

TESTIMONY OF JAMES K. ROBINSON  
MINI-CONFERENCE ON PROPOSED  
EVIDENCE RULE 502  
UNITED STATES JUDICIAL CONFERENCE ADVISORY  
COMMITTEE ON RULES OF EVIDENCE  
FORDHAM UNIVERSITY SCHOOL OF LAW  
APRIL 24, 2006

JUDGE SMITH, AND MEMBERS OF THE COMMITTEE, THANK YOU FOR THE INVITATION TO EXPRESS MY VIEWS ON PROPOSED RULE 502.

IT IS A PARTICULAR PLEASURE FOR ME TO APPEAR TODAY SINCE IT WAS MY HONOR TO SERVE AS A MEMBER OF THIS COMMITTEE FROM 1993 THROUGH 1998.

I COMMEND THE COMMITTEE FOR ADDRESSING THE IMPORTANT ISSUES CONCERNING THE COLLATERAL CONSEQUENCES OF DISCLOSURES BY CORPORATIONS TO THE GOVERNMENT OF OTHERWISE PROTECTED ATTORNEY CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT INFORMATION DURING THE COURSE OF GOVERNMENT INVESTIGATIONS.

I AM CURRENTLY A PARTNER IN THE BUSINESS FRAUD GROUP OF CADWALADER, WICKERSHAM & TAFT LLP, IN ITS WASHINGTON, D.C. OFFICE.

MY PRACTICE INCLUDES THE REPRESENTATION OF CORPORATIONS, AS WELL AS CURRENT AND FORMER EMPLOYEES OF CORPORATIONS, IN CONNECTION WITH CIVIL AND CRIMINAL MATTERS RELATED TO GOVERNMENT INVESTIGATIONS.

I AM ALSO SERVING (BY SELECTION OF THE DEPARTMENT OF JUSTICE AND TIME WARNER, INC.) AS THE INDEPENDENT MONITOR OF TIME WARNER'S SUBSIDIARY AMERICA ONLINE (AOL) UNDER ITS DEFERRED PROSECUTION AGREEMENT WITH THE DEPARTMENT OF JUSTICE.

MY EXPERIENCE AS A FEDERAL PROSECUTOR INCLUDES SERVICE AS THE UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MICHIGAN (1977-80) AND AS THE ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE (1998-2001).

DURING MY TENURE WITH THE CRIMINAL DIVISION I WAS INVOLVED IN THE DRAFTING AND APPROVAL OF THE DEPARTMENT'S 1999 MEMORANDUM CONCERNING FEDERAL PROSECUTION OF CORPORATIONS, KNOWN AS THE HOLDER MEMO.

FOR MANY, THE ISSUANCE OF THE HOLDER MEMO IN 1999, WITH ITS RECOGNITION THAT A CORPORATION'S WAIVER OF THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE ENTITLED THE CORPORATION TO "COOPERATION CREDIT," WAS THE EQUIVALENT OF CORPORATE AMERICA OPENING A FORTUNE COOKIE READING: "A CHANGE FOR THE BETTER HAS BEEN MADE AGAINST YOU."

MUCH HAS BEEN SPOKEN AND WRITTEN ON THE SUBJECT OF WHETHER THE HOLDER/THOMPSON MEMOS' FORMAL RECOGNITION THAT "COOPERATION CREDIT" WILL BE GIVEN TO WAIVERS OF THE ATTORNEY CLIENT PRIVILEGE AND THE PROTECTION OF THE WORK PRODUCT DOCTRINE, IS A "CHANGE FOR THE BETTER" OR NOT.

THE AMERICAN BAR ASSOCIATION, AND OTHER GROUPS, HAVE COMPLAINED THAT THE HOLDER/THOMPSON MEMOS HAVE RESULTED IN A "CULTURE OF WAIVER" THAT HAS SERIOUSLY ERODED THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE TO THE DETRIMENT OF CONSTRUCTIVE CORPORATE COMPLIANCE WITH THE LAW, BY THREATENING THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN CORPORATE EMPLOYEES AND CORPORATE LAWYERS..

PROSECUTORS, ON THE OTHER HAND, CLAIM THAT CORPORATIONS WITH SERIOUS CRIMINAL EXPOSURE THAT SEEK LENIENCY (INCLUDING NON-PROSECUTION) SHOULD BE EXPECTED TO COOPERATE FULLY WITH LAW ENFORCEMENT IN ROOTING OUT CRIMINAL CONDUCT IN THE CORPORATE RANKS, TAKING APPROPRIATE ACTION AGAINST WRONGDOERS AND ASSISTING WITH PROSECUTION OF CORPORATE EMPLOYEES IN APPROPRIATE CASES.

TO PROSECUTORS "FULL COOPERATION" OFTEN MEANS THE DISCLOSURE OF INFORMATION PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.

BOTH SIDES OF THIS DEBATE HAVE LEGITIMATE ARGUMENTS. IN MY VIEW THERE IS NO CLEARLY RIGHT OR WRONG VIEW OF THE MATTER. MUCH DEPENDS ON THE PARTICULAR CIRCUMSTANCES AND SCOPE OF A WAIVER.

IT CANNOT BE SERIOUSLY DISPUTED, HOWEVER, THAT THE RECENT TREND TOWARD CORPORATE INTERNAL INVESTIGATIONS, COUPLED WITH VOLUNTARY DISCLOSURES TO THE GOVERNMENT, HAS PRODUCED MANY IMPORTANT PROSECUTIONS AND CONVICTIONS, AND HAS RESULTED IN

SUBSTANTIALLY IMPROVED COMPLIANCE PROGRAMS IN MANY CORPORATIONS, BOTH DIRECTLY AND INDIRECTLY THROUGH THE DETERRENCE OF CRIMINAL CONDUCT IN THE CORPORATE SETTING.

IT IS ALSO TRUE THAT MANY CORPORATIONS AND THEIR STAKEHOLDERS HAVE BEEN SPARED CRIPPLING CRIMINAL PROSECUTIONS AS A DIRECT RESULT OF THEIR COOPERATION, INCLUDING WAIVERS OF THE PRIVILEGE AND THE PROTECTION OF THE WORK PRODUCT DOCTRINE . IN THE PROCESS, THE CORPORATE CULTURE OF COMPLIANCE WITH THE LAW HAS BEEN SIGNIFICANTLY IMPROVED IN MANY CORPORATIONS.

THERE IS, HOWEVER, A LEGITIMATE DEBATE ABOUT WHETHER THE BENEFITS TO THE PUBLIC OF THIS NEW APPROACH OUTWEIGHS THE SUBSTANTIAL ECONOMIC COSTS OF COMPLIANCE AND THE EROSION OF THE TRADITIONAL PROTECTIONS OF THE CORPORATE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

SOME ADVOCATES ON EACH SIDE OF THE DEBATE HAVE OVER OR UNDER STATED THE BENEFITS AND THE COSTS OF THIS NEW APPROACH TO CORPORATE CRIMINAL AND CIVIL INVESTIGATIONS.

THERE HAS BEEN MUCH “MOTHERHOOD AND APPLE PIE” TALK ABOUT THE LONG HISTORY AND CRITICAL IMPORTANCE OF THE ATTORNEY CLIENT PRIVILEGE IN INSURING COMPLIANCE WITH THE LAW BY CORPORATIONS.

IN THE PROCESS, HOWEVER, SOMETIMES THE CRITICS OF THIS NEW APPROACH FAIL TO ACKNOWLEDGE THAT THE SETTING OF THE **CORPORATE** ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE DOES NOT

REACH BACK IN HISTORY AS FAR AS IT DOES FOR INDIVIDUALS, AND THE SCOPE AND CONTOURS OF THESE PROTECTIONS ARE DIFFERENT IN IMPORTANT RESPECTS FROM CASES WHERE THE CLIENT IS AN INDIVIDUAL.

CORPORATIONS, UNLIKE INDIVIDUALS, FOR EXAMPLE DO NOT ENJOY THE CONSTITUTIONAL PROTECTION AGAINST SELF-INCRIMINATION. THUS, THE CONSTITUTIONAL UNDERPINNINGS THAT SUPPORT THESE PROTECTIONS FOR INDIVIDUALS DO NOT APPLY IN THE CORPORATE CONTEXT.

CORPORATIONS ARE CREATURES AUTHORIZED TO EXIST BY THE STATE. THEIR OWNERS ARE ACCORDED SIGNIFICANT BENEFITS BY DOING BUSINESS THROUGH THE VEHICLE OF A CORPORATION, INCLUDING PROTECTION FROM UNLIMITED LIABILITY BEYOND THE RESOURCES OF THE CORPORATION ITSELF.

THE ATTORNEY CLIENT PRIVILEGE PROTECTS THE INDIVIDUAL EMPLOYEES WHO CONFIDE IN THE CORPORATION'S LAWYERS ONLY AS LONG AS THE CORPORATION CONTINUES TO INVOKE THE PRIVILEGE. EMPLOYEES HAVE NO STANDING TO OBJECT TO A WAIVER BY THE CORPORATION.

AS A RESULT, IT IS NOT UNREASONABLE THAT THE RIGHTS AND PRIVILEGES OF CORPORATIONS ARE VIEWED DIFFERENTLY FROM THOSE OF CLIENTS WHO ARE REAL PEOPLE ENGAGED IN PROTECTED COMMUNICATIONS WITH THEIR LAWYERS FOR THE PURPOSE OF SECURING LEGAL ADVICE.

THE RIGHTEOUS INDIGNATION THAT WOULD FLOW IF THE DEPARTMENT OF JUSTICE WERE TO INSTITUTE A POLICY OF WITHHOLDING COOPERATION CREDIT FROM INDIVIDUALS FOR FAILURE TO WAIVE PRIVILEGES SIMPLY DOES NOT HAVE EQUAL FORCE WHEN APPLIED IN THE CORPORATE SETTING.

ON THE ISSUE OF PROSECUTING CORPORATIONS GENERALLY, AND GIVING COOPERATION CREDIT FOR WAIVER OF PRIVILEGES, THERE ARE SERIOUS COMPETING POLICY CONSIDERATIONS THAT MUST BE WEIGHED.

THE CURRENT ISSUE OF THE AMERICAN CRIMINAL LAW REVIEW CONTAINS AN ARTICLE URGING THAT THE ENTIRE QUESTION OF INDICTING CORPORATIONS SHOULD BE REVISITED IN THE WAKE OF THE ARTHUR ANDERSON PROSECUTION. SEE AINSLIE, INDICTING CORPORATIONS REVISITED: LESSONS OF THE ARTHUR ANDERSEN PROSECUTION, 43 AM CRIM L. REV 107 (2006).

THE DEPARTMENT OF JUSTICE, OF COURSE, HAS TAKES A VERY DIFFERENT VIEW ABOUT THE PROPRIETY OF PROSECUTING CORPORATIONS — ALTHOUGH THE CURRENT TREND IS TO REFRAIN FROM PROSECUTION OF THE CORPORATION—PROVIDED THE CORPORATION FULLY COOPERATES, AND THAT FULL COOPERATION OFTEN INVOLVES SOME FORM OF PRIVILEGE WAIVERS.

UNTIL THE DEBATE ABOUT WHETHER TO PROSECUTE CORPORATIONS IS RESOLVED, HOWEVER, THE REALITY IS THAT CORPORATIONS DO HAVE SUBSTANTIAL CRIMINAL EXPOSURE FOR THE ACTS OF ITS EMPLOYEES IN FURTHERANCE OF THE CORPORATION'S INTERESTS—THAT IS SO EVEN IF THE EMPLOYEE'S ACTIONS CONFLICT WITH THE CORPORATION'S GENERAL POLICIES OR CODES OF CONDUCT.

UNLESS THE JUSTICE DEPARTMENT CHANGES ITS POLICY WITH RESPECT TO CORPORATE PROSECUTION, THERE WILL CONTINUE TO BE A POWERFUL

INCENTIVE FOR FULL COOPERATION BY CORPORATIONS, INCLUDING WAIVING THE PRIVILEGE AND THE WORK PRODUCT PROTECTION.

EVEN IF CRIMINAL PROSECUTIONS WERE TO CEASE, PUBLIC COMPANIES WOULD CONTINUE TO HAVE A POWERFUL INCENTIVE TO FULLY COOPERATE WITH AGENCIES LIKE THE SEC, INCLUDING PRIVILEGE WAIVERS.

LIKE IT OR NOT, THE DAYS OF HOPING NEVER TO GET CAUGHT, OR SUCCESSFULLY CIRCLING THE WAGONS AND INSISTING ON THE PROTECTION OF THE ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE IN RESPONSE TO GOVERNMENT INVESTIGATIONS, ARE OVER.

IN LIGHT OF THIS REALITY, THE PROPOSAL BEFORE THE COMMITTEE TO LIMIT THE COLLATERAL COSTS OF A WAIVER IN THE CONTEXT OF A GOVERNMENT PROSECUTION IS A VERY APPROPRIATE MEASURE THAT WILL PROVIDE SOME PROTECTION FOR THESE IMPORTANT PROTECTIONS WHILE ELIMINATING A BARRIER TO CORPORATE COOPERATION WITH GOVERNMENT INVESTIGATIONS..

THE SELECTIVE WAIVER RULE RECOGNIZES THAT, AS A PRACTICAL MATTER, A DISCLOSURE OF PROTECTED INFORMATION IN THE CONTEXT OF A GOVERNMENT INVESTIGATION IS NOT TRULY "VOLUNTARY" IN THE MANNER THAT HAS TRADITIONALLY RESULTED IN A WAIVER OF THE PROTECTION OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

INSTEAD, THE DISCLOSURE IS FORCED BY THE STAKES INVOLVED AND CONSTITUTES A MUTUALLY BENEFICIAL SHARING OF INFORMATION BETWEEN

THE CORPORATION AND THE GOVERNMENT THAT SERVES THE PUBLIC INTEREST.

THE INTERESTS OF THE CORPORATION'S SHAREHOLDERS ARE ALSO SERVED BY RECEIVING THE BENEFITS OF AVOIDING CRIMINAL PROSECUTION AND MINIMIZING THE ADVERSE CONSEQUENCES OF A GOVERNMENT ENFORCEMENT ACTION.

ADVANCING THE MUTUAL GOALS OF THE GOVERNMENT AND THE CORPORATION, IN THE PUBLIC INTEREST, HOWEVER, IS SUBSTANTIALLY IMPEDED BY THE CURRENT WAIVER REGIME THAT INSISTS THAT DISCLOSURES TO THE GOVERNMENT CONSTITUTE A WAIVER TO THE WORLD, INCLUDING PRIVATE ADVERSARIES OF THE CORPORATION, OF THE PROTECTIONS OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE.

THE PERSUASIVE CASE FOR RECOGNITION OF THE SELECTIVE WAIVER RULE WAS WELL STATED BY SIXTH CIRCUIT CHIEF JUDGE DANNY BOGGS IN HIS DISSENTING OPINION IN *IN RE COLUMBIA/HCA HEALTHCARE*, 293 F.3D 289 (6<sup>TH</sup> CIR. 2002).

SOME MAY OPPOSE THE SELECTIVE WAIVER RULE FOR THE SAME REASONS THAT WERE ADVANCED TO OPPOSE THE SENTENCING GUIDELINE RECOGNITION OF "COOPERATION CREDIT" FOR PRIVILEGE WAIVERS—THAT IT WILL SOMEHOW PROVIDE OFFICIAL SUPPORT FOR A "CULTURE OF WAIVER" AND CONSTITUTE A "REGULATORY IMPRIMATUR" TO THE GOVERNMENT'S PRACTICE OF SEEKING, OR AT LEAST ACCEPTING, AND GIVING CREDIT FOR, WAIVERS.



UNLIKE THE SENTENCING GUIDELINE PROVISION RECENTLY RESCINDED BY THE SENTENCING COMMISSION, HOWEVER, THE SELECTIVE WAIVER DOCTRINE TAKES NO POSITION ON WHETHER WAIVERS SHOULD OR SHOULD NOT OCCUR, OR WHETHER IF THEY DO, THEY SHOULD RESULT IN ANY "COOPERATION CREDIT" FROM THE GOVERNMENT.

IT DOES, TO BE SURE, ELIMINATE A MAJOR IMPEDIMENT TO SUCH WAIVERS, AND THUS INDIRECTLY ENCOURAGES THEM.

REMOVING THE IMPEDIMENT OF WAIVER TO THE WORLD, HOWEVER, PROVIDES AT LEAST SOME MEASURE OF PROTECTION TO THE CORPORATE HOLDER OF THESE PROTECTIONS, AND TO THEIR EMPLOYEES AS WELL, WHEN PRIVATE PARTIES BRING CLAIMS AGAINST THE CORPORATION AND ITS EMPLOYEES.

DESPITE THE HOPE OF SOME THAT THE GOVERNMENT WILL BE FORCED BY CONGRESS TO RECONSIDER ITS CURRENT POLICIES AND ABANDON ITS POSITION THAT CORPORATE WAIVERS DESERVE CREDIT IN THE CHARGING OR SETTLEMENT NEGOTIATIONS WITH THE GOVERNMENT, OR THAT CONGRESS WILL MANDATE THAT NO CREDIT BE GIVEN FOR WAIVERS, IN MY VIEW THAT SHIP HAS SAILED.

CORPORATIONS THAT DECIDE IT IS THEIR BEST INTERESTS TO WAIVE THEIR PRIVILEGES -- EVEN WITHOUT AN EXPRESS GOVERNMENTAL REQUEST (THE MOST USUAL OCCURRENCE THESE DAYS IN MY EXPERIENCE, PERHAPS BECAUSE THE CONTEXT SUGGESTS THAT A WAIVER IS IN THE BEST INTERESTS OF THE CORPORATION), -- CERTAINLY WILL NOT (OR SHOULD NOT) WELCOME A

CONGRESSIONAL MANDATE THAT THEY BE GIVEN NO CREDIT FOR THEIR WAIVER.

THE ALTERNATIVE OF REFUSING “FULL” COOPERATION MAY WELL BE TO FACE CIVIL OR CRIMINAL ENFORCEMENT ACTIONS AGAINST THEM THAT COULD BE AVOIDED BY “FULL COOPERATION,” INCLUDING WAIVERS.

THE COMMITTEE’S DRAFT OF RULE 502, RECOGNIZING A SELECTIVE WAIVER OF THE PRIVILEGE AND THE WORK PRODUCT DOCTRINE, IS A VERY CONSTRUCTIVE STEP IN LIMITING THE CURRENT EXCESSIVE COST OF A “VOLUNTARY” DISCLOSURE TO THE GOVERNMENT.

I URGE THE COMMITTEE TO RECOMMEND ADOPTION OF THE PROPOSED RULE.