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The Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Arlen Specter
United States Senate
Committee on the Judiciary
711 Hart Senate Office Building
Washington , DC 20510

Dear Senators Leahy and Specter:

On behalf of the New York City Bar Association, I write to express support for S. 2450, a critically important piece of legislation currently pending before your committee.

The Association is one of the oldest and largest local bar associations in the United States, with a current membership of over 23,000 lawyers. The Association serves not only as a professional association, but also as a leader and advocate in the legal community on a local, state, national and international level. The Association pursues its advocacy through the work of over 160 committees, including a Federal Courts Committee, a Committee on Professional and Judicial Ethics and a Professional Responsibility Committee. Among other activities, the Association's committees prepare comments for legislative bodies, regulatory agencies and rule-making committees on pending and existing laws, regulations and rules that have broad legal, regulatory, practical or policy implications. Further information regarding the Association can be found at its web site, http://www.nycbar.org.

As you know, S. 2450 would amend the Federal Rules of Evidence by adding Rule 502, which addresses the effect of disclosure of privileged materials in federal courts and proceedings before federal offices and agencies.

Proposed Rule 502(a) would limit the risk of subject-matter waiver. The disclosure of a privileged communication would only extend to other undisclosed, privileged matters if the waiver was intentional, and the two communications were part of the same subject matter and ought in fairness be considered together. This would be binding in federal courts, proceedings before federal offices and agencies, and in state courts.

Proposed Rule 502(b) would protect an inadvertent disclosure in a federal court or federal administrative proceeding from operating as a waiver in another federal or state court proceeding, or a federal administrative proceeding, if the holder of the privilege took reasonable precautions to prevent disclosure, and the holder promptly took reasonable measures to rectify the error once it became known, including those outlined in Fed. R. Civ. P. 26(b)(5)(B).

Proposed Rule 502(c) would provide that a waiver in state court does not operate as a waiver in federal court if either (1) it would not be a waiver under state law, or (2) it would not be a waiver under Rule 502 if made in a federal proceeding.

Proposed Rules 502(d) and (e) provide, respectively, that a federal court may order that a disclosure of privileged matter in a proceeding pending before the court does not operate as a waiver in any other court (federal or state); and that an agreement of the parties to this effect is binding only on the parties before the court, unless incorporated in such an order.

Proposed Rule 502 would establish consistent guidelines regarding the consequences of both intentional and inadvertent disclosure of privileged material in federal proceedings. First, Rule 502(a) would mitigate the harsh common-law rule concerning subject-matter waiver, while still protecting against a party's use of selective disclosure in order to gain an unfair tactical advantage. Second, Rule 502(b) would protect a party that took reasonable steps to prevent and rectify unintended disclosures. In an era when the scope and volume of electronically stored information is growing exponentially each year, so too is the risk of inadvertent disclosure of material protected by the attorney-client or work-product privileges. Guarding against such disclosure imposes enormous costs on litigants. And the burden of resolving related disputes falls on district court judges whose dockets are already too full.

In fact, the proposed rule will complement the new Federal Rules of Civil Procedure that address electronic discovery. These new procedural rules include so-called "quick looks" (a review by the opposing side of documents from which attorney-client privileged and work product information has not been removed to facilitate a determination as to whether certain data bases will have to be reviewed for production). The rules also provide for "claw-back" agreements and orders (requiring parties to return inadvertently produced privileged information). Claw-back agreements and orders are necessary because electronic records, particularly emails, have substantially increased the volume of discovery. Many cases now involve massive amounts of e-discovery and in those cases it is almost a certainty that there will be mistakes and material will be inadvertently produced. In order for these rules to work and the costs of electronic discovery made more manageable, it is necessary to ensure that no waiver occurs not only in the case in which the privileged information is produced, but also in other cases. The proposed amendments to the evidence rules do just that.

While proposed Rule 502 would not altogether eliminate the need for privilege review, it would go a long way toward reducing the risks and costs associated with that review, and the likelihood of disputes resulting from inadvertent disclosure.

As litigators who practice regularly in federal and state courts, we support proposed Rule 502 as an effective means to streamline the discovery process and reduce the burdens currently placed on litigants and courts arising from discovery-related disputes involving the inadvertent waiver of privilege, while at the same time maintaining fairness and balance in dealing with intentional disclosure of privileged material for tactical gain. We thank you for introducing this legislation and urge its swift passage.

Respectfully submitted,

Barry Kamins