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February 13, 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

Re: Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

On behalf of the Committee on the Federal Rules of Evidence and the Committee on Attorney-Client Relationships (collectively the "Committees") of the American College of Trial Lawyers (the "College"), we are writing to convey to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Standing Committee") comments on the Advisory Committee on Evidence proposal to adopt Federal Rule of Evidence 502. We unanimously support the proposed Rule 502 with the exception of Rule 502(c) regarding selective waiver of the attorney-client privilege or work product protection. While acknowledging the benefit that selective waiver would provide to some parties, the Committees (one member dissenting) object to proposed Rule 502(c) on the grounds stated in the following comments.

The College is a professional association of lawyers skilled and experienced in the trial of cases and dedicated to improvement and enhancement of the standards of trial practice, the administration of justice, and the ethics of the profession. The Federal Rules of Evidence Committee is charged with the responsibility of monitoring the Federal Rules of Evidence, determining the adequacy of their operation, and studying - and making - recommendations concerning desirable changes. The Committee on Attorney-Client Relationships has specific responsibility for monitoring the traditional privilege accorded to communications between attorney and client and the maintenance of client confidences. Our Committees consist of fifty Fellows of the College engaged in trial practice throughout the United States.

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Proposed Rule 502(c)

The relevant language of proposed Rule 502(c) provides:

"[(c) Selective waiver. --- In a federal or state proceeding, a disclosure of a communication or information 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.]"

When the Advisory Committee released proposed Rule 502(c) for public comment, it noted that the Advisory Committee had not taken a position on the merits of this provision. Our Committees question the merits of proposed Rule 502(c) because an across-the-board rule of selective waiver for disclosures to federal agencies exercising regulatory authority would contribute to the erosion of the attorney-client privilege, a concern that the College has expressed in another context. *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations, 41 Duq. L. Rev. 307 (2003).*

In comments to the proposed rule the Advisory Committee explained that the purpose of the selective waiver rule is to promote cooperation with government investigations and maximize the efficiency of federal investigations and prosecutions. Standing alone, these policies presume that a selective waiver rule will induce waivers in cases where the privilege would otherwise be asserted and sustained. While the Advisory Committee is careful to note that proposed Rule 502(c) is not intended "either to promote or to deter any attempt by government agencies to seek waiver of privilege or work product," the purpose of the rule will only be achieved if the rule facilitates and increases the incidence of waivers. As a practical matter , the proposed rule would certainly make it more difficult to resist granting a waiver when requested by a federal regulator or law enforcement official who has the discretion to recommend prosecution. If the incidence of waivers increases to the point that waiver of the attorney-client privilege becomes the rule, rather than the exception, in federal investigations clients' belief that their confidences will not be revealed will be eroded. It is not enough to say that the client will ultimately decide whether the privilege will be waived when that decision is rarely a free choice. Moreover, the client's legitimate concern for the scope of disclosure of privileged information will not

stop with the federal authority that originally receives the privileged material. Rule 502(c) intentionally omits any restriction on how the government will use the information or to whom it will be disclosed. *See* Committee Note to subdivision (c).

The problems of waiver are particularly acute in the context of representing an organization that is a legal entity, such as a corporation. The pressure on such an entity to waive privilege in return for charging consideration is enormous given that an indictment of a corporation or other legal entity (particularly a professional services entity) can amount to a death sentence. The demise of Arthur Andersen illustrates this point. Given this dynamic, our Committees are concerned that the mounting pressure to waive, encouraged by Rule 502(c), unduly pits the interests of the corporate entity against the interests of the individual employee. While we are mindful that the privilege belongs to the corporation, and it is for the entity to decide whether or not to waive, the unique pressure on an entity to avoid indictment can lead to circumstances where the entity can be unduly influenced to sacrifice the interests of its employees in response to governmental pressure. *See* United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

The well known purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege is also premised on the long standing belief that people are more candid and more forthcoming when they believe that what they say will be held in confidence and they are "free from the consequences or the apprehension of disclosure." Hunt v. Blackburn, 128 U.S. 464, 470 (1888). In the current environment, our Committee is concerned that an across-the-board selective waiver rule will contribute to a culture that encourages waiver of the attorney-client privilege and that will undermine the historic purpose of the privilege itself.

Proponents of selective waiver point out that selective waiver will enable clients who wish voluntarily to assist law enforcement activities to do so without fear of compromising the client's position in civil litigation. It is argued that without selective waiver, corporations may well be reluctant to offer such assistance. Other clients may also believe it to be in their interest to waive privilege, precisely to receive credit in the charging setting. Without selective waiver, these clients will pay a high price in terms of their civil interest, if, in order to receive such charging credit they must waive privilege not only to the government, but also to third parties. Others argue that selective waiver will encourage corporations to do more thorough internal investigations when

allegations of corporate misdeeds arise because the corporation will have confidence that if the investigation and report that it generates is turned over only to the government, that disclosure will not thereby waive the attorney-client privilege as to third parties. The concept of selective waiver embodied in proposed Rule 502(c) thus has the significant advantage of limiting waiver of the attorney-client privilege and work product protection in those circumstances when the client decides that waiver is in its best interest.

Notwithstanding the benefits of selective waiver, the Committees remain concerned that selective waiver would advance the trend toward a "culture of waiver" where requests for waiver in return for charging credit will become all too common. The December 2006 Memorandum of Deputy Attorney General Paul J. McNulty entitled *Principles of Federal Prosecution of Business Organizations* acknowledges, but does not fully address, this problem. In this environment, the imperative of preserving and protecting the attorney-client privilege should take precedence over the ancillary benefits of selective waiver embodied in proposed Rule 502(c).

Respectfully submitted,

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