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NEW E-DISCOVERY RULES & THE ATTORNEY-CLIENT PRIVILEGE: A MIDDLE GROUND FOR WAIVER?

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INTRODUCTION

The proposed amendments to the Federal Rules of Civil Procedure will go into effect on December 1, 2006, absent some affirmative act by Congress to prevent their adoption. Among the amendments are provisions designed to address the ever-apparent problem faced by corporate litigants: the volume of electronically stored information and the varying ways it is maintained make it very difficult and often cost-prohibitive to efficiently and effectively review it for privileged material prior to production. Under the current legal framework, the inadvertent production of privileged or work-product protected material creates substantial risk; at the same time, the effort and cost to conduct a comprehensive pre-production privilege review often make such review impractical.

The proposed amendment[1] to Federal Rule of Civil Procedure ("FRCP")

[1] **Rule 26. General Provisions Governing Discovery; Duty of Disclosure.**
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(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

26(b)(5)(B) is designed to address these problems by establishing a procedure to assert privilege and work product claims even after production. Under the proposed rule, if a party has produced information in discovery that it claims is privileged or otherwise constitutes work product, that party may notify the receiving party of the claim and its basis. After receiving notification, the receiving party must return, sequester or destroy the information, and may not use or disclose it to third parties until the claim is resolved. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether waiver has occurred. A receiving party that has disclosed or provided the information to a nonparty before getting notice must take reasonable steps to obtain the return of the information. The producing party must preserve the information pending the court's ruling on whether the information is privileged or protected and whether any privilege or work product protection has been waived or forfeited by production.

However, the Committee Notes accompanying the proposed amendment to FRCP 26(b)(5) specifically caution that "[t]he proposed amendment does not address

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(5) Claims of Privilege or Protection of Trial Preparation Materials.

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(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Available at: http://www.uscourts.gov/rules/Reports/ST09_2005.pdf.

the *substantive question* whether privilege or work product protection has been waived or forfeited" in a particular case. (Emphasis added). Instead, the proposed rule is designed solely to establish a *procedural* mechanism to allow the responding party to assert a claim of privilege or of work-product protection after the production. To determine whether the privilege or work product protection has been waived or forfeited by the production, courts must turn to the substantive privilege law in the jurisdiction where the claim is pending.

In practice, the proposed amendment contemplates that litigants will execute non-waiver agreements (so-called "quick peek" or "claw back" agreements), where each party agrees to be bound by the procedures they establish. Under the "quick peek" scenario, the producing party generally makes all of its relevant documents available for inspection or review by the requesting party. Once the requesting party has selected the documents it wants, the producing party may review the selected documents for privilege, and withhold those documents (or portions of those documents) that it claims are privileged or protected.[2] Under the "claw back" scenario, the parties generally conduct some pre-production privilege review, but agree that any privileged or protected documents that are inadvertently produced will be returned or destroyed upon the request of the producing party. Such non-waiver agreements typically provide that the inadvertent production of a privileged document will not constitute a waiver of the privilege, at least as between the parties,

[2]While the quick peek approach may be acceptable to litigants if the only potentially privileged or protected material likely to be produced is mundane and relatively unimportant, it seems less likely that prudent corporate litigants will risk producing sensitive, potentially privileged or protected documents no matter what the parties' agreement.

so long as the parties adhere to the procedures set forth in their agreement.

A recent decision authored by Magistrate Judge Paul W. Grimm, *Louis H. Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. November 22, 2005), highlights that while such agreements may be very appealing in theory, in practice, they do not solve the bigger problem: that the effect courts give to non-waiver agreements between parties will vary, sometimes markedly, depending on the substantive privilege law of the jurisdiction in which the action or a subsequent action is pending. Judge Grimm's opinion identifies three fundamental problems associated with the use of non-waiver agreements.

First, depending on the substantive privilege law of the jurisdiction where the matter is pending, such agreements may not even be enforceable between the parties that enter into them.[3] Second, such agreements may not be enforceable against third parties.[4] Third, case law from the Fourth Circuit suggests that it may be inclined to adopt a strict liability approach to inadvertent waiver – disclosure means broad subject matter waiver, not simply a waiver that is limited to the content of the

[3]Not all courts have approved non-waiver agreements between counsel. *Hopson*, 232 F.R.D. at 235, n. 10 (citing *Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (court declined to give effect to agreement between counsel that production of certain documents would not waive privilege protection because such agreements "could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases."); *Columbia/HCA Healthcare Corp.*, 192 F.R.D. 575, 577-78 (M.D. Tenn. 2000) (holding that an agreement with the government to produce documents without waiving privilege/work product protection is invalid, rejecting the doctrine of "selective waiver."))

[4]*Hopson*, 232 F.R.D. at 235 (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27((3d Cir. 1991) (agreement between litigant and DOJ that documents produced in response to investigation would not waive privilege does not preserve privilege against different entity in unrelated civil proceeding); *Browne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D N.Y. 1993) (non-waiver agreement between producing party in one case not applicable to third party in another civil case)).

disclosed documents.[5] Accordingly, the *Hopson* decision suggests that one solution to this dilemma may be the issuance of case scheduling orders under FRCP 16, discovery management orders under FRCP 26(b)(2), or protective orders under FRCP 26(c) that specifically incorporate non-waiver language that would bind third parties. Others argue that such an approach will not solve the problem, given the uncertainty surrounding whether a particular court has the authority to bind third parties outside of its jurisdiction.

Taking its cue from Judge Grimm's decision in the *Hopson* case, the Judicial Conference Advisory Committee on Evidence Rules convened a special hearing to discuss proposed amendments to Evidence Rule ("ER") 502, governing waiver of the attorney-client privilege and work product protection, designed to address and offer solutions for resolving this dilemma. The hearing took place at Fordham University on April 24, 2006 and consisted of short statements by invited presenters,[6] followed

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[5]*Hopson*, 232 F.R.D. at 235-38 (citing *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) and *Martin Marietta Corp. v. United States*, 856 F.2d 619 (4th Cir. 1988) and noting that while both cases were decided in the context of grand jury investigations in criminal cases, the court spoke broadly in terms that would apply equally to civil cases; both cases clearly express a strict interpretation of the attorney-client privilege and an unambiguous willingness narrowly to confine it to preserving communications intended to be kept confidential; and both cases take an unforgiving view of the results of its waiver – subject matter waiver).

[6]The Committee invited distinguished members of the judiciary, academia, private practice and government practice to participate in the conference. The following is a list of presenters:

Judges:	Hon. John Koeltl, United States District Judge, Southern District of New York
	Hon. Paul Grimm, United States Magistrate Judge, District of Maryland
Practitioners:	David M. Brodsky, Esq., Latham & Watkins, New York City
	Gregory P. Joseph, Esq., Law Offices of Gregory Joseph, New York City
	James Robinson, Esq., Cadwalader Wickersham & Taft, Washington D.C.
	Stephen D. Susman, Esq., Susman Godfrey, Houston, TX
	Ariana J. Tadler, Esq., Milberg Weiss, Bershad & Schulman, New York City
	Mary Jo White, Esq., Debevoise & Plimpton, New York City
Organizations:	American College of Trial Lawyers: John Kenney, Esq.
	Association of Trial Lawyers of America: John Vail, Esq.
Regulators:	Peter Pope, Esq., New York Attorney General's Office
	Richard Humes, Esq., Securities Exchange Commission

by a discussion among the presenters and members of the Committee.[7] The proposed language of ER 502, discussed during the hearing, is as follows:

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure.

(a) Waiver by disclosure in general.

A person waives an attorney-client privilege or work product protection if that person – or a predecessor while its holder – voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general.

A voluntary disclosure does not operate as waiver if:

(1) the disclosure itself is privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings – and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in FED. R. CIV. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state or local governmental agency during an investigation by that agency, and is limited to persons involved in the

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Academics: Professor Bruce A. Green, Fordham Law School
Professor Timothy Glynn, Seton Hall Law School

[7] *See* http://www.uscourts.gov/rules/advcomm_miniconference.html.

investigation.

(c) Controlling effect of court orders.

Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements.

Notwithstanding subdivision (a), an agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection.

As used in this rule:

(1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and

(2) "work product" means the immunity for materials prepared in preparation of litigation as defined in FED.R.CIV.P. 26(b)(3) and FED.R.CRIM.P. 16(a)(2) and (b)(2), as well as the federal common-law and state-enacted provisions or common-law rules providing protection for attorney work product.[8]

According to the accompanying Committee Notes, the proposed changes to ER 502 have two major purposes. First, they are intended to resolve longstanding disputes about the effect of certain disclosures of material otherwise protected by the attorney-client privilege or the work product doctrine, specifically disputes involving

[8]Available at: http://www.uscourts.gove/rules/reports/EV05-2006.pdf.

inadvertent disclosure and selective waiver. Second, they are intended to respond to widespread concern that the costs associated with reviewing and protecting privileged or work product content have become prohibitive, given the concern that *any* disclosure, however innocent or minimal, will result in subject matter waiver for all protected information. The proposed changes to ER 502 are intended to provide a set of standards under which parties can predictably determine the consequences of disclosing information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the proposed rule changes are intended to regulate the consequences of disclosing privileged or protected information at *both the state and federal level*, so litigants can be assured that if they exchange privileged information pursuant to a court's confidentiality order, that order will be enforceable in both state and federal courts. Absent that certainty, the burdensome costs of privilege review will not likely be reduced because parties cannot be assured their non-waiver agreements will be enforced by other courts in other jurisdictions.

While the proposed amendments to ER 502 seem to take a practical and logical step in the right direction toward easing the burden and cost associated with reviewing huge volumes of electronic documents for privilege or work product prior to production, they have generated a fair amount of controversy. In particular, this controversy has centered around the provisions of proposed ER 502(b)(3), the so-called selective waiver rule — "[a] voluntary disclosure does not operate as waiver if ... the disclosure is made to a federal, state or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation."

This proposed amendment is designed to rectify a conflict among the courts as

to whether disclosure of privileged or protected information 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 as to all parties.[9] Some courts, however, have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency.[10] Still other 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.[11] The proposed amendment to ER 502 resolves this conflict by providing that disclosure of protected information to an investigating governmental agency does not constitute a general waiver of attorney-client privilege or work product protection. According to the Committee Notes, this rule furthers important public policy considerations, such as facilitating cooperation with government agencies and maximizing the effectiveness and efficiency of government investigations.[12]

Not everyone agrees. Members of the American Bar Association Task Force on the Attorney-Client Privilege ("ABA Task Force") have spoken out against the

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[9]*See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

[10]*See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981).

[11]*See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

[12]*Citing 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 protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

adoption of proposed ER 502(b)(3).[13] Among other things, the ABA Task Force believes the procedure contemplated by the rule perpetuates what it refers to as an "alarming trend threatening the viability of the corporate attorney-client privilege" – a "culture of waiver."

This trend began in 1999 with the Department of Justice's adoption of a memorandum written by then-Deputy Attorney General Eric Holder.[14] Known as "the Holder Memorandum," the stated intent of that document is to provide "guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case." As part of its guidance, the Holder Memorandum encourages federal prosecutors to request that companies waive the protections of the corporate attorney-client privilege and attorney work product doctrine in order to avoid a prosecution of the corporation itself.[15]

The Justice Department's waiver policy was perpetuated in 2003, with the adoption of a revised set of principles. A January 20, 2003 memorandum written by

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[13]David M. Brodsky, Liaison to the ABA Task Force, testified at the Fordham University hearings on April 24, 2006. In addition, at the invitation of the Judicial Conference Advisory Committee on Evidence Rules, members of the ABA Task Force (including Mr. Brodsky, Steven K. Hazen, Adviser to the ABA Task Force; R. William Ide, Chair of the ABA Task Force and Mark O. Kasanin, Liaison to the ABA Task Force) authored and submitted a paper entitled "Preserving the Attorney-Client Privilege" outlining the basis for their opposition to proposed ER 502(b)(3). Available at: http://www.uscourts.gove/rules/Brodsky.pdf.

[14]Memorandum to All Component Heads and United States Attorneys from Eric H. Holder, Deputy Attorney General, U.S. Department of Justice, *Bringing Criminal Charges Against Corporations*, dated June 16, 1999 ("Holder Memorandum"). Available at: http://www.usdoj.gov/criminal/fraud/policy/Chargincorps.html.

[15]*See* Holder Memorandum at Part IV.B ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, employees and counsel.")

then-Deputy Attorney General Larry Thompson ("the Thompson Memorandum") emphasizes that the main focus of the revised principles is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. The perspective reflected in the memo was that too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions made clear that such conduct should weigh in favor of corporate prosecution. The revisions also addressed the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.[16]

Although both the Holder and Thompson Memoranda state that waiver of corporate privileges is not mandatory and should not be required in every situation,[17] most critics believe that, in reality, these policies have led most federal prosecutors to routinely pressure companies and other organizations to waive their privileges as a condition for receiving cooperation credit during investigations – fostering a culture of waiver.

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[16]Memorandum to Heads of Department Components and United States Attorneys from Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, *Principles of Federal Prosecution of Business Organizations*, dated June 20, 2003 at 1 ("Thompson Memorandum"). Available at: http://www.usdoj.gov/dag/cftf/corporate_guidelines.html.

[17]The Holder Memorandum states "[t]he Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation." Holder Memorandum, at Section VI.B. Similarly, a footnote to the Thompson Memorandum states, "[t]his waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation." Thompson Memorandum, at 7 n.3.

According to a March 2005 survey of over 1,200 in-house and outside corporate counsel,[18] nearly 75% of respondents believe that this culture of waiver exists and that governmental agencies believe it is reasonable and appropriate for a company under investigation to broadly waive attorney-client or work product protections. According to the coalition sponsoring this survey, the attorney-client privilege is fundamental to fairness and balance in our justice system and essential to corporate compliance regimes. The coalition argues that without reliable privilege protections, executives and other employees are discouraged from asking difficult questions or seeking guidance regarding the most sensitive situations for which such guidance is critical.

> In today's complex business environment, it is increasingly important to encourage business executives and even line managers to regularly – and without any hesitation – engage their lawyers in open discussions about anything that concerns them in furtherance of assuring the corporation's legal health. It is our belief that attorney-client communications, and the confidentiality that fosters those communications, are more important than ever, and laudably serve society's and our legal system's public policy goals.[19]

The ABA agrees. In a May 2, 2006 letter from Michael S. Greco of the American Bar Association to Attorney General Alberto Gonzales, the ABA expressed its view that existing government waiver policies discourage entities from both

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[18] *The Decline of the Attorney-Client Privilege in the Corporate Context*, Survey Results Presented to the United States Congress and the United States Sentencing Commission, at 1. Available at http://www.acca.com/Surveys/attyclient2.pdf, and sponsored by a coalition of organizations including the American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation.

[19] *Id.*

consulting with their lawyers – impeding the lawyer's ability to effectively counsel and encourage compliance with the law – and conducting internal investigations designed to quickly detect and remedy misconduct.[20] The ABA argues, instead, that prosecutors can obtain the information they most frequently seek and need from a cooperating organization without resorting to requests for wavier of the privilege or doctrine. Accordingly, as part of its effort to influence Justice Department policy on this issue, the ABA attached to its letter to Attorney General Gonzales, a draft memorandum entitled "Guidelines for Determining 'Timely and Voluntary Disclosure of Wrongdoing and Willingness to Cooperate'." That memorandum sets forth guidelines that would, if adopted, prevent prosecutors from seeking privilege waiver during investigations, specify the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and clarify that any voluntary waiver of privilege is *not* to be considered when assessing whether the entity provided effective cooperation.

Given the current emphasis on corporate accountability and compliance generally, it seems unlikely the Justice Department will modify its prosecutorial guidelines anytime soon, so we may be headed for middle ground. At least one commentator has pointed out that critics of the Holder and Thompson Memoranda, and ultimately the proposed amendments to ER 502, often fail to acknowledge important differences between individuals and corporations when it comes to

[20]Available at: http://www.abanet.org/poladv/acprivgonz5206.pdf.

applying the attorney-client privilege and work product doctrine.[21] Attorney James Robinson argues that unlike individuals, corporations do not enjoy the same constitutional protection against self-incrimination. Thus, the constitutional origins of these individual protections do not apply in the corporate context. Additionally, corporations are artificial entities authorized to exist by the State. Their owners reap substantial benefits by doing business as a corporation, including protection from unlimited liability beyond the resources of the corporation itself. Moreover, the attorney-client privilege protects the individual employees who confide in the corporation's lawyer only as long as the corporation continues to invoke the privilege. Employees have no standing to object to waiver by the corporation. As a result, Robinson argues that it may not be entirely unreasonable to view the rights and privileges of corporations differently from those of clients who are real people engaged in protected communications with their lawyers for the purpose of securing legal advice. While Robinson does not necessarily endorse the Justice Department's policy of encouraging corporations with waive the attorney-client privilege and work product protection in certain aspects of criminal investigations, he does recognize that rational bases may exist for treating corporations differently from individuals in this context.

Regardless of the underlying rationale or merit, unless and until the Justice Department changes its policy with respect to corporate prosecution, powerful incentives for corporate cooperation, including "voluntary" waivers of the attorney-

[21]Testimony of James K. Robinson at the Mini-Conference on Proposed Evidence Rule 502, United States Judicial Conference Advisory Committee on Rules of Evidence, Fordham University Law School, April 24, 2006. Available at: http://www.uscourts.gov/rules/Robinson.pdf.

client privilege and work product protection, will continue to exist. The selective waiver rule would recognize that, as a practical matter, a disclosure of protected information in the context of a government investigation is not truly "voluntary" in the manner that has traditionally resulted in a waiver of the protection of the privilege and the work product doctrine. Instead, the disclosure is forced by the stakes involved and constitutes a mutually beneficial sharing of information between the corporation and the government that serves the public interest. The selective waiver rule, supporters argue, also benefits the interests of corporate shareholders because the company avoids criminal prosecution, minimizes the adverse consequences of a government enforcement action and protects otherwise privileged or protected material in subsequent litigation with third parties. Thus, while many oppose the selective waiver rule because it seems to provide official support for the "culture of waiver" and implicitly sanctions the government's practice of seeking and giving credit for waivers, the rule would at least eliminate the possibility that the governmental disclosure will waive the privilege or protection as to the rest of the world. Removing that impediment provides at least some protection to the corporate holder of these protections in the face of private litigation. One question may be whether that protection is worth the power that may be even unintentionally placed in the hands of government enforcement agencies.

Regardless of the merits of the arguments both for and against the adoption of proposed ER 502, courts at this point seem more than willing to defer the issue to Congress for resolution. In a recent case decided by the U.S. Court of Appeals for the Tenth Circuit, *In re Qwest Communications International, Inc. Securities Litigation*,

2006 WL 1668246, at 21 (10th Cir. Colo.), the Court stated:

> Whether a rule-making or legislative venue is appropriate to address the issues raised by Qwest and amice is a question for the Standing Committee and Congress. The rule-making and legislative process, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege and work-product protection is but another source for the legislative and rule making bodies to draw on to inform their deliberations concerning the need for and the parameters of selective waiver or a new privilege.

The court concluded that the record did not justify the adoption of a selective waiver rule in that case, and the district court did not abuse its discretion by ordering Qwest to produce over 220,000 pages of documents protected by the attorney-client privilege and the work product doctrine that had previously been produced to both the SEC and DOJ as part of separate investigations.

Progress toward resolving this issue is being made. At its June 22-23, 2006 meeting, the Committee on Rules of Practice and Procedure approved the recommendations of the Advisory Committee on Evidence Rules, and approved publishing for public comment proposed new Evidence Rule 502. The proposed new rule was published for public comment in August 2006. All interested parties should take advantage of the opportunity to be heard on this important rule.