

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

Proposed Amendment of Pa.R.E. 501 and
Proposed New Pa.R.E. 502

The Committee on Rules of Evidence is soliciting comments concerning a proposed recommendation to the Supreme Court of Pennsylvania to amend Pennsylvania Rule of Evidence 501 and to adopt new Pennsylvania Rule of Evidence 502, as more fully discussed in the accompanying Publication Report.

We request that interested persons submit suggestions, comments, or objections concerning this proposal to the Committee through counsel:

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no later than February 13, 2015.

By the Committee on Rules of Evidence,

SAMUEL G. ENCARNACION, ESQ. – CHAIR

Publication Report

Proposed Amendment of Pa.R.E. 501 and Proposed New Pa.R.E. 502

Attorney-Client Privilege & Waiver

The Committee on Rules of Evidence is publishing for public comment a proposed amendment to Pennsylvania Rule of Evidence 501 and a proposed new Pennsylvania Rule of Evidence 502. These rules represent an intention to codify the law concerning the attorney-client privilege, and waiver thereof, in Pennsylvania.

“The attorney-client privilege is deeply rooted in our common law and can be traced to the reign of Elizabeth I, where it was already unquestioned.” *Commonwealth v. Maguigan*, 511 A.2d 1327 (1986) (citing 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). It has been described as “the most revered of our common law privileges,” the rationale for which:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged; - that the attorney shall not be permitted, without the consent of his, - and much less will he be compelled—to reveal or disclose communications made to him under such circumstances. 2 Mechem on Agency, 2d Ed., § 2297.

Slater v. Rimar, Inc., 462 Pa. 138, 148, 338 A.2d 584, 589 (1975).

Presently, the rules of testimonial privilege afforded to attorney-client communications in Pennsylvania are an amalgamation of statutory and common law. See, e.g., 42 Pa.C.S. §§ 5916 & 5928; *Commonwealth v. Chimel*, 738 A.2d 406, 414 (Pa. 1991) (attorney-client privilege rooted in common law and embodied in § 5916); *Gillard v. AIG*, 15 A.3d 44 (Pa. 2011) (interpreting § 5928 to include derivative protection); *Commonwealth v. Hutchinson*, 434 A.2d 740 (Pa. Super. 1981) (privilege extends to agent of attorney and survives the termination of the attorney-client

relationship); *In re Condemnation by City of Philadelphia in 16.2626 Acre Area*, 981 A.2d 391 (Pa. Cmwlth. 2009) (privileged applicable to “joint defense”).

By no means exhaustive, these piecemeal laws concerning the attorney-client privilege have resulted in statutes hopelessly out-dated with no collective pronouncement on the topic. As observed in *Gillard v. AIG Insurance Company*, 15 A.3d 44, 56 (Pa. 2011), “Pennsylvania courts have been inconsistent in expressing the scope of the attorney-client privilege.” This codification is intended to assist the attorney and client in predicting with some degree of certainty whether particular discussions will be protected because an uncertain privilege is little better than no privilege at all. *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 371 (Pa. 2013) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)). The Committee proposes to codify the existing law concerning attorney-client privilege into Article V of the Rules of Evidence to provide the bench and bar with authoritative, accessible, concise, and unified information on the subject matter in a single source.

The proposed Rule 502 is based, in part, on Uniform Rule of Evidence 502 (“Lawyer-Client Privilege”), drafted by the National Conference of Commissioners on Uniform State Laws. While the proposed Pennsylvania Rule of Evidence follows its contours, the rule also reflects Pennsylvania precedent. Informatively, approximately 23 states and territories have adopted some version of Uniform Rule of Evidence 502 or proposed (and rejected) Federal Rule of Evidence 503. David M. Greenwald, 1 Testimonial Privileges §1:6 (3rd ed.)

Within this proposal, the Committee has endeavored to neither abridge, enlarge, nor modify the attorney-client privilege, as it now exists. See Pa. Const. Art. V, § 10(c). In its rulemaking activities, the Committee engaged in a two-step process. First, it examined each provision of the Uniform Rule and Pennsylvania law and practice to determine whether there was a basis in Pennsylvania law to include each provision in the proposed rule. Where no basis existed, the particular provision was excluded from the proposed rule, “reserved” in the rule text to maintain parallel construction with the Uniform Rule, and mentioned in the Comment.

Next, where such a basis did exist, the Committee re-examined the precise language of the Uniform Rule and made conforming changes, if necessary, to make the proposed rule consistent with Pennsylvania law. As is the practice for new Pennsylvania Rules of Evidence, the *Comments* to the rules include citations to precedential and persuasive authorities, as well as recognized commentators, to demonstrate **consistency** between the Rule text and the current law. The term, “consistent,” is used in the *Comments* to indicate an accord or compatibility between the rule and Pennsylvania law.

The Committee intends to recommend that Pa.R.E. 502 operate to codify the current body of law and be considered authoritative henceforth. This is necessary to unify the piecemeal body of law that comprises today's attorney-client privilege, exceptions, and waiver thereof. To do so, the Committee proposes amending Pa.R.E. 501 to give force and effect to Pa.R.E. 502. In designing the scope of the amendment to Pa.R.E. 501, the Committee was cognizant to limit it only to the attorney-client privilege and not to all privileges in general. Nothing in the proposed language of Pa.R.E. 501 is intended to preempt future legislative enactments on this topic, although the statutory pronouncement on attorney-client privilege has remained relatively static since 1887.

The Committee has also reviewed Federal Rule of Evidence 502 concerning attorney-client privilege, especially the areas of intentional and inadvertent waiver. The rule was intended to lessen the exhaustive and expensive reviews conducted to prevent inadvertent disclosures of privileged materials and "extravagant claims of privilege" brought on by a fear of waiver through disclosure.¹ Report of Senate Committee on the Judiciary. S. Rep. no. 264 at p. 2 (2008). The rule:

[L]imit[s] the consequences of inadvertent disclosure, thereby relieving litigants of the burden that a single mistake during the discovery process can cost them the protection of a privilege. It provides that if there is a waiver of privilege, it applies only to the specific information disclosed and not the broader subject matter unless the holder has intentionally used the privilege information in a misleading fashion. An inadvertent disclosure of privilege information does not constitute a waiver as long as the holder took reasonable steps to prevent disclosure and acted promptly to retrieve the mistakenly disclosed information.

Id. at 3. The Committee believes there is merit to crafting a similar waiver rule consonant with the case law of *Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65 (Pa. 2010) (evenly divided Court);² *Carbis Walker, LLP v. Hill, Barth and King, LLC*, 930 A.2d 573 (Pa. Super. 2007).

All comments, concerns, and suggestions concerning this proposal are welcome.

¹ Coupled with the increase in electronic discovery causing more waiver issues, "the costs of privilege review are often wholly disproportionate to the overall cost of the case." *Id.*

² The Committee recognizes that *Fleming* was affirmed by an equally divided Court; however, it appears the Court agreed on the doctrine of subject matter waiver for intentionally disclosed document, but disagreed on the application of that doctrine to the facts.