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7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9  
10 PETITION TO ADOPT RULE 502  
11 ARIZONA RULES OF EVIDENCE

Supreme Court No. R-09-0004

**Comment of the State Bar of  
Arizona Regarding Petition to  
Adopt Rule 502, Arizona Rules  
of Evidence**

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15 The State Bar of Arizona agrees with petitioner that the Arizona Rules of Evidence  
16 should be amended to add Rule 502 to protect litigants from inadvertent waivers of  
17 privilege. The proposed Rule follows the newly enacted Federal Rule of Evidence 502,  
18 and would provide important protection to litigants in Arizona state court proceedings,  
19 especially in matters involving electronic discovery. Protecting litigants from inadvertent  
20 waiver of privilege is not just a concern of the federal courts, but rather a concern that  
21 should be addressed in Arizona as well. The State Bar endorses the petitioner's proposed  
22 Rule, but suggests one modest modification in proposed Rule 502(c) to extend the Rule's  
23 coverage to disclosures made in federal proceedings where the federal court has not ruled  
24 on a waiver issue.

25 **The Need for Rule 502**

26 Federal Rule of Evidence 502 was adopted by Congress and signed into law by the

1 President in September 2008. PUB. L. 110-322. Rule 502 was adopted for two primary  
2 reasons: (A) to resolve disputes in the courts about the effect of inadvertent disclosures of  
3 communications or information protected by the attorney-client privilege or as work  
4 product; and (B) to respond to the increasing litigation costs arising out of concerns that  
5 any disclosure (however innocent or minimal) could operate as a subject matter waiver of  
6 all protected communications or information, a concern that is especially pronounced in  
7 cases involving electronic discovery. Fed. R. Evid. 502 advisory committee's note. The  
8 intent of the Federal Rule was to address these issues by providing "a predictable, uniform  
9 set of standards under which parties can determine the consequences of a disclosure of a  
10 communication or information covered by the attorney-client privilege or work-product  
11 protection." *Id.*

12 The State Bar believes that the reasons for the adoption of Federal Rule of  
13 Evidence 502 are equally applicable in Arizona state court proceedings. Disputes often  
14 arise in Arizona proceedings regarding alleged waiver of privileged communications.  
15 With the increasing proliferation of electronic information and its disclosure in discovery,  
16 the risk of inadvertent disclosure of privileged communications has steadily risen.

17 This Court has already grappled with these issues in the recent amendments to the  
18 Rules of Civil Procedure regarding electronic discovery. *See* R-06-034 (adopted as  
19 modified, effective Jan. 1, 2008). Rule 26.1(f)(2) sets forth a procedure for seeking the  
20 return of inadvertently disclosed materials, and Rule 16(b)(1)(B)(iii) includes as a subject  
21 for discussion at case management conferences "[a]ny agreements reached by the parties  
22 for asserting claims of privilege or of protection as to trial-preparation materials after  
23 production." While important, the State Bar believes those Rules are only the first steps  
24 necessary to address the issue of inadvertent disclosure.

25 Rule 26.1(f)(2) merely puts a "hold" on further use or dissemination of materials  
26 that are subject to a privilege dispute. Ariz. R. Civ. P. 26.1(f)(2) State Bar Committee

1 Note 2008 Amendment. The Rule does not address whether or not a waiver of privilege  
2 has occurred, or the scope of any waiver. *Id.* Not only does proposed Rule of Evidence  
3 502 fill this gap by addressing whether a disclosure operates as a waiver, as well as the  
4 circumstances in which a waiver extends to undisclosed communications or information,  
5 but (as explained below) the State Bar believes the approach to these issues presented in  
6 Rule 502 is sound.

7 Rule 16(b)(1)(B)(iii) acknowledges the potential need for agreements regarding the  
8 protection of privileged information. And, Rule 26(c) empowers courts to enter protective  
9 orders to protect parties from undue expense. However, even if the parties and the court  
10 reach agreement on procedures to deal with inadvertent disclosure of privileged materials  
11 in a proceeding, the binding effect of such agreements and protective orders upon third  
12 parties in other litigation remains doubtful. Proposed Rule 502 addresses this issue by  
13 setting forth expressly the impact of an inadvertent disclosure in proceedings in this State.  
14 Again, the State Bar believes the approach to these issues presented in Rule 502 is sound.

### 15 Proposed Rule 502

#### 16 **A. Proposed Rule 502(a)**

17 Proposed Rule 502(a) addresses the scope of waiver of the attorney-client privilege  
18 or work-product protection arising from the disclosure of communications or information.  
19 The proposed Rule provides that the waiver does not extend to undisclosed  
20 communications or information unless (1) the waiver was intentional, (2) the disclosed  
21 and undisclosed material concern the same subject matter, and (3) the undisclosed  
22 material ought in fairness to be considered together with the disclosed material.

23 The State Bar believes this approach sensibly balances the need to protect  
24 privileged material against the unfairness that could arise from allowing a party to  
25 selectively disclose evidence and thereby gain an unfair advantage.

26

1           **B. Proposed Rule 502(b)**

2           Proposed Rule 502(b) sets forth the circumstances in which a disclosure of a  
3 communication or information operates as a waiver. Under the proposed Rule, a  
4 disclosure does not operate as a waiver if: (1) the disclosure was inadvertent; (2) the  
5 holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder of  
6 the privilege took reasonable steps to rectify the error.

7           As explained in the Advisory Committee's Note to Federal Rule 502, this approach  
8 represents a middle ground between differing and conflicting approaches taken by various  
9 courts in resolving questions of waiver. The State Bar believes that the approach taken in  
10 proposed Rule 502(b) is a sensible approach to addressing the issue of waiver, particularly  
11 in light of the increasing impact of electronically stored information in the discovery  
12 process and the cost that is required to guard against the inadvertent disclosure of  
13 privileged materials.

14           **C. Proposed Rule 502(c)**

15           Proposed Rule 502(c) addresses the impact of out-of-state disclosures in Arizona  
16 proceedings. The proposed Rule provides that a disclosure in an out-of-state proceedings  
17 does not operate as a waiver in an Arizona proceeding if: (1) the disclosure would not  
18 have operated as a waiver if it had occurred in an Arizona proceeding; or (2) the  
19 disclosure does not operate as waiver under the law of the state where the disclosure  
20 occurred.

21           The State Bar believes this approach properly gives full faith and credit to the  
22 courts and laws of the other states, while appropriately protecting privileged  
23 communications and information in Arizona proceedings. The State Bar, however,  
24 suggests that the proposed Rule be expanded to cover disclosures that occur in federal  
25 proceedings. In such a situation, the same rule should apply: if the federal court has not  
26 ruled on the waiver issue, the disclosure would not be a waiver in the Arizona proceeding

1 if it would not be a waiver under Arizona Rule of Evidence 502 or would not be “a waiver  
2 under the law *governing the federal or state proceeding* where the disclosure occurred.”  
3 (Modification shown in italics.) A suggested revision of proposed Rule 502(c) is attached  
4 in Exhibit A.

5 **D. Proposed Rule 502(d)**

6 Proposed Rule 502(d) allows Arizona courts to order that an inadvertent disclosure  
7 in a pending action will not waive privilege or work product protection, and provides that  
8 such an order would be binding in other Arizona proceedings. The State Bar believes this  
9 provision is important because it fills a gap currently in the rules. While Arizona Rule of  
10 Civil Procedure 16(b)(1)(B)(iii) authorizes a court to enter an order “adopting any  
11 agreement the parties reach” regarding privilege waiver, the rule “does not provide the  
12 court with authority to enter such an order without party agreement.” Ariz. R. Civ. P. 16,  
13 State Bar Committee Note 2008 Amendment. If adopted, proposed Rule 502(d) (like the  
14 federal rule) would give the court the power to enter a “nonwaiver” order irrespective of  
15 whether all the parties agree to it. The order’s binding effect in other proceedings also is  
16 of particular importance because allegations of waiver may arise not only in the  
17 proceeding in which a disclosure occurs, but also potentially in other proceedings  
18 involving third parties. The proposed Rule ensures that if the court handling the  
19 proceeding determines that an inadvertent disclosure does not give rise to waiver that  
20 determination will apply in other Arizona proceedings.

21 **E. Proposed Rule 502(e)**

22 Proposed Rule 502(e) provides that agreements reached between parties regarding  
23 the effect of disclosure are not binding upon third parties unless incorporated into a court  
24 order. The State Bar believes this approach is consistent with Arizona law, and properly  
25 limits the impact of so-called “claw back” agreements<sup>1</sup> to the parties to a proceeding

26 <sup>1</sup> See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 & n.81 (S.D.N.Y. 2003), for a discussion regarding claw back agreements.

1 unless incorporated into a court order, while at the same time authorizing courts to  
2 approve claw back agreements or other safeguards where appropriate.

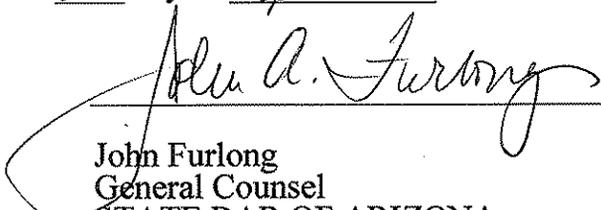
3 **F. Proposed Rule 502(f)**

4 Proposed Rule 502(f) clarifies that the proposed Rule applies only to the attorney-  
5 client privilege and work-product protection, as those protections exist under Arizona law.  
6 The Rule does not apply to other privileges, such as the privilege against self-  
7 incrimination.

8 **Conclusion**

9 The State Bar of Arizona respectfully recommends the adoption of proposed Rule  
10 of Evidence 502 with the modifications in proposed Rule 502(c) shown in Exhibit A.

11 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of April 2009.

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14 \_\_\_\_\_  
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20 Electronic copy filed with the  
21 Clerk of the Supreme Court of Arizona  
22 this 20<sup>th</sup> day of April 2009.

23  
24 by: Kathleen Lundgren  
25  
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# **EXHIBIT A**

