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Memorandum To: Advisory Committee on Evidence Rules
From: Professors Daniel Capra, Reporter and Kenneth Broun, Consultant
Re: **Proposed Rule 502: Draft of Cover Letter to Congress**
Date: March 15, 2007

Because Congress must enact Rule 502 directly, it may be useful to add a cover letter to proposed Rule 502, to explain the provenance of the Rule and the choices made in drafting it. The cover letter is referred to in various places in the principal memo on Rule 502 in this agenda book.

What follows is the draft of a cover letter to Congress. It is styled as a report from the Judicial Conference. This assumes that the rule, if approved by the Judicial Conference, will be sent to Congress directly. If instead the rule is sent through the usual rulemaking process, the cover letter might be styled as an explanatory memorandum from the Advisory Committee or the Standing Committee. The precise iteration is still to be determined, but the important task at this point is to come to some agreement on the language of the memo.

## 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 suggestion for the proposal of a rule dealing with waiver of attorney-client privilege and work product was presented in a January 23, 2006 letter from F. James Sensenbrenner, Jr., then-Chair of the House Committee on the Judiciary, to Leonidas Ralph Mecham, then-Director of the Administrative Office of the United States Courts. A copy of Congressman Sensenbrenner's letter is attached. In the letter, Congressman Sensenbrenner urged the Judicial Conference 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; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

Congressman Sensenbrenner noted the impact on litigation costs of reviewing for privilege and work product protection the enormous volume of materials in cases involving electronic discovery. He noted the concern that any disclosure could waive the privilege not only with regard to a particular document but for all other documents dealing with the same subject matter. He observed that, while parties may make agreements limiting forfeiture of privilege, such agreements do not provide adequate assurance that the privilege against waiver in other proceedings. He added:

> A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants.

The task of drafting a proposed rule responding to Congressman Sensenbrenner's request was 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 and ended February 15, 2007. The Advisory Committee received more that 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 of 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* 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 recognized the same concerns that had prompted Congressman Sensenbrenner's letter. Concern for waiver of privilege – especially when waiver as to one document may result in a waiver of the privilege with regard to all documents dealing with the same subject matter – dramatically increases the already high costs of litigation in voluminous document cases and particularly in cases involving electronic discovery. The existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. 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 Committee also noted the likely adverse effect on governmental investigations where parties withhold privileged documents – even after a promise of confidentiality – for fear that a disclosure of a privileged document to the agency will result in a total waiver of the privilege. The great majority of federal cases have held that a general waiver will result from disclosure of a privileged document to a government agency irrespective of an agreement between the parties with regard to confidentiality.]

The Proposed Rule 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 documents in a federal court [or court annexed or order arbitrations] proceedings [or to a federal public office or agency] [or to a federal public office or agency in the course of any regulatory, investigative, or enforcement process]. It 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, [selective waiver by disclosure to a federal office or agency], 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 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.

- [*Protection When Disclosure is Made to a Federal Office or Agency*: Subdivision (c) provides that if a privileged or protected communication or information is disclosed to a federal office or agency acting in the course of a regulatory, investigative or enforcement process, then the disclosure does not operate as a waiver to anyone other than a federal office or agency. This protection is knows as "selective 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 preproduction 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.

- *Disclosures Made in State Proceedings of Communications or Information Subsequently Offered in a Federal Proceeding:* Subdivision (g) provides that if privileged or protected communications or information are disclosed in a state proceeding, then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

## 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 and notes the options that Congress might have in implementing those choices either in Rule 502 or in independent legislation to complement Rule 502.

**1) The effect in state proceedings of disclosures initially made in state proceedings.** Rule 502 does not apply to disclosures made in state proceedings when the disclosed communications or information are subsequently offered in other state proceedings. 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 Evidence Rules Committee voted unanimously to cut back the Rule, so that it would not cover the "state-to-state" problem . While states would be bound by the Federal Rule, that would only be the case for disclosures initially made at the federal level, when the communications or information were later offered in a state proceeding (the so-called "federal to state" problem). The Conference of Chief Justices thereupon withdrew its objection to Rule 502.

During the public comment period on the scaled-back rule, the Advisory Committee received many comments from lawyers and lawyer groups suggesting that Rule 502 must be extended to 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 in those proceedings and 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. Parties and their lawyers in federal proceedings can therefore predict the consequences of disclosure of protected information 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 in a federal proceeding.

While the Advisory Committee determined that Rule 502 should not be extended to disclosures initially made in state proceedings, when the protected communication or information is then offered in a state proceeding, the Judicial Conference does take this opportunity to notify Congress of the substantial public comment advocating a uniform rule of privilege waiver that would apply to all disclosures of protected information made or offered in state or federal courts. The public comment noted an alternative to extending Rule 502: separate legislation that would extend the substantive provisions of Rule 502 to state court determinations of waiver with respect to disclosures in state proceedings.

**2) Other applications of Rule 502 to state court proceedings.** Although disclosures made in state court proceedings 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. State courts in such circumstances would be bound by federal confidentiality orders, and could not find a waiver after a mistaken disclosure if the holder took reasonable precautions and reasonably prompt measures to retrieve the material. The Rule, as submitted, specifically provides that it applies to state proceedings under the circumstances set out in the rule. See Rule 502(g).

Nevertheless, it may also be useful for Congress to consider additional legislation that would provide for the binding effect of Rule 502 in state courts for disclosures made in federal proceedings. A statute worded as follows might be appropriate: "The effect of a disclosure of privileged or protected information made in a federal proceeding is determined, in state proceedings, by Federal Rule of Evidence 502." If enacted, such legislation could serve to protect state litigants who might not look to a Federal Rule of Evidence for guidance.

**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 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 protect the attorney-client privilege and work product immunity. This provision is properly placed in the rule even if Congress adopts legislation providing a uniform law of waiver. If Congress enacts independent legislation to govern state disclosures, then it is recommended that the legislation specify that the uniform rule is intended to provide a floor, not a ceiling, and that states retain the option to provide greater protection against waiver if they wish. If Congress takes that approach, then the language in Proposed Rule 502 applying state law when it is more protective will remain valid.

**4) Selective waiver.** At the suggestion of Congressman Sensenbrenner, the Committee proceeded with 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 policy supporting a selective waiver rule is that without it corporations will be less likely to cooperate with government investigations; thus, selective waiver is argued to be a necessary means of encouraging cooperation and limiting the costs of government investigations. The Advisory Committee prepared a selective waiver provision and it was submitted for public comment as Proposed Rule 502(c). It provided for protection for disclosures made to federal offices or agencies only — but it bound state courts to 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:

- Selective waiver was criticized as inappropriate in the alleged current environment of 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 such information.

- 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 will deprive individual plaintiffs of the information necessary to bring meritorious private litigation.

- 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.

- Lawyers 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. Lawyers 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.

- Lawyers 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. These agencies made the following arguments.

- 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 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 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.

**[If selective waiver is included in the Rule:**

The Advisory Committee carefully considered and discussed all of the favorable and unfavorable comments on the selective waiver provision. Recognizing the strength of the arguments on both sides of the issue, the Judicial Conference has elected to include a selective waiver section in the rule it is presenting, Rule 502(c), and to leave the ultimate decision on its adoption to Congress. Rule 502(c) has been revised somewhat from the rule submitted for public comment. The rule now provides that disclosure to a federal agency does not operate as a waiver to a state agency. The Rule specifies that is not intended to foster the alleged "culture of waiver." References are also

made to the fact that disclosure by the receiving agency does not constitute a waiver and that disclosure to an agency does not constitute a waiver to Congress. In addition, the language of the section was amended to track the language of the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators. ]

**[If selective waiver is not included in the Rule:**

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 rest of Rule 502 is intended 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 litigation costs. Thus, the selective waiver provision was outside the central, discovery-related focus of the rest of the rule.

The Advisory Committee therefore 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 Bank Regulatory Act of 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 Bank Regulatory Act and also incorporates some drafting suggestions received during the public comment period on Rule 502(c).

***Possible language for separate legislation could provide as follows*:**

> **( 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 [state or local] public 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] public

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;
2) authorize a government office or agency to require or request disclosure of a communication or information protected by an attorney-client privilege or as work product; or
3) limit any protection against waiver provided in any other Act of Congress.

**[(c) Disclosures made to a state or local-government office or agency.** — When a disclosure of a communication or information protected by the attorney client privilege or as work product is made to a state or local-government office or agency, is not the subject of a state court order, and the disclosed information is offered in a federal proceeding, the disclosure does not operate as a waiver if:

(A) it would not be a waiver under this rule if it had been made to a federal public office or agency; or

(B) it is not a waiver under the law of the state where the disclosure occurred.][1]

**(d) 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 intangible equivalent, prepared in anticipation of litigation or for trial.

In addition, the Committee's Note for its proposed draft of a selective waiver provision follows, in the event that it may assist Congress should it decide to consider separate legislation on selective waiver

**Draft of Committee Note on Selective Waiver.**

Courts are in conflict over whether disclosure of privileged or protected information

[1] This provision is necessary if Congress does not extend selective waiver protection to disclosures made to state and local agencies in the first instance.

to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver," holding that waiver of privileged or protected information to a government 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 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 protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal [or state or local] government office or agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The rule does not purport to affect the disclosure of protected information after it has been received by the public office or agency. The rule does, however, provide protection from waiver in favor of anyone other than public offices or agencies, regardless of the extent of disclosure of that information by any such office or agency. Even if the communications or information are disclosed or become available to non-governmental persons or entities through the use of the material during an enforcement proceeding, the communications or information will continue to be protected as against other persons or entities.

The rule provides that when protected information is disclosed to a public office or agency the disclosure does not operate as a waiver to any person or entity other than a [the] public 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).]

## Conclusion

Proposed Rule 502 is respectfully submitted for consideration by Congress. 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,