

**CONFERENCE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS**

**Resolution 1
Regarding Waiver of Attorney-Client Privilege and Work Product**

WHEREAS, policy leaders in both the United States Courts and the Congress of the United States have publicly expressed concerns about the common law of waiver of attorney-client privilege or work product in situations such as where there has been an inadvertent or minuscule disclosure by a party to litigation or by a person or corporation in response to a government investigation; and

WHEREAS, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States [?Federal Rules Committee?] has undertaken the promulgation of a new Federal Rule of Evidence 502 [?Rule 502?] governing certain disclosures of information protected by the attorney-client privilege that are inadvertent or occur in the course of investigative or regulatory proceedings; and

WHEREAS, proposed Rule 502 is commendably designed to reduce the high costs of privilege reviews in discovery intensive litigation, particularly where electronic records are involved, by protecting against the forfeiture of privilege where a disclosure is the result of innocent mistake, by agreement of the parties to litigation, or by virtue of cooperation with government investigation; and

WHEREAS, the Federal Rules Committee has already revised previous drafts of proposed Rule 502 to address federalism concerns by, for example, removing a provision that would have extended protection against forfeiture of privilege in cases of inadvertent disclosure in state court litigation; and

WHEREAS, current proposed Rule 502(b) may conflict with principles of federalism by providing that inadvertent disclosures in federal litigation do not operate as a waiver in state proceedings; and

WHEREAS, current proposed Rule 502(d) may also conflict with principles of federalism by providing that confidentiality orders by federal courts would bind persons or entities in state court proceedings; and

WHEREAS, the public policy in some states with respect to forfeiture of privilege after inadvertent disclosure or pursuant to confidentiality orders may differ from what would be mandated by proposed Rule 502; and

WHEREAS, principles of comity and federalism would suggest that changes to attorney-client privilege policy should be determined in and through state courts and legislatures which are best situated to determine and control the impact of reform within their own communities; and

WHEREAS, proposed Rule 502 is the subject of a six-month public comment period ending approximately in February 2007;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators engage in a dialogue with the appropriate Rules Committees of the Judicial Conference to share the federalism concerns of the state judiciary with proposed Rule 502.

Adopted as proposed by the CCJ Board of Directors at the 58th Annual Meeting on August 2, 2006.