# MEMORANDUM

To: Hon. Edward E. Leineweber, Chair
of the Evidence & Civil Procedure Committee
of the Wisconsin Judicial Council

From: Committee Member Bill Gleisner

Date: November 24, 2008

Re: Comparative Analysis of Federal Rule 502 &
*Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57

## Introduction

During the November 21, 2008 meeting of the Evidence and Civil Procedure Committee of the Judicial Council, you asked that I provide a short memorandum comparing recently adopted USCS Fed Rules Evidence R. 502 [Federal Rule 502] and *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust,* 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794. The purpose was to provide guidance to the Committee as to whether it should recommend to the Judicial Council the adoption of a Wisconsin rule comparable to Federal Rule 502. After extensive research, I have concluded that this is not a simple task that will lend itself to the production of a short memorandum. However, I will provide herein a short summarize of my research in support of my conclusion that the adoption of a Wisconsin rule comparable to Federal Rule 502 would in effect constitute a significant lessening of the protections provided for inadvertent disclosure of attorney client privileged materials embodied in the *Harold Sampson* decision.

## The Genesis of Federal Rule 502

Federal Rule 502[1] is much more that a formulation of a technical rule by the United States Judicial Conference. Unlike other amendments to the federal rules of practice, procedure and evidence that take effect automatically unless Congress acts affirmatively to modify, defer, or reject it, Federal Rule 502 is a " rule creating, abolishing, or modifying an evidentiary privilege [and] shall have no force or effect unless approved by Act of Congress." See 28 U.S.C. § 2074(b). In fact, Federal Rule 502 is more unique than most rules because its genesis actually is much more similar to an economic regulation than a rule of evidence. Federal Rule 502 was initially the result of a request from the Chair of the House Committee on the Judiciary to the Judicial Conference of the United States.[2]

There were a number of concerns that led to the development of Federal Rule 502, but as will be demonstrated in the next section there was concern that the fear of inadvertent disclosure of confidential information was forcing exorbitant expenses upon corporate America. Thus, Federal Rule 502 was as much the product of Congressional action as it was the result of the scholarly concerns of the United States Judicial Conference.

After it was acted upon by the Judicial Conference, it was proposed to Congress in late 2007. It was based on Senate Bill 2450 in the 110th

[1] It is not correct to cite this new rule of evidence as 28 USC §502. Following that citation will take you to a completely unrelated federal rule governing court seals. The correct citation in Lexis is: USCS Fed Rules Evidence R. 502

[2] October 2008 “The Third Branch,” official newsletter of the federal courts, located at http://www.uscourts.gov/ttb/2008-10/index.cfm.

Congress and was co-sponsored by Senators Leahy, Specter and Graham. It moved through Congress to the President's Desk in very short order.[3]

**The Reasons for the Adoption of Federal Rule 502**

In terms of whether Wisconsin should consider the adoption of a counterpart rule to Federal Rule 502, it is important to understand the evil Federal Rule 502 was designed to correct. First, as noted, Federal Rule 502 really originated with Congress. According to the April 12-13, 2007 Minutes of the Judicial Conference's Advisory Committee on Evidence Rules ["Advisory Committee"]:

> The Chair of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate a rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Evidence Rules Committee complied with this request and prepared a draft rule to address waiver of privilege and work product — a proposed Rule 502. [4]

In fact, any consideration of a possible counterpart rule in Wisconsin should begin with a careful study of the April 2007 Advisory Committee Minutes and that is why I am forwarding an electronic copy of those minutes along with this memorandum. The Advisory Committee Minutes

[3] According to the 110 Bill Tracking Report for S. 2450 (Lexis 2008), Congressional action on Federal Rule 502 was as follows:

> Introduced in the Senate, December 11, 2007
> Reported in the Senate, February 25, 2008
> Considered in the Senate, February 27, 2008
> Passed in the Senate, February 27, 2008
> Considered in the House, September 8, 2008
> Passed in the House, September 8, 2008
> Passed both chambers (cleared for the President), September 8, 2008
> Presented to the President, September 11, 2008
> Became Public Law (P.L. 110-322), September 19, 2008

contain a wealth of insight into what is the equivalent of the legislative history of Federal Rule 502, including the following basic commentary as to why Federal Rule 502 was necessary:

> At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that 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. 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. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, or even a waiver of the document disclosed, then the discovery process could be made less expensive. … Another concern considered by the Committee the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product.[5]

There were many reasons why Federal Rule 502 needed to be adopted because, make no mistake about it, the federal common law governing waiver of the attorney client privileged materials was particularly draconian.[6] This was the case even if the disclosure was inadvertent[7] or

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[4] April 12-13 Advisory Committee on Evidence Rules of the United States Judicial Conference. A copy of this lengthy committee report accompanies the electronic version of this memorandum.

[5] *Id.*

[6] *See, e.g., Christman v. Brauvin Realty Advisors, Inc.,* 185 F.R.D. 251, 255 (N.D.Ill.1999) (attorney-client privilege can be waived by client's sharing information with third parties; likewise, client can waive privilege by producing similar documents in response to discovery request); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1416 (Fed.Cir.1997) (when attorney-client privilege has been waived, whatever the subject matter of the waiver, privilege is gone).

[7] *See Vellone v. First Union Brokerage Services, Inc.,* 203 F.R.D. 231, 235 (D.Md.2001) (where defendants and their accountants failed to describe the nature of documents they claimed were protected by state accountant-client privilege in compliance with Rule 26(b)(5), and thus failed to demonstrate that any of the materials were subject to the privilege; court would order the production of all the requested the requested documents without any limitation based on confidentiality); *Lohrenz v. Donnelly*, 187 F.R.D. 1 (D.D.C.1999) (plaintiff required [continued]

otherwise completely innocent.[8] The issue of inadvertent disclosure became especially serious when dealing with electronic discovery.[9]

**The Effect of Federal Rule 502**

Federal Rule 502 only addresses issues of *inadvertent* disclosure of confidential information and is particularly well suited to undo the adverse rules existing on the federal level where electronic discovery is concerned. Prior to Federal Rule 502, parties had to enter into "claw back" agreements to protect against the inadvertent disclosure of confidential information during electronic discovery.[10]

Federal Rule 502 is not a "get out of jail free card" for someone who produces confidential information. There is nothing in Federal Rule 502 that specifies that the privilege belongs only to the client. An attorney can

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to produce documents allegedly protected by work product privilege where plaintiff failed to produce privilege log to court or to provide information regarding withheld documents).

[8] *See* Redgrave & Nimsger, Electronic Discovery and Inadvertent Productions of Privileged Documents, Federal Lawyer, July 2002, at 37, 39. *See, e.g., See Koch Materials Co. v. Shore Slurry Seal, Inc*., 208 F.R.D. 109, 118-19 (D.N.J.2002) (inadvertent disclosure of handwritten unsigned documents authored by plaintiff's in-house counsel waived attorney-client privilege with respect to documents); Likewise *Master Funding v. Telebank*, 206 F.R.D. 298, 303-04 (D. Utah 2002) (party that produces privileged documents in response to discovery request thereby waives attorney-client and work product privileges if it intended to disclose documents, but was merely unaware of legal consequences or nature of document produced).

[9] *See United States v. Keystone Sanitation Co.*, 885 F.Supp. 672 (M.D.Pa.1994) (attorney-client privilege waived because two e-mails had been inadvertently disclosed in a massive production of documents). According to a preliminary report of a survey by the American Bar Association's Digital Evidence Project (a working group of the Section of Science and Technology Law), about 12 percent of respondents reported privileged information produced during the production of electronic evidence. See Preliminary Report, ABA Digital Evidence Project Survey on Electronic Discovery Trends and Proposed Amendments to the Federal Rules of Civil Procedure, www.abanet.org/scitech/digitalevidencesurvey.pdf (Feb.2005).

[10] *See Zubulake v. UBS Warburg*, 216 F.R.D. 280 (S.D.N.Y.2003). The *Zubulake* court also cited Comment 10a from the then existing Sedona Principles, which provided: "Because of the large volumes of documents and data typically at issue in cases involving production of electronic data, courts should consider entering orders protecting the parties against any waiver of privileges or protections due to the inadvertent production of documents and data. . . . Such an order should provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege, that the privileged document should be returned (or there will be a [continued]

waive the privilege and must take great care to avoid waiver. According Federal Rule 502(b):

> When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Before proceeding to the existing Wisconsin on waiver, it is worth noting that it is entirely appropriate to consider the wisdom of adopting a Wisconsin counterpart to Federal Rule 502 since subsections (c)[11] and (f)[12] of the rule makes it clear that the rule is to have an effect on state court proceedings.

**The More Stringent Wisconsin Common Law Rule**

First, any Wisconsin consideration of Federal Rule 502 must begin with the recognition that Federal Rule 502 governs *inadvertent* disclosures. Second, any Wisconsin consideration of Federal Rule 502 must take account of the very stark difference between Wisconsin Common Law and the federal Common Law supplanted by Federal Rule 502.

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certification that it has been deleted), and that any notes or copies will be destroyed or deleted. Ideally, an agreement or order should be obtained prior to any production.)."

[11] When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred.

[12] Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision. The effect on state proceedings is far from accidental. The Advisory Committee Minutes make it clear that the effect on state proceedings was deemed to be of the utmost importance in order to afford the greatest protection to the principles covered by Federal Rule 502. *See* The April 2007 Advisory Committee Minutes, pp. 4-8.

Wisconsin has a far broader rule covering both inadvertent and intentional disclosures of confidential information than that contained in Federal Rule 502. Based on the following discussion, I am of the opinion that if the Council does anything in regard to the subject matter of Federal Rule 502 it needs only to recommend the codification of rule laid down in *Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust,* 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794.

In *Sampson,* an attorney disclosed confidential information. The disclosure was not inadvertent. The attorney intended to disclose the documents in question because he failed to recognize their confidential nature. 2004 WI 57, ¶¶7 & 12. According to the Supreme Court in *Sampson,* its decision was based on four Wisconsin rules.[13] In my opinion, the decision in *Sampson* turns on the long tradition in Wisconsin that the attorney client privilege belongs to the client.[14]

The Supreme Court explicitly rejects the standards applicable to "inadvertent disclosures" in other jurisdictions "[b]ecause the attorney intended to release the documents in issue…"[15] The Supreme Court rejected the Court of Appeals decision that because the clients delegated

[13] 2004 WI 57, ¶17: "Four rules govern our decision on this issue: Wis. Stat. § (Rule) 905.03 (1)(d) (defining 'confidential'); Wis. Stat. § (Rule) 905.03(2) (general rule of attorney-client privilege); Wis. Stat. § (Rule) 905.03(3) (who may claim the privilege); and Wis. Stat. § (Rule) 905.11 (waiver of the privilege by voluntary disclosure)."

[14] 2004 WI 57, ¶22: In keeping with the text of the statute, case law has declared that the attorney-client privilege belongs to the client. *See, e.g., Lane v. Sharp Packaging Sys., Inc*., 2002 WI 28, P33, 251 Wis. 2d 68, 640 N.W.2d 788; *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 605, 150 N.W.2d 387 (1967); *Borgwardt v. Redlin*, 196 Wis. 2d 342, 355, 538 N.W.2d 581 (Ct. App, 1995); *Swan Sales Corp. v. Jos. Schlitz Brewing Co*., 126 Wis. 2d 16, 31-32, 374 N.W.2d 640 (Ct. App. 1985)

management of the discovery procedure to the attorney and because the attorney is the agent of the clients, the attorney's voluntary disclosure of the privileged documents during pretrial discovery constituted waiver.[16] The Supreme Court reached back to the seminal decision of *State ex rel. Dudek v. the Circuit Court* which held "an attorney may not waive any objections to discovery which are based upon the attorney-client privilege. Only the client can waive these objections."[17]

There is no doubt that the decision in *Sampson* is not dicta; it is very carefully drafted and full account is taken of contrary authority.[18]

## Conclusion

I see no reason to suggest or advocate the adoption of Federal Rule 502 in Wisconsin, unless the Council is prepared to directly contradict the Supreme Court. It seems to me that a rule far broader than Federal Rule 502 can be derived from the *Sampson* decision that will afford far more protection against waiver of confidential information. If one were to codify

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[15] 2004 WI 57, ¶28.

[16] 2004 WI 57, ¶30. In fact, as noted by the Supreme Court, the holding of the Court of Appeals in effect adopted the strict rule adopted by several courts in inadvertent disclosure cases, citing two federal decisions. *Id.* at ¶30, n. 16. It is worth noting that Federal Rule 502 adopts the so-called middle rule on the inadvertent disclosure of privileged material. *See April 2007 Advisory Committee Minutes*: "The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error." *Id.* at p. 13.

[17] 2004 WI 57, ¶33.

[18] *Id.* ¶36, where the Supreme Court states "although we acknowledge that under agency law ordinarily a litigant is bound by the acts of counsel during the representation, … In [*Johnson v. Allis Chalmers*, 162 Wis. 2d 261] we concluded that the decision whether to impute the attorney's conduct to the client and sanction the client for the attorney's conduct was within the circuit court's discretion." The Supreme Court then cites Comment b to §26, 1 Restatement 3rd of the Law Governing Lawyers (2000) that "in practice, however, clients are sometimes unable to control their lawyer's conduct and accordingly may sometimes be excused from the consequences of their lawyer's behavior when that can be done without seriously harming others." *Id.* §36, n. 25.

*Sampson*, I think the following language from that decision would do nicely:

> A lawyer, without the consent or knowledge of a client, cannot waive the attorney-client privilege by voluntarily producing privileged documents (which the attorney does not recognize as privileged) to an opposing attorney in response to a discovery request. Only the client can waive the attorney-client privilege under Wis. Stat. § (Rule) 905.11 regarding attorney-client privileged documents.

To the extent federal agency or court proceedings intersect with Wisconsin state court proceedings, it seems to me that Federal Rule 502(c) and (f) control. However, even there the rule of *Sampson* will afford far more protection that the mandate of Federal Rule 502.

Respectfully submitted to the Evidence & Civil Procedure Committee of the Judicial Council this 24th day of November, 2008:

Bill Gleisner