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February 14, 2007

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Pursuant to the Advisory Committee's request for comments on proposed Federal Rule of Evidence 502, we respectfully submit our views on the proposal. We understand that the American Bar Association ("ABA") is separately providing you its comments on proposed Rule 502(b) as it relates to existing ABA policy embodied in the August 2006 ABA Resolution 120D and on a proposed new subsection of FRE 502 dealing with "Effect of Disclosure of Factual Summaries of Internal Investigations."[1] We therefore do not reiterate or otherwise discuss here those same points.

Turning to the other portions of the proposed rule, we support most of them. For example:

- Rule 502(d) provides that an order by a federal court that attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the action pending before it will "govern all persons or entities in all state or federal proceedings" – even if they are not parties to the matter before the court – if the order "incorporates the agreement of the parties before the court." This is a valuable addition that would help "fill the gap" created by new Rules 16(b)(6) and 26(f)(4) of the Federal Rules of Civil Procedure ("FRCP"), which allow parties to submit their non-waiver agreements to a court for inclusion in a court order. This provision would solve the problem of the order not binding non-parties in other actions and/or jurisdictions.

- Rule 502(e) is a corollary and provides that, where the parties reach an agreement as to the effect of disclosure on the attorney-client privilege or work product protection, the agreement will bind only the agreeing parties, unless the agreement is "incorporated into a court order."

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[1] **The views expressed in this comment letter are those of the individual signatories listed at the end of the letter only. They have not been approved by the ABA House of Delegates or Board of Governors and should not be construed as representing the position of the association.** The ABA is submitting separate comment letters on proposed Federal Rule of Evidence 502(b), on other aspects of proposed FRE 502 (dealing with proposed new subsection on "Effect of Disclosure of Factual Summaries of Internal Investigations"), and on Federal Rule of Criminal Procedure 29. In addition, on January 29, 2006, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure

There are, however, several provisions in the current draft of the Rule that we believe merit further consideration by the Advisory Committee.

I. Selective Waiver

Proposed Rule of Evidence 502(c) provides that

> In a federal or state proceeding, a disclosure of a communication covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

Although we note that the ABA has not taken a position on proposed FRE 502(c) or the concept of selective waiver in general, we share the broader concern – often expressed by the ABA – that the practice of governmental agencies pressuring parties to waive their attorney-client privilege by making such waiver the price of being given leniency or "credit" by the agency is a serious abrogation of the fundamental principles that underlie the privilege. The consequences of refusing such a demand can be so severe – potentially amounting to jeopardizing the very existence of a corporate entity or an individual's freedom – that, as a practical matter, the pressure to accede to the government's demand for waiver may be impossible to withstand. We are concerned that support for – or adoption of – proposed FRE 502(c) would be construed as tacit approval of the governmental practice of demanding waiver. We also are concerned that the existence of a selective waiver provision such as this would be relied on by the government as further support for its practice to request or insist on a waiver, since the provision would limit the potentially adverse consequences of such a waiver.

We also are concerned with the suggestion in the Committee Note that a selective waiver rule would "further[] the important policy of cooperation with government agencies" and "maximize[] the effectiveness and efficiency of government investigations." We believe the Committee should take care not to imply that coercive demands for waiver of parties' attorney client privilege can be justified in the name of "efficiency."

We recognize that the U.S. Department of Justice's December 12, 2006 "McNulty Memorandum" ("Principles of Federal Prosecution of Business Organizations") reframes the Department's previous policy (set forth in the January 20, 2003 "Thompson Memorandum") on requiring business entities to disclose the results of their privileged internal investigations. It retains some of the features of the Thompson Memorandum that permit a federal prosecutor to ask for a waiver, but limits it to situations "when there is a legitimate need for the privileged information to fulfill . . . law enforcement obligations." It is unclear how the

McNulty Memorandum will be applied. But it is clear that, even under the revised policy, the government continues to assert that it can appropriately demand a waiver of a party's attorney-client privilege. Moreover the McNulty Memorandum appears to be an effort to block or temper the passage of a bill introduced by Senator Specter on December 7, 2006, entitled the Attorney-Client Privilege Protection Act, that would forbid federal prosecutors and civil enforcement lawyers from requesting any communications protected by attorney-client privilege or any attorney work-product. We do not know, of course, whether the Specter bill, which was reintroduced on January 4, 2007 as S. 186 and seems to have widespread support (at least outside of federal criminal and regulatory agencies), will be enacted and, if so, in what form.

Accordingly, we believe that, to the extent the government continues – or is permitted to continue – the practice of demanding or seeking waiver of the privilege, this proposed revision provides important countervailing protection to the party subjected to the coercive demand or request. There also may be instances when a client determines that truly voluntary disclosure of otherwise privileged information is in its interests. As the proposed Advisory Committee Note points out it, it can allow the government to obtain a better understanding of the client's position, as well as its view of the facts and applicable law.

We therefore urge that language be included along the following lines, preferably in the rule itself, to underscore that the amendment is not intended, and should not be interpreted, to allow a government agency to "suggest" or "request" that an entity or individual disclose privileged information for any reason:

> Nothing in this rule authorizes a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product protection.

With this addition, the proposed Rule 502(c) could be restructured slightly as follows:

> (1) In a federal or state proceeding, a disclosure of a communication covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law.
>
> (2) Nothing in this rule (A) limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law or (B) authorizes a government agency to require or request a person or entity to disclose a communication covered by the attorney-client privilege or work product protection.

II. Scope of Waiver

Proposed Rule 502(a) provides:

> In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

As the Committee Notes make clear, the proposal rejects a rule that a voluntary disclosure automatically results in a broad "subject matter" waiver. Instead, as a general matter, a voluntary disclosure would constitute a waiver only of the communication or information actually disclosed. For both attorney-client privilege and work product protections, the broader subject matter waiver, "is reserved for those *unusual situations* in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary" (emphasis added). Although we recognize that the "fairness" standard is subjective and does not lend itself to certainty and predictability, we nevertheless support the Committee's efforts to limit the scope of waiver.

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We applaud the Committee for grappling with these important issues and believe that a rule consistent with our comments above would be a significant improvement to the law in this important area. Please let us know if we can supply the Advisory Committee with any additional information or be of further assistance.

Sincerely,

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