee, supported the efforts of the Evidence Rules
835 Committee to limit the costs of electronic discovery. He argued that
836 Rule 502 should extend to state disclosures, because “attorneys are
837 driven by the uncertainties and have to look to the lowest common
838 denominator.” He also noted that if Rule 502 does not cover
839 disclosures initially made in state proceedings, the parties could end
840 up in a “race to the Federal courthouse to get the benefits of 502.”

841 Mr. Merton concludes that the court order provision (Rule 502(d)) is
842 “exactly right.” He opposed the bracketed selective waiver provision
843 on the ground that its enactment would lead to more waivers of
844 privilege.

845 **Dabney J. Carr, IV, Esq., (06-EV-038)**, expresses concerns
846 about the rising costs of electronic discovery, and supports the
847 Committee’s efforts to address this critical problem. He states that the
848 Rule must be extended to disclosures initially made in state
849 proceedings, otherwise the goal of reducing costs will be undermined:
850 “If there is a substantial possibility that the client will be sued in a
851 jurisdiction that applies a broad subject matter waiver rule or holds
852 that any inadvertent disclosure constitutes a waiver, a client has no
853 choice but to comply with those standards, and so Rule 502 will be
854 of no benefit.” With respect to the inadvertent disclosure provision
855 (Rule 502(b)), Mr. Carr suggests that the Committee Note provide
856 “that the time period for the holder of the privilege to rectify an
857 inadvertent disclosure does not begin to run until the holder
858 discovered, or with reasonable diligence should have discovered, the
859 inadvertent disclosure.” He explains that in most cases, “a party will
860 not learn of an inadvertent disclosure until the receiving party brings
861 the disclosure to the holder’s attention, and the holder should not be
862 penalized if the receiving party does not promptly notify the holder
863 of the inadvertent disclosure.”

864 **Desmond T. Barry, Jr., Esq., (06-EV-039)**, states that the
865 inadvertent disclosure provision (Rule 502(b)), should be included in
866 the Rule “to protect important privileges.” He also states the the Rule
867 should be extended to disclosures initially made in state proceedings,
868 in order “to achieve uniform treatment of privileged materials.”

869 **Dan D. Kohane, Esq., (06-EV-041)**, on behalf of the
870 **Federation of Defense and Corporate Counsel**, recommends that

871 Rule 502 be extended to govern disclosures initially made in state
872 proceedings, because treating parties differently in state and federal
873 forums puts the privilege and work product protections “in jeopardy
874 and provides inconsistent guidance to attorneys and clients alike.”
875 The Federation strongly supports the Rule insofar as it protects parties
876 who mistakenly disclose privileged material:

877 “Corporations and their counsel, struggling to comply with
878 short deadlines, are compelled to locate, secure and produce
879 thousands of documents, many of which have not yet been
880 screened for privilege or have been given only cursory review.
881 Using document filters and ‘people on the ground,’ fair
882 attempts are made to identify documents which are privileged
883 so as to produce a privilege log. However a document or a
884 number of document or a classification of documents slip
885 through despite best efforts, under the time constraints
886 provided, to prevent that disclosure. Once discovered, the
887 corporation and its counsel immediately notify the opposing
888 side of the error and seek to retrieve those documents. Are the
889 interests of justice served by not allowing the error to be
890 corrected? We think not and support Rules changes that
891 would protect the privilege here.”

892 The Federation suggests that the term “reasonable precautions” in the
893 inadvertent disclosure provision (Rule 502(b)) “is unclear” and
894 recommends “other, less pejorative words” to describe the efforts that
895 must be made to try to protect against a mistaken disclosure. Finally,
896 the Federation opposes the bracketed selective waiver provision,
897 because it would “encourage waiver and underscore the protocols
898 which lead to a *forced* sacrifice of protected materials and
899 communication.” (emphasis in original).

900 **Anthony Tagliagambe, Esq. (06-EV-042)**, states that Rule
901 502 should be amended “to apply in federal and state court, and in
902 diversity and federal question cases, to ensure that the Rule is

903 effective.” He supports the provisions on subject matter waiver,
904 mistaken disclosures, and court orders (Rule 502(a)(b) and (d)), but
905 he opposes the bracketed selective waiver provision. He argues that
906 selective waiver “does not enhance and protect the attorney-client
907 privilege or work product protection.”

908 **Lawrence S. Goldman, Esq., (06-EV-043), on behalf of the**
909 **National Association of Criminal Defense Lawyers**, opposes the
910 bracketed selective waiver provision. The Association contends that
911 selective waiver “would not solve, but rather would exacerbate, what
912 most observers and practitioners agree are real and undeniable
913 problems caused by privilege waivers that are made during the course
914 of government investigations.” The Association states that “selective
915 waiver will not operate in a vacuum but must be inserted into a legal
916 environment already tainted by the culture of waiver.” It argues that
917 selective waiver “purports to alleviate a symptom (third party lawsuits
918 made possible by privilege waiver in government investigations)
919 while leaving the actual problem (frequent and coercive demands for
920 confidential material) untreated.” The Association further argues that
921 1) selective waiver allows a party to use the privilege as a sword and
922 a shield, which is improper; 2) selective waiver creates an “unlevel
923 playing field” because it benefits corporations and leaves individuals
924 without protection and without access to confidential material
925 disclosed to the government; and 3) applying selective waiver to state
926 courts runs afoul of federalism principles.

927 **Richard J. Wolf, Esq., (06-EV-044)**, supports the mistaken
928 disclosure provision (Rule 502(b)), noting that it is a “complex and
929 expensive undertaking” to isolate privileged and work product
930 materials from “the mass of electronic information corporations
931 amass and store.” He notes, however, surveys indicating that many
932 corporations have not yet implemented effective records management
933 programs, and that to do so “could take eighteen months and up to

934 three years in a large company.” He concludes that the “reasonable
935 precautions” standard in Rule 502(b) “is likely too high for most
936 corporations to meet.” He concludes that the test of reasonableness
937 “should take into account whether an organization has followed the
938 steps necessary to have an effective compliance program for records
939 management, which should include an enforceable policy, adequate
940 resources, training and awareness, regular monitoring, and proper
941 remediation.” On the bracketed selective waiver provision issued for
942 public comment, Mr. Wolf states that the opposition in the Bar “is not
943 representative of or consistent with corporate interests in general.
944 Organizations have always wanted the type of protections envisioned
945 under the proposed rule.” He suggests that the Rule take account of
946 “the prospect for prosecutorial abuses and coerced waivers by adding
947 the word ‘proper’ before the phrase ‘exercise of its regulatory,
948 investigative or enforcement authority.” He also suggests that the
949 Committee Note address “the importance of considering the totality
950 of circumstances, including the effectiveness of an ethics and
951 compliance program, before parties resort to extreme measures such
952 as requesting waiver of attorney-client privilege or attorney work
953 product.”

954 **Alfred W. Cortese, Esq., (06-EV-047)**, states that the
955 Committee “is to be commended for recommending a rule that on the
956 whole should help save significant amounts of time and effort spent
957 in litigation to avoid waiver of the attorney-client privilege, and that
958 will help make the discovery process more efficient and less costly.”
959 Mr. Cortese recommends that either the Rule be extended to cover
960 disclosures initially made in state proceedings, or that separate
961 legislation be recommended to extend such coverage. Mr. Cortese
962 opposes selective waiver, stating that “the Committee’s and
963 judiciary’s priority should be strengthening and protecting privilege
964 and work product, not elevating the interest in efficient government
965 investigations and prosecutions over the rights of individuals and

966 companies to confidential communications with their attorneys.” He
967 hopes that the Committee “will report to Congress that public
968 comment has demonstrated that selective waiver is not a viable or
969 workable concept and should be withdrawn from consideration.”

970 **Lawyers for Civil Justice (06-EV-047)**, submitted a lengthy
971 comment on proposed Rule 502. LCJ generally supports the Rule,
972 with the exception of the bracketed selective waiver provision. LCJ
973 “applauds the Committee’s attempts to safeguard and more clearly
974 define the scope of the attorney-client privilege and work product
975 protection through proposed Federal Rule of Evidence 502.” LCJ
976 provides the following suggestions for change to the Rule:

977 1. The waiver standards embodied in Rule 502 should be
978 applicable to both state and federal proceedings. Otherwise, “the
979 Advisory Committee’s goal of increasing efficiency and lowering the
980 costs of discovery will be substantially lost” because “parties would
981 not be able to predict in advance the consequences of a decision to
982 disclose privileged information.” LCJ concludes that “[s]ince
983 Congress has the authority to enact federal legislation governing the
984 substantive scope of attorney-client privilege and work product
985 materials [under its Commerce Clause powers], it has the power to
986 take the lesser step of creating a uniform federal law governing
987 waivers by disclosure.” LCJ recommends as an alternative to
988 amending the rule that separate legislation be recommended to extend
989 identical provisions on waiver to disclosures initially made in state
990 proceedings.

991 2. The Committee should clarify in the Note that Rule 502
992 applies to both diversity and federal question cases. “Because under
993 Rule 501 a federal district court sitting in diversity must apply state
994 law to determine issues of privilege waiver, practitioners might

995 question whether a court should apply Rule 502 in a diversity case,
996 even though new Rule 502 would supersede 501 on such matters.”

997 3. The Committee Note on the subject matter waiver provision
998 (Rule 502(a)) should be strengthened “to make sure that subject
999 matter waiver is limited to truly rare situations and to define more
1000 clearly the scope of undisclosed communications that ‘ought in
1001 fairness’ to be produced.” LCJ asserts that “a subject matter waiver
1002 should not occur unless and until a party discloses privileged
1003 materials in an attempt to mislead the court or other litigants.”

1004 4. The mistaken disclosure provision (Rule 502(b)) should be
1005 amended to require “reasonable steps” to prevent disclosures rather
1006 than “reasonable precautions”, and “the Committee Note should
1007 clarify that a party must only act with reasonable promptness upon
1008 learning of a disclosure.” LCJ contends that a requirement of
1009 “reasonable steps” is “less subjective and adequately accomplishes
1010 the Committee’s goal of ensuring that parties establish reasonable
1011 procedures to protect against the disclosure of privileged
1012 information.” LCJ further suggests that the Note specify that “the
1013 reasonableness of steps taken to prevent disclosure of privileged
1014 information will vary according to the circumstances presented, such
1015 as the number of documents involved and the time constraints for
1016 production. Where a large number of documents must be reviewed
1017 within a relatively short period of time, a party should be permitted
1018 to employ procedures that otherwise would not satisfy the producing
1019 party’s burden. Conversely, where a party is not burdened by time
1020 constraints, more comprehensive measures might be required to
1021 reduce the possibility of inadvertent disclosures.”

1022 5. The Committee should withdraw the selective waiver
1023 provision, as it will “encourage a growing and questionable
1024 presumption amongst government investigators and prosecutors that

1025 it is appropriate and 'harmless' for corporations to waive the attorney-
1026 client privilege and work product protection." LCJ asserts that
1027 selective waiver "would make it difficult for a company to assert the
1028 right not to waive the privilege in any government investigation" and
1029 "might incorrectly be viewed as ratification by [the] Committee of
1030 government policies that even now are coming under increased
1031 attack."

1032 6. LCJ "believes that there is an urgent need for the real,
1033 substantive protection afforded by proposed Rule 502(d)" because
1034 without that provision "parties will be forced to conduct the type of
1035 burdensome and expensive review of disclosed documents for
1036 privilege to ensure that sensitive information does not become freely
1037 available to other litigants." LCJ suggests that the Note to Rule
1038 502(d) "make clear that parties cannot use the rule to enter into
1039 selective waiver agreements."

1040 **The Federal Magistrate Judges Association (06-EV-051),**
1041 supports the provisions of Rule 502 that the Committee has proposed
1042 for adoption. The Association takes no position on the bracketed
1043 provision on selective waiver. The Association notes that "[a]n
1044 important goal of recent amendments to the Federal Rules of Civil
1045 Procedure is the reduction of the cost and delay to discovery arising
1046 from the need to screen voluminous electronic information, and these
1047 amendments specifically encourage parties to enter into non-waiver
1048 and clawback agreements." The Association "believes that new Rule
1049 502 will support this goal by providing predictable and uniform
1050 standards under which parties can determine the consequences of
1051 disclosure of information." The Association states that the rule, "to
1052 be fully effective, must regulate the consequences of disclosure at
1053 both the state and federal levels" and "supports the effort of the
1054 Advisory Committee to encourage Congress to enact the rule directly
1055 so that it would be binding on the states."

1056 **William McGuinness, Esq., and Michael Russ, Esq., (06-**
1057 **EV-052), on behalf of the Committees on Attorney-Client**
1058 **Relations and Federal Rules of Evidence of the American College**
1059 **of Trial Lawyers,** unanimously support the provisions of proposed
1060 Rule 502, with the exception of the bracketed provision on selective
1061 waiver. The Committees acknowledge the benefits that selective
1062 waiver would provide to some parties, but they are concerned that
1063 “the mounting pressure to waive” that would be “encouraged” by
1064 selective waiver protection “unduly pits the interests of the corporate
1065 entity against the interests of the individual employee.” The
1066 Committees conclude that in an environment of a “culture of waiver,”
1067 “the imperative of protecting and preserving the attorney-client
1068 privilege should take precedence over the ancillary benefits of
1069 selective waiver.”

1070 **Russell J. Wood, Esq. And Bruce R. Deming, Esq. (06-EV-**
1071 **053), on behalf of the Corporations Committee, Business Law**
1072 **Section of the State Bar of California,** “support and applaud the
1073 Advisory Committee’s efforts to advance most of the provisions of
1074 Rule 502 and the Advisory Committee’s objective of reducing the
1075 burden, expense and complexity associated with privilege
1076 evaluations of documents produced in response to discovery
1077 requests.” The Committee opposes the bracketed selective waiver
1078 provision, however, because if enacted it “1) will not encourage
1079 cooperation with government investigations; 2) improperly interferes
1080 with the attorney-client relationship; 3) will lead to unintended
1081 disputes between government agencies and private corporations; and
1082 4) will not be applied uniformly in all jurisdictions.”

1083 **Matthew J. Walko, Esq., (06-EV-054),** has the following
1084 suggestions for change to Proposed Rule 502 as it was issued for
1085 public comment: 1) the definition of work product should be
1086 expanded to cover “tangible as well as intangible information of

1087 parties— whether pro se or represented by counsel”; 2) the court
1088 order provision (Rule 502(d)) “should not hinge on whether parties
1089 can reach an agreement” because the “primacy of the court’s order
1090 should not be undermined by making its wider applicability hinge on
1091 whether parties embroiled in litigation decide to be agreeable”; 3)
1092 Rule 502(d) should be rephrased to incorporate language from the full
1093 faith and credit statute; and 4) the Rule must clarify that it applies to
1094 diversity actions and therefore supersedes Rule 501 on that point.

1095 **Jinjian Huang, Esq. (06-EV-055)**, argues that proposed Rule
1096 502 gives the parties to a litigation too much authority to determine
1097 whether a waiver will be found. He suggests that the Rule be
1098 amended to specify that court orders are not enforceable unless they
1099 are fair, and that agreements should not be enforceable between the
1100 parties unless they are fair.

1101 **Perry Goldberg, Esq., (06-EV-056)**, on behalf of himself
1102 and a number of partners at Irell & Manella who frequently litigate
1103 in federal court, commends the Advisory Committee’s efforts “to
1104 make litigation more efficient and less costly.” He suggests that the
1105 Rule could be improved by the following:

1106 1) The standard for avoiding waiver by mistaken disclosure —
1107 “reasonable precautions” — “likely would spawn significant
1108 litigation” and “would not change how discovery is actually
1109 conducted”. “To give the proposed Rule greater clarity, and to give
1110 producing parties greater comfort,” the Note should include examples
1111 of precautions that are considered reasonable. “For instance, with
1112 respect to electronic discovery, it would be helpful to specify that
1113 searching for key words — such as attorney names and ‘privilege’ —
1114 is a reasonable precaution against disclosure.”

1115 2) The requirement of “reasonably prompt” measures to
1116 retrieve mistakenly disclosed should be explained in the Note.
1117 Specifically the Note should state that “action within a 14-day

1118 window generally would be considered prompt” and the Note should
1119 further state that the “should have known” standard “should be
1120 construed narrowly so that the 14-day clock would not start running
1121 until a party is on actual notice of the problem.”

1122 3) The “ought in fairness” standard for subject matter waiver
1123 (Rule 502(a)) should be limited to inadvertent disclosures, and the
1124 current jurisprudence for determining the scope of waiver for
1125 intentional disclosures “should not be disturbed.”

1126 4) The definitions section is “unnecessary and may become
1127 an unintentional source of confusion.”

1128 **Bernstein Litowitz Berger & Grossman (06-EV-057),**
1129 opposes the bracketed provision on selective waiver. The firm states
1130 that “the majority view under the existing case law in this area is
1131 correct and should not be reversed through rulemaking. The proposed
1132 Rule 502(c) does not serve the legitimate purposes of the attorney-
1133 client privilege and work product doctrine and should not be
1134 adopted.” The firm argues that existing law properly bars defendants
1135 “from picking and choosing among their adversaries when waiving
1136 privilege.” The firm notes its experience in representing shareholders
1137 who did not benefit from a regulatory activity in which a corporation
1138 turned over privileged information, but did benefit from the use of
1139 that information in a subsequent private lawsuit. The firm concludes
1140 that “reversal of the law on selective waiver is a question best left to
1141 Congress without the implied judicial endorsement that would be
1142 perceived if it was proposed by the Advisory Committee” and that
1143 adoption of selective waiver “would be a controversial, value-laden
1144 political decision.”

1145 **Kim J. Askew, Esq. (06-EV-058)** on behalf of herself and
1146 nine other members in the leadership of the ABA Section of
1147 Litigation, supports the court order provision (Rule 502(d)) as “a
1148 valuable addition that would help fill the gap created by Rules

1149 16(b)(6) and 26(f)(4) of the Federal Rules of Civil Procedure” as it
1150 would “solve the problem of the order not binding non-parties in
1151 other actions and/or jurisdictions.” They also “support the
1152 Committee’s efforts to limit the scope of waiver” in Rule 502(a). Ms.
1153 Askew and the other lawyers oppose the bracketed selective waiver
1154 provision. They are concerned that support for selective waiver
1155 “would be construed as tacit approval of the governmental practice of
1156 demanding waiver.” They suggest that if selective waiver is to be
1157 proposed, language should be added to specify that “[n]othing in this
1158 rule authorizes a government agency to require or request a person or
1159 entity to disclose a communication covered by the attorney-client
1160 privilege or work product protection.”

1161 **Professor Liesa L. Richter, (06-EV-059)**, states that the
1162 bracketed selective waiver provision, if adopted, would represent “a
1163 salutary change to waiver doctrine: one that will simultaneously
1164 protect corporations cooperating with the federal government from
1165 the damaging effect of third party waivers *and* serve the public
1166 interest in the effective oversight of business entities.” (emphasis in
1167 original). She argues that a system of voluntary cooperation with the
1168 protection of selective waiver is vastly preferable to “the continuation
1169 of federal policies that generate privileged disclosures to the
1170 government with no selective waiver protection to provide cover for
1171 corporations faced with massive civil exposure.” She notes that “a
1172 doctrine of selective waiver to federal entities can fit comfortably
1173 within the evolving flexible view of privilege and waiver recognized
1174 in the case law and academic commentary.” For example, under the
1175 provisions of Proposed Rule 502(d), waiver doctrine “is being
1176 adjusted to permit greater flexibility and less rigid adherence to
1177 common law confidentiality requirements” by permitting claw-back
1178 and quick peek agreements. Accordingly, “it would be both
1179 counterintuitive and counterproductive to tell private litigants that
1180 they may share with their allies, they may share with their private

1181 adversaries, but they will be punished for sharing with the federal
1182 government in pursuit of its law enforcement responsibility. Such a
1183 disfavored status for cooperation with government investigations does
1184 not serve the public interest any more than the needless waste of
1185 private resources to review millions of documents for privileged
1186 communications.”

1187 **The New York County Lawyers’ Association, (06-EV-060),**
1188 makes the following recommendations with respect to Proposed Rule
1189 502:

1190 1) Rule 502(a) should be adopted as a reasonable limitation
1191 on subject matter waiver. The Association notes that most disclosure
1192 of privileged material is “probably inadvertent” and the disclosing
1193 party “usually has no plans to make unfair adversarial use of the
1194 privileged matter so produced and, in the absence of such
1195 contemplated unfair use, requiring that other materials be produced
1196 is an excessive sanction for what is generally nothing more than
1197 carelessness..”

1198 2) Rule 502(b) should be adopted because it is important to
1199 have one uniform rule on waiver with respect to mistaken disclosures;
1200 Rule 502(b) proposes the majority rule under existing law, and so is
1201 the rule to which most practitioners are already accustomed.

1202 3) The Association makes no recommendation on the
1203 bracketed selective waiver provision, as it has not yet had the
1204 opportunity to consider the arguments of those who might be
1205 expected to oppose the provision. It notes, however, that “[t]o the
1206 extent that a culture of waiver exists and is undesirable, it exists
1207 under the present rule forbidding selective waiver, and government
1208 and regulatory officials have not seemed sympathetic to pleas that
1209 revelation of privileged matter to them could result in disclosures to
1210 private plaintiffs.” The Association concludes that if selective waiver
1211 is desirable on its own merits, “it should be adopted regardless of the
1212 ‘culture of waiver.’”

1213 **The State Bar of California Committee on Federal Courts**
1214 **(06-EV-061)** opposes the subject matter waiver provision (Rule
1215 502(a)), concluding that the “ought in fairness” test in the Rule will
1216 give rise to litigation and will allow gamesmanship. The Committee
1217 concludes that “the current subject matter waiver rules operate fairly
1218 for both producing and receiving parties” and “there is no need to
1219 change the current standard.”

1220 **The United States Securities and Exchange Commission**
1221 **(06-EV-062)** supports enactment of selective waiver protection. It
1222 states that selective waiver “significantly enhances the Commission’s
1223 ability to conduct expeditious investigations and, where appropriate,
1224 to obtain prompt relief for defrauded investors.” The Commission
1225 cites as examples five complex, fact-intensive corporate
1226 investigations in which the corporations turned over privileged
1227 material, which “saved the Commission months of work, as well as
1228 large amounts of money.” The Commission also notes that “the
1229 companies themselves can benefit from providing privileged and
1230 protected materials” because it “can reduce overall disruption for the
1231 companies by limiting the number of executives and other employees
1232 whose testimony will be sought by the Commission staff and by
1233 reducing the length of the investigation.” The Commission states that
1234 selective waiver protection is necessary because many corporations
1235 are deterred from cooperating by the concern that disclosure to the
1236 Commission will result in use of the information in private litigation.
1237 The Commission suggests the following improvements to the
1238 bracketed selective waiver provision as issued for public comment:
1239 1) the Rule or Committee Note should provide “that a receiving
1240 government agency may use the privileged or protected materials
1241 without waiving the privilege or allowing third parties to use the
1242 materials”; 2) “The Advisory Committee should state expressly in
1243 the Notes that, even if the communications or information are
1244 disclosed or become available to non-governmental persons or

1245 entities through the use of the material during an enforcement
1246 proceeding, the communications or information will continue to be
1247 protected.”; 3) the Committee Note should provide that a government
1248 agency is not required to disclose Rule 502(c) material under the
1249 Freedom of Information Act; and 4) the Committee Note should
1250 emphasize that selective waiver preempts any conflicting state rule
1251 of privilege.

1252 **The Federal Bar Council, (06-EV-063)**, “supports the
1253 policy decisions made by the Advisory Committee . . . to ease the
1254 burden of discovery and to make uniform the law concerning the
1255 waiver of privilege.” The Council makes the following suggestions:

1256 1) Rule 502 should be amended to add a new subsection “to
1257 clarify that it governs state courts and to overcome the potential
1258 ambiguities arising from the scope provisions of Rules 101 and
1259 1101.” The Council suggests a subsection stating: “Notwithstanding
1260 Rules 101 and 1101, and unless otherwise provided in this Rule, this
1261 Rule shall be binding in state court proceedings.”

1262 2) The scope of the subject matter waiver provision (Rule
1263 502(a)) “should be broadened to create a federal one-rule analysis to
1264 use when determining the scope of privilege waivers.” Specifically,
1265 the subdivision should be amended to clarify that it applies to federal
1266 and state proceedings, and a separate subdivision should be added to
1267 cover disclosures initially made in state proceedings when the
1268 question of subject matter waiver arises in subsequent federal court
1269 proceedings.

1270 3) The “knew or should have known” test of Rule 502(b)
1271 “should be replaced with a totality of circumstances approach.” The
1272 Council states that a “should have known” standard “would invite
1273 arguments that parties should make a post-production review to
1274 determine whether any privileged information was inadvertently
1275 produced.”

1276 4) The mistaken disclosure provision should be extended to
1277 apply to regulatory investigations, because “disclosures made to
1278 federal agencies in connection with their investigations are as onerous
1279 — if not moreso — than discovery in litigation.”

1280 5) The bracketed selective waiver provision should be deleted
1281 “as it is very controversial and might bog down enactment of the
1282 remainder of the Rule.”

1283 **The United States Commodity Futures Trading**
1284 **Commission, (06-EV-064)**, supports the bracketed selective waiver
1285 provision because it “would serve the public interest by enhancing the
1286 Commission’s ability to conduct expeditious investigations resulting
1287 in more timely enforcement, at a reduced cost to taxpayers as well as
1288 witnesses.” The Commission “agrees with other commenters that, if
1289 the provision is adopted, private litigants will not be harmed. Indeed,
1290 they will be in precisely the same position under the proposed rule as
1291 they would be if the government had not obtained the privileged or
1292 protected documents. That is, if the privileged or protected documents
1293 were not produced to the government, private third-party litigants
1294 would not be able to argue that the individual or entity had waived
1295 attorney-client privilege or work product protection; similarly, they
1296 would not be able to make those arguments under the proposed rule.”
1297 The Commission urges that “the rule prevent waiver under both
1298 federal and state law.”

1299 **David Booth Alden, Esq. and Ted S. Hiser, Esq, (06-EV-**
1300 **065)**, suggest that Rule 502(a) is not clear on whether the proposed
1301 rule on subject matter waiver applies to disclosures of privileged or
1302 protected communications in state court proceedings. They suggest
1303 that the rule expressly bar a state court from finding a subject matter
1304 waiver with respect to a disclosure in a federal court proceeding;
1305 otherwise Rule 502(a) will be inconsistent with Rule 502(d), which
1306 binds state courts to respect federal court confidentiality orders. They

1307 also suggest that the Committee make clear that “notwithstanding the
1308 language of Rule 101 and 1101, proposed Fed.R.Evid. 502(b) may
1309 apply in state court proceedings under some circumstances.” Finally,
1310 they state that “the interplay” between Rules 501 and 502 in diversity
1311 actions “may create uncertainty” and that the Rule should be changed
1312 to state expressly that Rule 502 governs in diversity actions.

1313 **Kenneth L. Mann, Esq., (06-EV-066)**, is opposed to the
1314 bracketed selective waiver provision and recommends that the
1315 Committee “should abstain” from recommending adoption of the
1316 selective waiver provision by Congress.

1317 **The American Bar Association (06-EV-067)**, suggests that
1318 the two-part test of the mistaken disclosure provision (Rule 502(b))
1319 be changed to add two extra factors: the scope of discovery and the
1320 extent of inadvertent disclosure. The ABA recognizes that those two
1321 factors “could be construed” as falling within the standard in Rule
1322 502(b)— reasonable precautions. But the ABA states that the best
1323 way to assure that these factors are considered by the courts is to
1324 include them in the text of the Rule. The ABA also suggests that an
1325 “interest of justice” standard be added because it is important for
1326 courts to consider other relevant facts that are not encompassed
1327 within “reasonable precautions”, the scope of discovery, and the
1328 extent of inadvertent disclosure. The ABA recognizes that an open-
1329 ended “interests of justice” factor could add a level of unpredictability
1330 to the question of whether a mistaken disclosure constitutes a waiver
1331 — but it contends that this risk is “outweighed by the benefit gained
1332 by giving judges flexibility to adapt the rule to each set of unique
1333 circumstances presented.” The ABA also opposes the “should have
1334 known” standard for recovery of the privileged material as
1335 “subjective” and likely to lead to litigation. Its policy is that the duty
1336 to seek return of the information is triggered only when the disclosing
1337 party “actually discovers that a mistake has been made.” Finally, the

1338 ABA is opposed to the requirement that the holder take “reasonably
1339 prompt” measures to seek return of the mistakenly disclosed
1340 information. It states that this standard is subjective. The ABA
1341 suggests as an alternative that “within a specified period of days after
1342 learning of the inadvertent production, the producing party should be
1343 required to raise the privileged status of the documents by simply
1344 giving notice to the opposing party that the materials are protected
1345 and amending its discovery responses to identify the materials and the
1346 privileges.”

1347 **The American Bar Association (06-EV-068)**, in a comment
1348 submitted on the last day of the public comment period, proposes an
1349 extensive amendment to Rule 502 to cover a topic that is not
1350 addressed in the Rule; was never intended to be part of the Rule;
1351 was not the subject of any other public comment; and was not one of
1352 the issues on which Congress sought rulemaking. The ABA’s
1353 proposed addition to the Rule would codify federal cases determining
1354 whether disclosure of underlying factual information constitutes a
1355 waiver of the attorney-client privilege. The ABA also prepared an
1356 elaborate Committee Note on the implied waiver provision.

1357 **The Commercial and Federal Litigation Section of the**
1358 **New York State Bar Association (06-EV-069)**, provided the
1359 following comments on Proposed Rule 502:

1360 1. The Section does not support the subject matter waiver
1361 provision (Rule 502(a)). It argues that different standards for subject
1362 matter waiver should apply to privilege and work product. It also
1363 states that the “ought in fairness” standard will spawn litigation.

1364 2. The Section supports the adoption of the mistaken
1365 disclosure provision (Rule 502(b)), noting that “parties spend large,
1366 perhaps inordinate, amounts of time” reviewing discovery materials
1367 prior to production to determine whether they are privileged, “which
1368 can substantially delay access for the party seeking discovery.”

1369 3. The Section opposes the bracketed selective waiver
1370 provision, “given the lack of evidence as to whether it will actually
1371 have the desired impact.” The Section states that caution is required
1372 because those “who would presumably stand to gain from the
1373 potential decrease in cost referenced by the Committee . . . have
1374 expressed serious concerns that the proposal will be harmful to the
1375 very corporate parties it ostensibly is designed to protect.” The
1376 Section is “unaware of any situation where concern over privilege
1377 waiver vis-a-vis third parties resulted in diminished cooperation with
1378 the government. Moreover, this possibility seems unlikely to occur
1379 with any significant frequency given the weight of the incentives
1380 motivating parties to cooperate with government investigations.”

1381 4. The Section supports Proposed Rules 502(d) and (e), “as
1382 necessary adjuncts to the limitations on inadvertent disclosure
1383 contained in proposed Rule 502(b).”

1384 5. The Section concludes that “if enacted by Congress under
1385 its Commerce Clause powers, the proposed Rule will quite likely
1386 withstand constitutional scrutiny.”

1387 **Jeffrey J. Greenbaum, Esq., (06-EV-070)**, submitted a
1388 column from the *New Jersey Lawyer* entitled “Proposed Rule 502: An
1389 Important Step Forward.”

1390 **Mark Jordan (06-EV-072)** argues that the focus of Rule 502
1391 is too narrow and that it will have a negative impact on small-scale
1392 civil litigation and non-corporate criminal prosecutions. He also
1393 argues that inadvertent waiver should never be found where the
1394 mistake is made by counsel, because the privilege is held by the
1395 client.

1396 **Kevin N. Ainsworth, Esq. (06-EV-073)** states that Rule
1397 502(d) “should explicitly state a good-cause requirement and should
1398 give federal courts the power, even in the absence of agreement of the

1399 parties, to enter 'privilege protection' orders based on a showing of
1400 good cause."

Draft of Cover Letter to Congress on Proposed Rule 502.

The Judicial Conference respectfully submits to the United States Congress a proposed addition to the Federal Rules of Evidence. The Conference recommends that Congress consider adopting this proposed rule as Federal Rule of Evidence 502.

The Rule provides for protections against waiver of the attorney-client privilege or work product immunity. The Conference submits this proposal directly to Congress because of the limitations on the rulemaking function of the federal courts in matters dealing with evidentiary privilege. Under 28 U.S.C. § 2074(b), rules governing evidentiary privilege must be approved by an Act of Congress rather than adopted through the process prescribed by the Rules Enabling Act, 28 U.S.C. § 2072.

Description of the Process Leading to the Proposed Rule

The Judicial Conference Rules Committees have long been concerned about the rising costs of litigation, much of which has been caused by the review, required under current law, of every document produced in discovery, in order to determine whether the document contains privileged information. In 2006, the House Judiciary Committee Chair suggested the proposal of a rule dealing with waiver of attorney-client privilege and work product, in order to limit these rising costs. The Judicial Conference was urged to proceed with rulemaking that would

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation.

The task of drafting a proposed rule referred to the Advisory Committee on Evidence Rules (the “Advisory Committee”). The Advisory Committee prepared a draft Rule 502 and invited a select group of judges, lawyers and academics to testify before the Committee about the need for the rule, and to suggest any improvements. The Advisory Committee considered all the testimony presented by these experts, and redrafted the rule accordingly. At its Spring 2006 meeting, the Advisory Committee approved for release for public comment a proposed Rule 502 that would provide certain exceptions to the federal common law on waiver of privileges and work product. That rule was approved for release for public comment by the Committee on Rules of Practice and Procedure (“the Standing Committee”). The public comment period began in August, 2006 and ended February 15, 2007. The Advisory Committee received more than 70 public comments, and also heard the testimony of more than 20 witnesses at two public hearings. The rule released for public comment was also carefully reviewed by the Standing Committee’s Subcommittee on Style. In April, 2007, the Evidence Rules Committee issued a revised proposed Rule 502 taking into account the public comment, the views of the Subcommittee on Style and its own judgment. The revised rule was approved by the Standing Committee and the Judicial Conference and is attached to this letter.

In order to inform Congress of the legal issues involved in this rule, the proposed Rule 502 also includes a proposed Committee Note of the kind that accompanies all rules adopted through the Rules Enabling Act. This Committee Note may be incorporated as all or part of the legislative history of the rule if it is adopted by Congress. *See, e.g.*, House Conference Report 103-711 (stating that the “Conferees intend that the Advisory Committee Note on [Evidence] Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section” of the Violent Crime Control and Law Enforcement Act of 1994).

Problems Addressed by the Proposed Rule

In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.

The Proposed Rule 502 does not attempt to deal comprehensively with either attorney-client privilege or work product protection. It also does not purport to cover all issues concerning waiver or forfeiture of either the attorney-client privilege or work product protection. Rather, it deals primarily with issues involved in the disclosure of protected information in federal court proceedings or to a federal public office or agency. The rule binds state courts only with regard to disclosures made in federal proceedings. It deals with disclosures made in state proceedings only to the extent that the effect of those disclosures becomes an issue in federal litigation. The Rule covers issues of scope of waiver, inadvertent disclosure, and the controlling effect of court orders and agreements.

Rule 502 provides the following protections against waiver of privilege or work product:

- *Limitations on Scope of Waiver:* Subdivision (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder’s intentional and misleading use of privileged or protected communications or information.

● *Protections Against Inadvertent Disclosure:* Subdivision (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

● *Effect on State Proceedings and Disclosures Made in State Courts:* Subdivision (c) provides that 1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and 2) if there is a disclosure of privileged or protected communications or information in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

● *Confidentiality Orders Binding on Non-Parties:* Subdivision (d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

● *Confidentiality Agreements:* Subdivision (e) provides that parties in a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

Drafting Choices Made by the Advisory Committee

The Advisory Committee made a number of important drafting choices in Rule 502. This section explains those choices.

1) The effect in state proceedings of disclosures initially made in state proceedings. Rule 502 does not apply to a disclosure made in a state proceeding when the disclosed communication or information is subsequently offered in another state proceeding. The first draft of Rule 502 provided for uniform waiver rules in federal and state proceedings, regardless of where the initial disclosure was made. This draft raised the objections of the Conference of State Chief Justices. State judges argued that the Rule as drafted offended principles of federalism and comity, by superseding state law of privilege waiver, even for disclosures that are made initially in state proceedings — and even where the disclosed material is then offered in a state proceeding (the so-called “state to state” problem). In response to these objections, the Advisory Committee voted unanimously to scale back the Rule, so that it would not cover the “state-to-state” problem. Under the current proposal state courts are bound by the Federal Rule only when a disclosure is made at the federal level and the disclosed communication or information is later offered in a state proceeding (the so-called “federal to state” problem). The Conference of Chief Justices withdrew its objection to Rule 502 after the rule was scaled back to regulate only the “federal to state” problem.

During the public comment period on the scaled-back rule, the Advisory Committee received many requests from lawyers and lawyer groups to return to the original draft and provide a uniform rule of privilege waiver that would bind both state and federal courts, for disclosures made in either state or federal proceedings. These comments expressed the concern that if states were not bound by a uniform federal rule on privilege waiver, the protections afforded by Rule 502 would be undermined; parties and their lawyers might not be able to rely on the protections of the Rule, for fear that a state law would find a waiver even though the Federal Rule would not.

The Advisory Committee determined that these comments raised a legitimate concern, but decided not to extend Rule 502 to govern a state court's determination of waiver with respect to disclosures made in state proceedings. The Committee relied on the following considerations:

- Rule 502 is located in the Federal Rules of Evidence, a body of rules determining the admissibility of evidence in federal proceedings. Parties in a state proceeding determining the effect of a disclosure made in that proceeding or in other state courts would be unlikely to look to the Federal Rules of Evidence for the answer.
- In the Committee's view, Rule 502, as proposed herein, does fulfill its primary goal of reducing the costs of discovery in *federal* proceedings. Rule 502 by its terms governs state courts with regard to the effect of disclosures initially made in federal proceedings or to federal offices or agencies. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure by referring to Rule 502; there is no possibility that a state court could find a waiver when Rule 502 would not, when the disclosure is initially made at the federal level.

In light of the public comment, however, Congress may wish to consider separate legislation to cover the problem of waiver of privilege and work product when the disclosure is made at the state level and the consequence is to be determined in a state court. The Conference takes no position on the merits of such separate legislation.

2) Other applications of Rule 502 to state court proceedings. Although disclosures made in state court proceedings and later offered in state proceedings would not be covered, Rule 502 would have an effect on state court proceedings where the disclosure is initially made in a federal proceeding or to a federal office or agency. Most importantly, state courts in such circumstances would be bound by federal confidentiality orders. The other protections against waiver in Rule 502 — against mistaken disclosure and subject matter waiver — would also bind state courts as to disclosures initially made at the federal level. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the Rule. This protection is needed, otherwise parties could not rely on Rule 502 even as to federal disclosures, for fear that a state court would find waiver even where a federal court would not.

3) Disclosures made in state proceedings and offered in a subsequent federal proceeding. Earlier drafts of Proposed Rule 502 did not determine the question of what rule would

apply when a disclosure is made in state court and the waiver determination is to be made in a subsequent federal proceeding. Proposed Rule 502 as submitted herein provides that all of the provisions of Rule 502 apply unless the state law of privilege is more protective (less likely to find waiver) than the federal law. The Advisory Committee determined that this solution best preserved federal interests in protecting against waiver, and also provided appropriate respect for state attempts to give greater protection to communications and information covered by the attorney-client privilege or work product immunity.

4) Selective waiver. At the suggestion of the House Judiciary Committee Chair, the Advisory Committee considered a rule that would allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation. Such a rule is known as a “selective waiver” rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity.

The selective waiver provision proved to be very controversial. The Advisory Committee determined that it would not propose adoption of a selective waiver provision; but in light of the request from the House Judiciary Committee, the Advisory Committee did prepare language for a selective waiver provision should Congress decide to proceed. The draft language for a selective waiver provision is set forth in a separate report.

Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress as a rule that will effectively limit the skyrocketing costs of discovery. Members of the Standing Committee, the Advisory Committee on Federal Rules, as well as their reporters and consultants, are ready to assist Congress in any way its sees fit.

Respectfully submitted,

Draft of Cover Letter to Congress on Selective Waiver

The Judicial Conference has respectfully submitted proposed Federal Rule of Evidence 502. As submitted in a separate letter, Proposed Rule 502 governs scope of waiver, inadvertent disclosure and the enforceability of court orders, all with the goal of limiting the costs of privilege review in production of materials during litigation or to federal offices or agencies. The House Judiciary Committee Chair also asked the Advisory Committee on Evidence Rules (the “Advisory Committee”) to consider the possibility of proposing a rule that would “allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation.” Such a rule is known as a “selective waiver” rule, meaning that disclosure of protected communications or information to the government waives the protection only selectively — to the government — and not to any other person or entity. In response to the Chair’s request, the Advisory Committee prepared a selective waiver provision, and it was submitted for public comment. It provided for protection for disclosures made to federal offices or agencies only — but it bound state courts to enforcing selective waiver when a disclosure to a federal office or agency was offered in a subsequent state proceeding.

The selective waiver provision proved to be very controversial. The public comment from the legal community (including lawyer groups such as the American Bar Association, Lawyers for Civil Justice, and the American College of Trial Lawyers) was almost uniformly negative. The negative comments can be summarized as follows:

- Lawyers expressed the concern that if selective waiver is enacted, corporate personnel will not communicate confidentially with lawyers for the corporation, for fear that the corporation will be more likely to produce the information to the government and thereby place the individual agents at personal risk.
- Public interest lawyers and lawyers for the plaintiffs’ bar were concerned that selective waiver would deprive individual plaintiffs of the information necessary to bring meritorious private litigation.
- Selective waiver was criticized as inappropriate in the alleged current environment of what some have called the “culture of waiver.” Lawyers expressed the belief that corporations are currently being indicted unless they turn over privileged or protected information; they contended that selective waiver could be expected to increase government demands to produce protected information.
- Selective waiver was criticized as unfair, because it allows corporations to waive the privilege to their advantage, without suffering the risks that would ordinarily occur with such a waiver.

- Critics emphasized that under the federal common law, every federal circuit court but one has rejected the notion of selective waiver, those courts reasoning 1) that corporations do not need any extra incentive to cooperate, and 2) that selective waiver protection could allow the holder to use the privilege as a sword rather than a shield. Those critics contended that a doctrine roundly rejected under federal common law should not be enacted by rule.
- Judges of state courts objected that selective waiver raised serious federalism problems, because in order to be effective it would have to bind state courts, and as such it would change the law of privilege in virtually every state, because most of the states do not recognize selective waiver.
- Critics argued that selective waiver does not really protect the privilege because nothing prohibits the government agency from publicly disclosing the privileged information.

In sharp contrast, federal agencies and authorities (including the Securities Exchange Commission, the Commodity Futures Trading Commission, and the Department of Justice) expressed strong support for selective waiver. Those agencies made the following arguments.

- The agencies doubted that a selective waiver rule would discourage candid conversations between corporate counsel and employees. They noted that even in the current world without selective waiver, employees must already be advised by corporate counsel that the corporation holds the privilege and may choose to waive it, so the agencies concluded that an employee's candor will not be affected by a change in the rules on whether such a waiver is "selective" or not.
- The agencies contended that private parties will in the end benefit from selective waiver, as it will lead to more timely and efficient public investigations.
- The agencies asserted that government practices have not created a "culture of waiver." They also argued that the selective waiver rule addresses only the evidentiary consequences that flow in a later litigation from an earlier disclosure. This is a problem distinct from how often waiver is sought, and is a problem that will exist even if the government never seeks a waiver but companies still provide them, a possibility that even critics acknowledge will continue.
- The protection of selective waiver was asserted to be necessary because corporations are otherwise deterred from cooperating with government investigations, and such

cooperation serves the public interest by substantially reducing the cost of those investigations.

- The complaint from private parties about lack of access to information was dismissed on the ground that the information they sought would not even be produced in the absence of selective waiver.
- The agencies noted that even if the government can disclose the information widely, this did not undermine the doctrine of selective waiver; under selective waiver, private parties could not use the information in court, no matter how widely it is distributed in public.
- The agencies found nothing in the federal common law to indicate that legislation on selective waiver would be improper or unjustified.

The Advisory Committee carefully considered and discussed all of the favorable and unfavorable comments on the selective waiver provision. The Advisory Committee finally determined that selective waiver raised questions that were essentially political in nature. Those questions included: 1) Do corporations need selective waiver to cooperate with government investigations? 2) Is there a “culture of waiver” and, if so, how would selective waiver affect that “culture”? These are questions that are difficult if not impossible to determine in the rulemaking process. The Advisory Committee also noted that as a rulemaking matter, selective waiver raised issues different from those addressed in the rest of Rule 502. The basic goal of Rule 502 is to limit the costs of discovery (especially electronic discovery), whereas selective waiver, if implemented, is intended to limit the costs of government investigations, independently of any discovery costs. Thus, the selective waiver provision was outside the central, discovery-related focus of the rest of the rule.

The Advisory Committee determined that it would not include a selective waiver provision as part of proposed Rule 502. The Judicial Conference approves that decision. The Conference recognizes, however, that Congress may be interested in considering separate legislation to enact selective waiver, as evidenced by the enactment of the Financial Services Regulatory Relief Act of 2006, Pub.L.No. 109-351, § 607, 120 Stat. 1966, 1981 (2006), which provides that disclosure of privileged information to a banking regulator does not operate as a waiver to private parties.

The Advisory Committee prepared language to assist Congress should it decide to proceed with independent legislation on selective waiver. This suggested language is derived from the Financial Services Regulatory Relief Act and also incorporates some drafting suggestions received during the public comment period on Rule 502. The draft language includes a Committee Note that explains the drafting choices that were made. The draft language is as follows:

Statutory language on selective waiver

(a) **Selective waiver.** — In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney client privilege or as work product — when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process — does not waive the privilege or work-product protection in favor of any person or entity other than a [the] federal office or agency.

(b) **Rule of construction.** — This rule does not:

- 1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law; or
- 2) limit any protection against waiver provided in any other Act of Congress.

(c) **Definitions.** — In this Act:

- 1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
- 2) "work-product protection" means the protection that applicable law provides for tangible material or its tangible equivalent, prepared in anticipation of litigation or for trial.

Committee Note on Selective Waiver

Courts are in conflict over whether disclosure of privileged or protected communications or information to a government office or agency conducting an investigation of the client constitutes a general waiver of the communications or information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected communications or information to a government office or agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government office or agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of privileged or protected communications or information to the government does not constitute a general waiver, so that the privilege or protection remains applicable against other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule resolves this conflict by providing that disclosure of protected

communications or information to a federal office or agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to any person or entity other than a [the] federal public office or agency; that protection of selective waiver applies when the disclosed communication or information is subsequently offered in [either] federal [or state] court.

The rule does not purport to affect the disclosure of protected communications or information after receipt by the federal office or agency. The rule does, however, provide protection from waiver in favor of anyone other than federal offices or agencies, regardless of the extent of disclosure of the communications or information by any such office or agency. Even if the communications or information are used in an enforcement proceeding and so become publicly available, the communications or information will continue to be protected as against other persons or entities.

The rule provides that when protected communications or information are disclosed to a “federal office or agency” the disclosure does not operate as a waiver to any person or entity other than a [the] federal office or agency. As such, a disclosure covered by the rule does not operate as a waiver in any congressional investigation or hearing.

The rule is not intended to limit or affect any other Act of Congress that provides for selective waiver protection for disclosures made to government agencies or offices. *See, e.g.,* Financial Services Regulatory Relief Act of 2006, Pub.L.No. 109-351, § 607, 120 Stat. 1966, 1981 (2006).

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Memorandum To: Standing Committee on Rules of Practice and Procedure
From: Daniel Capra, Reporter, Advisory Committee on Evidence Rules
Re: Draft report to Congress on "harm-to-child" exception to the marital privileges
Date: May 15, 2007

Attached is the draft of a report to Congress on the necessity and desirability of codifying the "harm-to-child" exception to the marital privileges. This report is in response to the Congressional directive in the Adam Walsh Child Protection Act. At its Spring 2007 meeting the Evidence Rules Committee discussed the merits of amending the Evidence Rules to provide for a harm-to-child exception to the marital privileges. The Committee decided that such an amendment was not needed, but that a report to Congress should contain suggested language for an amendment should Congress decide to proceed.

The attached report explains the Evidence Rules Committee's determinations and recommends against an amendment, and also includes suggested language for amendment should Congress decide to proceed. It is styled as a report by the Standing Committee, because the Adam Walsh Act directs the Standing Committee to study the matter. The Evidence Rules Committee has approved the report, with the recommendation that the Standing Committee adopt it and send it to Congress.

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a “Harm to Child” Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

June 15, 2007

Introduction

Public Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

- (1) a child of either spouse; or
- (2) a child under the custody or control of either spouse.

* * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure (“the Rules Committee”) is in response to the Section 214 directive. The Advisory Committee on Evidence Rules (“the Advisory Committee”) has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the “harm to child” exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against a harm to child exception; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee’s work on this subject and agrees with the Advisory Committee’s conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the

Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. See *Trammel v. United States*, 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. See *United States v. Montgomery*, 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. See Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether the Evidence Rules should be amended to codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege

There is only one reported case in which a Federal court has upheld a claim of marital privilege in a prosecution involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison*, 409 F.3d 1221 (10th Cir. 2005), the accused was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting a witness from

being compelled to testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe*, 128 F.3d 1440 (10th Cir.1997). In *Bahe*, we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. See *Trammel*, 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe*, 128 F.3d at 1442; see also *Jaffee v. Redmond*, 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified by *Trammel* because it "furthers the important public interest in marital harmony"). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception--not currently recognized by any federal court--allowing a court to compel adverse spousal testimony.

409 F.3d at 1231.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe*, 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The *Jarvison* court made no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial privilege – the precise privilege involved in *Jarvison*. In *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no warning was required because the defendant was charged with harm to a child of the marriage, and therefore the spouse had no adverse testimonial privilege to assert. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See, e.g., United States v. Clark*, 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

Cases Recognizing Harm to Child Exception

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse testimonial privilege and the confidential communications privilege.

Marital Communications Privilege

In *United States v. White*, 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply to the defendant's communication. The court stated:

The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See United States v. Roberson*, 859 F.2d 1376, 1370 (9th Cir. 1988). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138.

In *Bahe, supra*, the court relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez*, 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. See also 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.

The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. * * *

The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

Adverse Testimonial Privilege

In *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

We recognize that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that

a serious crime against a child is an offense against that family harmony and to society as well.

Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 *Geo. L. J.* 257, 258 (1974).

526 F.2d at 1366.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison*, is dubious on a number of grounds:

1. Its analysis is perfunctory.
2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).
3. It is contrary to a prior case in its own circuit that applied the harm to child exception to the adverse testimonial privilege.
4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery*.
5. Its assertion that no federal court had ever compelled a witness to testify against a spouse is incorrect.

II. The “Necessity and Desirability” of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.

A. General Criteria for Proposing an Amendment to the Evidence Rules

The Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment’s notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria are found:

- 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;
- 2) the existing rule is simply unworkable for courts and litigants; or
- 3) the rule is subject to an unconstitutional application.

B. Application of Amendment Criteria to Proposed Harm to Child Exception

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application, because the privilege would not apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But the split in the courts over the harm to child exception, discussed above, is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split on the question, and ten circuits had written decisions on the subject; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the admissibility of compromise evidence in criminal prosecutions was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question. Again, the disputed question was one that arose frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises only rarely in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications*. All of the reported federal court cases have agreed with and applied this exception. So there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

As to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privileges does not rise to the level of necessity that traditionally has justified an amendment to the Evidence Rules.

C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, foster-children, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term “custody or control” may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant’s custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature. But even if that distinction has merit, the dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, and none of these decisions provide analysis of the scope of such an exception. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. Codifying the harm to child exception runs the risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of the accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm to child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm to child exception to the adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to codify such an exception would create an anomaly: that very specific, and rarely applicable,

exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.¹

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there are policy arguments supporting such an exception, and is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

¹ The situation can be usefully contrasted with the proposed Rule 502 that has been approved by the Advisory Committee and is currently being considered by the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of pre-production privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute both on when waiver is to be found and on the scope of waiver.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term “minor” in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.*, Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.*, Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, harm to children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster-children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. *See, e.g.*, *Daniels v. State*, 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster-child); *Stevens v. State*, 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State*, 711 P.2d 852 (Nev. 1985) (statute providing exception to spousal testimony privilege for child in “custody or control” covered children spending the night with defendant’s daughters); *State v. Waleczek*, 585 P.2d 797 (Wash. 1978) (term “guardian” in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether “custody or control” might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. *See, e.g.*, Colo. Rev. Stat. § 13-90-107 (exception to adverse testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis.

Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which “one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either”). See also *United States v. White*, 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence*, 28 Hous. L.Rev. 1095 (1991).

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.